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# JOURNAL ON ENVIRONMENTAL LAW POLICY AND DEVELOPMENT

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**Centre For Environmental Law Education, Research And Advocacy (CEERA)**

Bengaluru

# JOURNAL ON ENVIRONMENTAL LAW POLICY AND DEVELOPMENT

# MESSAGE FROM THE PATRON-IN CHIEF

2015, as far as environmental enthusiasts all around the world were concerned, ended on a solemn note- The Paris Negotiations. Nations, setting aside their differences, acknowledged the imminent threat posed by climate change and joined hands to play a part in curbing the menace.

It is heart-warming to note that at this crucial juncture, where the world is grappling with myriad environmental problems, the Journal on Environmental Law, Policy and Development has been able to showcase a few of them and spread word about the change that each one of us need bring about in 2016 as well.

I congratulate the whole team for keeping up the tempo and coming out with yet another volume which speak volumes about it being luminous.

**Prof. (Dr.) R Venkata Rao**
Vice Chancellor, NLSIU

# MESSAGE FROM THE PATRON

The conglomerate of the centres on Environmental Law in the Law School is making it big in the international arena. Recently, the Government of India showcased the Legal Advice tended by our Research Team, in the Climate Change Negotiations at Paris, by ensuring that the stand of the developing countries finds a prominent place in the text of the climate agreements. This is a moment to cherish as our Love's labour has created hope for a better climate-friendly future for humanity to be rooted in equity. Not resting on these laurels, the team has rolled up its sleeves to turn out the third issue of the "JELPD", right on time. Infusion of fresh blood and grooming of young talent, that is full of energy and ideas, by Prof. Sairam Bhat, augurs well for the future of environmental law research and advocacy, in this part of the world. While I continue to struggle in penning down my thoughts on paper (pressure of work, being the least of hurdles) production of a legal literature on environment, with clock-work precision, against all odds by this young team, leaves me mesmerised, grateful and overwhelmingly happy. My salutations to the team of Sairam, Subin, Veada and Divyesh, for this wonderful effort. May you be blessed with more strength to produce tons of such pearls of legal wisdom!

Your fellow traveller in the Environmental Mission.

**Prof. (Dr.) M K Ramesh**
Professor of Law, NLSIU

# EDITORIAL

The Environmental Law Centres at NLSIU, are gratified to present the 3rd edition of the Journal on Environmental Law, Policy and Development. Research centres aim to provide all levels of support to the knowledge and development of law. Research, training, teaching and capacity building in environmental law are still the need of the hour. At NLSIU, the environmental law research centres have contributed significantly and positively towards fulfilling this aim. We have consistently organized National level Seminars and Conferences, training programmes for Central Pollution Control Board Officers, organized Environmental Law literacy workshops in schools and colleges and also contributed to drafting of law and policy not only for the Central Government, but also for the State Governments. We have traced the developments of environmental law, with the publication of the 'March of Environmental Law' and with this Journal we have been able to create a qualitative platform for dissemination of knowledge in this field of law. The www.nlsenlaw.org website is another active platform for reaching out the information network required in this area of law.

The vigorous, enterprising, bold and effective leadership of our Vice Chancellor Prof. (Dr.) R Venkata Rao, continues to be our main motivating factor to strive towards achieves excellence in our research and academic endeavours. We continue to be grateful to him for this support and encouragement, without which this publication would not have been possible. I offer my humble pranams and remain indebted to our teacher, Prof. (Dr.) M K Ramesh. He is not only my teacher, guru, mentor and philosopher, but also one who always persuades and galvanizes me in all my work. He is the source of energy and guiding light in our mission. We are also thankful to our Registrar, Prof. (Dr.) O V Nandimath for all the aid, assistance, encouragement and support, we continue to receive from him. His active involvement in our activities corroborates and ratifies our directions.

The current edition also has seen the emergence of the current generation. Mr.Manjeri Subin Sunder Raj, the editor has shown exceptional leadership qualities in ensuring quality, standard and merit in the publication of JELPD. I welcome Veada and Divyesh into the Editorial Board and congratulate both of them for having displayed tremendous skill and research capabilities. Ms. Baba our Administrative head, as usual, has been exceptional.

Our opening article is from the environmental law guru Prof. Armin Rosencranz. In his article titled 'The Supreme Court of India Exceeds its Constitutional Boundaries', the author, teacher and researcher explores three actions/cases by the Supreme Court of India on its own motion (suo-moto): The Delhi Bus Pollution Case of 2002; the two Interlinking Rivers instructions to the Executive, most recently in 2012; and the Godavarman case of 1995, which is ongoing under the Court's questionable doctrine of "continuing mandamus." In all these cases, Prof. Rosencranz believes that the Court seems to have exceeded constitutional boundaries. In Godavarman it has unleashed unprecedented political, social and economic upheavals.

Second, we have an article authored jointly by Rajesh Gopinath and Sairam Bhat, which is an analysis of the inferential outlook on the role of Doctrine of Public Trust. The 'Doctrine of Public Trust', an early principle originating from Roman law and adopted from England by the American states in its traditional role has in the past been effectively employed to protect 'public-uses' of navigable waters and in the present across the globe to preserve 'ecological' functions. Though in India, Pakistan, Philippines, Uganda, Kenya, Nigeria, South Africa, Brazil, Ecuador, and Canada; the doctrine has become equated with environmental protection and is frequently entrenched in constitutional and statutory provisions with latter nations; there are only just a few instances of the scores of Indian judicial pronouncements that have put environmental protection and doctrine on the highest pedestal of the legal landscape. The article explores and strives to stress for the need of a robust interaction between nuisance enforcement and a reinvigorated 'Doctrine of Public Trust' as an ideal machinery/mechanism for ensuring effective legal protection of the environment so as to serve the nature, guide the intensity of actions and to support preservation.

Next, Geetanjoy Sahu writes about the Impact of the National Green Tribunal on Environmental Governance in India. Much has been talked and debated about the National Green Tribunal in India and rightly so, as since the enactment of the NGT Act in October 2010 till 31$^{st}$ January 2015, the total institution of cases before the National Green Tribunal and its four Zonal benches located in Kolkata, Chennai, Pune and Bhopal was 7768 cases. Out of which 5167 cases were resolved and 2601 cases were pending. The number of environmental cases resolved by the NGT has drawn the attention of legal experts, environmental groups, social

science scholars and media to understand and examine what has been the impact of the NGT on the nature and process of environmental governance in India. Current studies and media reports view the role of the NGT in various ways. Many have welcomed this relatively new role of the Green Tribunal in environmental protection for the good that it is perceived to have done; others are somewhat uneasy at this development; a few feel strongly that it is improper. Judging by the recent literature, this ambivalence is increasing. These studies, however, do not necessarily provide insight on the nature of environmental orders or illuminate broader patterns of the green tribunal orders and what kind of impact it has made on environmental governance in India. This paper seeks to transcend these limitations and offer a critical analysis of green tribunal orders from 2010-2015 through a review of selective NGT orders. In doing so, I begin by explaining why and how the NGT was set up and what are the powers and functions of NGT and then I discuss the nature and process of NGT decisions on environmental issues and finally, I highlight the major impact of NGT orders on environmental governance in India.

Debasis Poddar, in his article 'Global Climate Justice as a Newer Goalpost Before the Non-aligned Movement' puts across the dimension of climate political landscape, especially on the NAM movement. With a declaration by the UN Secretary General Ban-Ki-moon on May 25, 2011 on climate change as one among three concerns in which joint action by the United Nations and the Non-Aligned Movement (NAM) is essential, the so called third world transcended the threshold of newer worldwide threat- anthropocentric change in hitherto sustainable climate to gross detriment of the carrying capacity of the planet vis-à-vis life sustenance. Other concerns, e.g. armed conflict and extreme poverty, being no de novo threats as such, global climate justice possess a newer goalpost before the NAM to grapple with in the post-bipolar world and thereby prove its relevance to renegotiate collective measures for the maintenance of international peace and security not only from the scourge of war but also from anthropocentric syndrome out of given mode of modernity for carbon civilization- dark development in literal sense of the term- in larger interest of the humanity.

Diana John, an independent researcher, contributes on the issues and challenges faced in Rainwater Harvesting. The law and policy relating to rainwater harvesting forms an important part of Environmental Law. Its dimensions; however extends much beyond environmental law. This is because it touches the economic,

agricultural, commercial and domestic life of every country. Rainwater Harvesting- A Glimpse attempts to briefly state the history, meaning and scientific aspect of rainwater harvesting. It defines the position of the legislation, law and policy adopted in India and some international good practices. In the light of the fact that there is still room for making efficient the scientific and legal aspects of rainwater harvesting, the article equally tries to bring to the attention of the reader some suggestions for achieving the same.

Next, we have two alumni of NLSIU-LLM batch, Dinkar Gitte and Nainy Singh who have looked at the issue of Toxic Waste, especially in India and in the Transboundary context. With the emergence of new export market for toxic garbage, developing nations have become the foremost choice for hazardous waste dumping by the developed world. This practice, also called, 'toxic waste colonialism' allows a rich country to exploit differing environmental regulations for the purpose of identifying lands suitable for use as dumping sites. Basel convention, so far, has been the international response to this problem. Despite resistance on several fronts, it continues to be the hallmark of international regulation of transboundary movement of hazardous waste and a pristine reflection of environmental democracy. However, the convention is not any longer considered as coercive enough to fight the increasing global quantities of hazardous waste, including the electronic waste that dangerously threatens the environment and public health of the people in the developing world. By re-evaluating the flaws in the present international legal framework and suggesting possible solutions by focusing on devastating effects of toxic trade, this area of global environment injustice may be effectively confronted.

Siddiqui Saima J.A., Research Scholar, HNLU, has viewed and analysed the role of local population in protection of environment in India. The author argues that the local communities including tribes, hunters, gatherers and closed groups share an indispensable bond with natural environment. Their livelihood and occupations are closely connected with natural resources and their ecological services. In fact, the living pattern of local communities is such that they use and preserve natural resources sustainably. Inspite of their pivotal contribution towards protecting natural resources, the Indian legal system has not adequately recognized their role in this regard. Though Indian Constitution explicitly directs the state to take legislative and policy decisions to safeguard environment under Directive Principles of State Policy and also prescribes a fundamental duty of every citizen

to protect and improve natural environment, it nowhere explicitly recognizes the role of local communities in achieving the above stated ends. Similarly, several statutes on protection of natural resources and environment like Forestry legislations enacted from 1865 to 1980, Water Act, 1974, Coastal Regulation Zone Notification, 1991 have not acknowledged the role of local communities in assisting the state to protect natural resources. Nonetheless, certain measures like Fifth and Sixth Schedule of Indian Constitution, Panchayat Extension to Schedule Areas Act, 1996 and Forest Dwellers Act, 2006 have given prominence and autonomy to local communities like tribal to protect natural resources through participatory democracy and decision making process. The Indian Judicial system has also played a cardinal role in harmoniously construing the practices of local communities and their efficacy in preserving the natural environment. Lately, a strong incentive has arose at the international and grass root level to adopt community strategies in preserving the natural resources.

Another contribution we have received is from Keith Varghese on Analysis of Plantations industry vis-à-vis Environmental laws. Plantations industry like tea, coffee, spices etc. has a tremendous contribution to our nation in terms of economy and employment. Apart from the contribution to the economy, the industry has a direct connection to Environmental laws. It has a positive as well as negative impact on the environment. The article explains in detail the numerous laws applicable to the plantations industry with respect to the existing environmental laws. There is a lacuna in the legal framework in the plantations industry in relation to the environmental laws. Recently, the industry has been hit hard by issues pertaining to labor and status of plantation lands as forests. Frequent strikes and confusion regarding the status of plantation lands has been the source of constant chaos and numerous litigations. The article while highlighting the need for a national policy relating to Plantations also points out how safeguarding the environmental aspect in the industry might solve the issues in relation to labor being faced throughout the industry.

At the end, we have a case comment from Subin on the issue of Climate Justice, in the case of *Ioane Teitiota* v. *The Chief Executive of Ministry of Business, Innovation and Employment, New Zealand*. The effects of climate change, felt across the globe in a myriad ways, have a latest addition- Climate Refugees. The New Zealand judiciary has had an opportunity to look into whether a person can claim refugee status under the 1951 Refugee Convention owing to climate change. The court, having

had to tread a careful path, so as to ensure that a right balance is maintained between human rights and the law in place, has come out with a reasoned judgment, though in the negative, but making it clear that when the right case comes before it, the status would be considered.

**Dr. Sairam Bhat**
Chief Editor, JELPD
Coordinator, Centre for Environmental Law Research and
Advocacy and the Environmental Law Clinic, NLSIU

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# THE SUPREME COURT OF INDIA EXCEEDS ITS CONSTITUTIONAL BOUNDARIES

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# 1

# THE SUPREME COURT OF INDIA EXCEEDS ITS CONSTITUTIONAL BOUNDARIES

*Prof. Armin Rosencranz**

## 1. THE DELHI POLLUTION CASE

In at least three cases, the Supreme Court of India (hereafter the Court) has exceeded its constitutional boundaries. In 1998, in the Delhi Bus Pollution case,[1] the Court issued a controversial order *suo moto* mandating the conversion of the entire Delhi fleet of diesel-powered buses to compressed natural gas (CNG). Steadfast resistance from the agencies responsible for enforcing the court order had raised serious questions about the wisdom of this decision. Many opponents disputed the reliability and practicality of CNG, arguing that the technology was still in development, making the conversion both risky and costly. By disregarding the pleas of the Delhi government and insisting upon the implementation of its orders, the Court seemed to usurp the authority of the existing pollution control authorities to fulfill their duties independently. By 2002, the bus companies finally complied with the Court's order, and the entire fleet of buses in Delhi is

*Professor of Law, Jindal Global Law School. Former Stanford Professor and trustee. Co-author, Environmental Law and Policy in India (3rd ed. forthcoming). The author acknowledges the valuable research and editing support of Kruthika N.S. of Nat'l University of Juridical Sciences, Kolkata. The author can be reached at armin@stanford.edu.

1 See Rosencranz and Jackson, The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power, 28 Colum. J. Envtl. L. 223 (2003)

now powered by CNG. Indeed, other cities in India and around the world now power their buses with CNG. Many taxis and three wheeler "autos" are also CNG-driven. Since at the time there was apparently no scientific or technological assessment establishing the superiority of CNG over other fuels in terms of performance and pollution output, the choice of CNG by the Court seems to have been a lucky guess.The larger point is whether the Court had any justification to involve itself with controlling air pollution in Delhi or anywhere in India, notwithstanding the success of CNG.

## 2. THE INTERLINKING RIVERS CASE

Another example of the court venturing way outside its constitutional boundaries is the Court's two instructions to the executive to develop a plan to interlink rivers (ILR)[2]. The ILR project, initiated on its own motion by the Supreme Court of India,[3] would involve connecting 37 rivers in India through 30 links and 36 dams.[4] The Court seems to have been motivated by concerns about the disparate regional availability of water in India: while parts of India are host to perennial rivers that frequently flood, other parts have access to surface freshwater resources only during the monsoon and are frequently afflicted by droughts. In this context, the idea of linking India's rivers to divert waters from areas with a surplus to areas of scarcity seems intuitively desirable. In the process, if it is possible to generate 30,000 megawatts (MW) of cheap hydropower, supply drinking water to 101 districts and five metropolises, and irrigate 34 million hectares[5], all the better. But there are some major problems with this proposed project.

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2 See Supreme Court order, February 26, 2012

3 In Re: Networking of Rivers ¶ 3, 27 (Feb. 2012), http://indiankanoon.org/doc/41857247/, last accessed on 26/03/ 2015. The inter-linking of rivers proposal was first taken up by the Supreme Court on its own initiative in 1994.

4 Rohan D'Souza, Supply-Side Hydrology in India: The Last Gasp, 38(36) ECONOMIC AND POLITICAL WEEKLY 3785, 3786 (Sep. 6, 2003).

5 *Id.*

To begin with, the project is internationally contentious, with Bangladesh having protested strongly against the proposal on the grounds that it would severely reduce its share of the waters of the Ganges River.[6] It is extremely expensive, with an estimated cost of $120 billion.[7] There are significant humanitarian concerns, stemming primarily from the potential displacement of millions of people. There are process concerns emanating also from the total absence of consultation and transparency by the government. Logistical concerns arise from the complex technological challenges posed by the project and the variable track record of the Indian government in implementing large-scale infrastructural projects. Ecological considerations include risks of increased salinity, flooding, loss of necessary sedimentary content behind dams, soil degradation, large scale submergence of forests, spread of pollutants, and disturbances to freshwater ecosystems, to name a few. The large number of dams this project would involve would exacerbate the environmental consequences; the devastating environmental consequences of large-scale dams are well documented.[8] Finally, there is a divergence of opinions among scientists and hydrologists regarding the effectiveness of such a scheme, raising questions as to how the massive costs involved can possibly be justified.

These problems, significant though they are, are at least capable of being addressed. Diplomatic and humanitarian costs can be managed, environmental costs can be mitigated, process concerns can be redressed, and economic costs can be justified. Over and above the merits of the

6 Shawkat Alam, An Examination of the International Environmental Law Governing the Proposed Indian River-Linking Project and an Appraisal of its Ecological and Socio-Economic Implications for Lower Riparian Countries, 19 GEORGETOWN INTL. ENVTL. L. REV.209, 213 (Winter 2007).

7 *Supra* n. 4, at 12.

8 See, e.g., DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING--THE REPORT OF THE WORLD COMMISSION ON DAMS xxxi (2000), available at http://www.internationalrivers.org/files/attached-files/world_commission_on_dams_final_report.pdf., last accessed on 26/03/ 2015.

proposal, however, there are two crucial problems in its conceptualization. First, it is politically unviable, and second, it is constitutionally contentious.

First, it is politically unviable because few, if any, of the states of India are in favor of the project.[9] So far only two states have unconditionally approved the proposal: Haryana and Tamil Nadu. Not surprisingly, these are also the only two states that would not be donors in the project: they will only receive water from other states. Many other states that will have to part with some part of their water resources have registered opposition to the scheme, including Andhra Pradesh, Bihar, Chhatisgarh, Goa, Karnataka, Kerala, Maharashtra, Orissa, Punjab, and West Bengal. The concerns of these states are prompted primarily by reluctance to forfeit future usage rights based on present day surpluses. Vehement and widespread state opposition will almost certainly halt this project in its tracks.

Second, it is constitutionally contentious because the proposal was initiated at the behest of the Supreme Court of India rather than the executive branch of the Union government, raising fundamental questions about violations of the doctrine of separation of powers between the branches of government. The ILR project was taken up on its own motion by the Court in 1994 and has thereafter been folded within its jurisdiction through writ petitions and applications filed by court-appointed amicus curiae and public-spirited individuals. There are two distinct problems with the Court's consideration of this issue.

One problem stems from the obvious challenge to the separation of powers doctrine. The separation of powers doctrine has been recognized as a critical part of the 'basic structure' of the Indian constitution--in other words, one of its fundamental precepts. The Court is well-known for its

9 The Ken-Betwa link referred to in note 4 supra is an exception, and even that has been put on the back burner as the project has come up against political and environmental hurdles. AartiDhar, A Project That Has Run Dry in Bundelkhand, THE HINDU, Feb. 14, 2012, http://www.thehindu.com/news/national/a-project-that-has-run-dry-in-bundelkhand/article2889651.ece, last accessed on 26/03/ 2015.

encroachment upon the prerogative of the executive--previous highlights include, inter alia, the elaboration of a code of conduct for prevention of sexual harassment in the workplace,[10] enforcing changes in fuel for public transportation vehicles,[11] laying down guidelines for waste management,[12] and elaboration of forest management policy,[13] discussed below. However, even with this record of judicial legislation, the ILR project stands out. First, this is the very rare instance in which the Court has suomoto encroached upon executive prerogative and not in response to writ petitions and public interest litigation. Moreover, the ILR project stands out in terms of its sheer scale-- political, economic, and logistical.

Another problem stems from practical shortcomings in judicial involvement in policymaking. Judicial involvement in policy decisions has traditionally been limited on account of the limited competence of the judiciary in that regard. And the involvement of the Court in policymaking has borne witness to these shortcomings, including lack of consultation, limited effectiveness, and weakening of regulatory agencies. As noted above, similar problems exist with regard to the ILR project. Judicial institutions are inherently unsuited to the creation and implementation of policy; they do not possess the manpower, time, or expertise to research, create, and implement policy. The Court has responded to these physical inabilities by relying on writs of mandamus to require government action. The effectiveness of this model in the several cases referred to above has been questionable. There is little reason to believe that the ILR project will be different.

10 *Vishaka & Ors.* v. *State of Rajasthan & Ors.,* Aug. 13, 1997, http://indiankanoon.org/doc/1031794, last accessed on 26/03/ 2015.

11 *MC Mehta* v. *Union of India & Ors.,* Jul. 28, 1998, http://indiankanoon.org/doc/1351218, last accessed on 26/03/ 2015.

12 *Almitra H Patel & Anr.* v. *Union of India & Ors.,* Feb. 15, 2000, http://indiankanoon.org/doc/339109, last accessed on 26/03/ 2015.

13 *T N Godavarman Thirumulkpad* v. *Union Of India & Ors.,* Dec. 12, 1996, http://indiankanoon.org/doc/298957/, last accessed on 26/03/ 2015.

Finally, the fact that the ILR's origins lack constitutional authority, and that it is bound to encounter significant political opposition, seem insurmountable problems. These problems may explain why recent statements from the Indian Planning Commission evince reluctance to proceed with projects on the grand scale of the ILR, and instead, to focus on select and localized interlinking projects between one or two rivers.[14]

### 3. The Godavarman Case

In 1995, T N Godavarman Thirumulpad filed a writ petition with the Supreme Court of India to protect the Nilgiris forest land from deforestation by illegal timber operations (Writ Petition No. 202 of 1995, *T N GodavarmanThirumulpad* v. *Union of India,* Supreme Court of India).[15] The Supreme Court, without reliance on any established precedent, expanded the Godavarman case from a matter of ceasing illegal operations in one forest into a reformation of the entire country's forest policy. In its first order, the Court suspended tree felling across the country, effectively paralyzing wood-based industries and drastically affecting forest dwellers – mostly tribal people. The case has remained open, and in the process of hearing over 1500 interlocutory applications since 1996, the Court has not only assumed the role of interpreter of law, but also of policymaker and administrator.[16]

Moreover, the Court ordered all non-forest activities, e.g. saw mills and mining operations, that had not received explicit approval from the Central

14 Bikash Singh, Planning Commission Against River-Linking Project, ECON. TIMES, Mar. 7, 2013, http://articles.economictimes.indiatimes.com/2013-03-07/news/37531975_1_12th-plan-northeast-india-pilot-projects, last accessed on 26/03/ 2015.

15 Down to Earth, Interview between T N GodavarmanThirumulpad and Surendranath C., DTE Aug 31, 2002. http://www.downtoearth.org.in/Interview1.asp?FolderName=20020831&FileNAme=inv&sid=1&sec_id=14 last accessed on 26/03/2015.

16 Down To Earth, "Deep in the Woods," January 15, 2003, at 1. http://www.downtoearth.org.in/full6.asp?foldername=20030115&filename=anal&sec_id=7&sid=8, last accessed on 26/03/2015.

Government, to cease operating immediately.[17] It temporarily suspended all tree felling in all forests with the exception of state governments' working plans,[18] effectively freezing the country's timber industry.[19] It forbade any transportation of timber out of the forest-rich North East states,[20] and ordered the relocation of those North Eastern wood based industries to state-specified industrial zones where they could be more closely monitored.[21]

The Supreme Court's role of executer and administrator of the law became more evident in its later directions that required the state governments of those states to gather, process, and sell already felled timber in the manner it specified.[22] To maintain its control of the case, the Court excluded jurisdiction of all lower courts in matters concerning seized illegal timber, choosing to micromanage such proceedings itself. [23]

After instituting the bans on tree-felling, the Supreme Court ordered investigations into various complaints of illegal mining operations.[24] The Court observed that the reported mining operations were blatantly contrary to its orders and demanded a response from the state governments.[25] It assumed the policing role of state authorities and constituted its own

17 *Supra* n. 5 at I. 1

18 *Supra* n. 5 at I. 3

19 *Supra* n. 5 at 294

20 *Supra* n. 5 at I. 4

21 *T.N. Godavarman Thirumulpad* v. *Union of India and Others,* Supreme Court of India, January 15, 1998, at 12.

22 *T.N. Godavarman Thirumulpad* v. *Union of India and Others,* Supreme Court of India, May 8, 1997, at B. (a)-(b).

23 *T.N. Godavarman Thirumulpad* v. *Union of India and Others* reported at 2001-(010)-SCC -0645 -SC

24 *T.N. Godavarman Thirumulpad,* v. *Union of India and Others,* (IAs Nos. 71, 79, 104, 105, 107, 113, 121, 166, 260, 261, 262 in Writ Petition (C) No. 202 of 1995) with *Environment Awareness Forum* v. *State of Jammu and Kashmir and Others* (IA No. 13 in W.P. (C) No. 171 of 1996), Supreme Court of India, January 7, 1998.

25 *Id.*

committee to investigate and report on illegal mining so that proper action could be taken.[26]

## 4. Effects of the Case

The Supreme Court's far-reaching measures to control deforestation resulted in confusion among state and national organizations, mismanagement of forestry issues, and attempts at forest protection at the expense of respect for human rights. The complexity of the problem expanded with the involvement of state governments, the Ministry of Environment and Forests (MoEF), and the Central Empowered Committee (CEC), which the Supreme Court created in 2002.

### A. The Timber Industry of North East States

The North East states contain one-fourth of India's forests and account for half of the domestic timber trade.[27] 31,700 hectares of forest were being cut down every year by these states' timber industries, which many of the states' poor forest dwellers depended on.[28] When the Supreme Court instituted its ban on tree felling, more than 90 per cent of production units closed, and the country's import of timber rose from 10 per cent to as high as 90 per cent[29]. In Arunachal Pradesh, the state's revenue dropped almost 84% from Rs 49 crore (approx. $11.1 million) in 1995-96 to Rs 7.9 crore (approx. $1.8 million) in 2000-01 as a result of the tree felling ban[30]. In Manipur, the revenue from forest products dropped from Rs 2.9 crore (approx. $0.66 million) in 1996-97 to Rs 0.6 crore ($0.14 million) in 1999-2000[31].

26 *Id.*

27 Down To Earth, "Logjam," March 15, 2002, online edition, at 2 and 3.http://www.downtoearth.org.in/cover.asp?foldername=20020315&filename=Anal&sid=8&page=7&sec_id=7&p=1, last accessed on 26/03/ 2015.

28 *Id.* at 1.

29 *Id.* at 2.

30 *Supra* n. 2 at 1.

31 *Id.*

### B. The Timber Industry and State Inefficiencies

Post the 1996 ban, due to the loss in control over forests and the lack of better alternatives provided, many people returned to illegal tree felling.

In order to protect the nation's forests, particularly in the North East, the state governments need to prevent illegal tree felling and deforestation. This can be achieved not through more rigorous attempts at control, but rather by addressing the problem with respect to the simple fact that people need work to earn a living. The states need to develop, gain approval for, and execute working plans to provide jobs for those people who resort to illegal tree felling. For those individuals or groups who are not satisfied by the available working plans and who do not participate in them, the government must impose strict regulation on their activities to prevent deforestation. People cannot be completely blamed for illegally felling trees when they need to do so to feed themselves and their families. Before states can effectively reduce illegal tree felling, they need to ensure that sufficient working plans are in place so that most, if not all, the people who previously lost their jobs can be provided with new ones.

## 5. Constitutionality and the Expansion of the Scope of Judicial Activism

The *Godavarman* case marks hitherto unseen assumption of powers by the Supreme Court in disregard of constitutional limitations, and it marks a culmination of a process by which the Court has gradually usurped the role of every arm of the government.[32] The case has profound implications for the further rise of judicial activism in India.

32 *See Supreme Court Advocates-on-Record Assn.* v. *Union of India* (1993) 4 SCC 441, 688 (para 437) The Constitutional Obligation of the Judiciary, Hon'ble Shri J.S. Verma,(1997) 7 SCC (Jour) 1

In the *Godavarman* case, the Court impinged upon the power of the legislature by banning the transport and felling of timber and creating a Central Empowered Committee, accountable only to the Court itself, disregarding the principle of separation of powers. By assuming the powers of other organizations through judicial activism, the Supreme Court's has restricted the growth of responsible and independent bureaucracy.[33] Moreover, it used the case as justification for implementing and administering national forest policy to a degree far beyond the original scope of the case.

The Court has also extended its assumption of powers beyond a reasonable time frame. Under the constitution, the writ of mandamus is restricted to compelling action with reference to previously existing and clearly defined duties.[34] Thus, mandamus is not a creative writ allowing the Court to usurp the role of lawmaking and policy formulation. In the *Godavarman* case, the Court micromanaged the implementation of its orders by keeping the case open. This practice of "continuing mandamus" is not envisaged by the constitution. It was introduced through the judgment of *Vineet Narain* v. *UOI*.[35] In its last order,[36] a constitutional bench of the Court clarified that the application of mandamus was an extraordinary one andstated that it had respected the constitutional scope of mandamus because it kept the case open only to receive reports that the executive action was not being tampered with by politicians. It did not interfere with the manner of investigation by the executive at any stage during the issuance of "continuing mandamus." In contrast, in the *Godavarman* case, which is the only other case of "continuing mandamus," the court has strayed from such limits.

33 Divan, Shyam, as cited in Can the Supreme Court of India Manage India's Environment? by Armin Rosencranz. Oct. 12, 2005

34 *Mansukhlal Vithaldas Chauhan* v. *State of Gujarat* [(1997) 7 SCC 622] at Para 14 (1996) 2 SCC 199

35 (1996) 2 SCC 199

36 *Vineet Narain* v. *UOI* 1998-(001)-SCC -0226 -SC

The Supreme Court was attempting to address the very important problem of forest management, or mismanagement, in India. Forest cover in the country was decreasing rapidly, and unless India quickly adopted sustainable forest practices, the country's ecological stability and biodiversity would suffer immensely to the detriment of future generations. The Supreme Court recognized the importance of forest preservation and observed the increasing destruction and degradation of forest land. The Court noticed that those central and state organizations responsible for forest management were failing in their duties. In light of central and state governments' inaction, national and timely action seemed necessary to curb deforestation.

Although decisive action was necessary (and still is), the Supreme Court's orders made demands far beyond its control. The (Union) Ministry of Environment and Forests (MoEF), claiming to function in accordance with the Supreme Court's policy judgments, ordered the eviction of all illegal encroachers in forests within five months. The States failed to implement the last MoEF order in 1990 to remove encroachers. After 12 years of having failed to obey MoEF directives, the MoEF, in 2002, expected states to comply and complete evictions in five months. In addition to the impracticality of the deadline, the various problems such as how do define encroachers, how to manage tribal claims to land, and how to evict the thousands of people living on and dependent on forest lands were unresolved. Just as the Supreme Court ordered that all logging operations completely cease in various locations, the MoEF attempted to reach its goal too fast, and the results of such hastiness were the unfair evictions and destruction of homes by state governments.

The Supreme Court assumed too much power too quickly to effectively manage it. The Court's orders may have been logically sound from a policy perspective, but from a practical perspective, they demanded too much from India's weak state and local governments. The Supreme Court did not exercise sufficient caution in extending its role to directly oversee forestry issues.

The MoEF's eviction drives have also had a detrimental effect on the Supreme Court's attempt to protect forests. The National Forest Policy of 1988 states:

> *"Having regard to the symbiotic relationship between the tribal people and forests, a primary task of all agencies responsible for forest management, including the forest development corporations should be to associate the tribal people closely in the protection, regeneration and development of forests as well as to provide gainful employment to people living in and around the forest"* .[37]

In addition to promoting a cooperative existence between people and forests, the government is responsible for using the tribal people to protect the forests that they use and for ensuring that tribal people find employment. In many successful government programs, tribal people partner with the forest department to patrol local forests for illegal non-forestry operations. In return, the tribal people receive permission to use the forest for subsistence. They are instructed on sustainable forest use, are provided with jobs, and are used to protect the forests. By ensuring that tribal people engage in sustainable use of the forest's resources, the government preserves current forests. By providing jobs, the government reduces the number of jobless people who resort to illegal tree felling for profit. By empowering local communities, the government can cooperate with them to protect forests. The *Godavarman* case went so far as to oppose the tribal groups that could be used to protect the forests according to the Supreme Court's original intent.

In the judgment of *Samatha* v. *State of AP,*[38] a five judge bench of the Supreme Court recognized that for tribals, forests are their traditional source of sustenance, and hence have a historical right to minor forest produce and to communal residence on forest land. These rights of tribals were totally neglected in the *Godavarman* orders. The restrictions placed on forest use and access had an especially debilitating effect on the tribal

37 National Forest Policy, 1988 at 4.6

38 (1997) 8 SCC 191

communities in the North East. The continuing immigration from Bangladesh has caused a demographic and social shift in the region. The displacement caused by *Godavarman* has exerted further pressure on scarce jobs and resources.[39] As tribals have no other training or skills than in forest industries, it is inequitable to expect tribals to raise money from sources other than the forest. Some state governments did challenge the unfair treatment of the tribals, but the Court paid no heed.[40] The region has lapsed into a state of constant violence[41]. The causal link between terrorism and the tribal people can be traced to the steady deterioration of their way of life, which was compounded by the effect of orders in this case.

After receiving complaints that tribals were being unjustly evicted, the MoEF issued a circular on February 5, 2004 modifying its instructions on dealing with encroachments and showing the first reasonable steps toward recovery from the Supreme Court's 1996 decision. The 2004 circular requires that: "The State Government or Union Territory Administration should recognize the traditional rights of the tribal population on forest lands, and these rights should be incorporated into the relevant acts, rules and regulations prevalent in the concerned States/UTs by following the prescribed procedure"[42]. This recognition, if more than words on paper, will improve the way tribals are treated and compensate for the lack of attention to tribal needs in the progression of forest policy since the Supreme Court's overactive involvement.

The second and third provisions of the circular recognize the legal rights of forest dwellers to use forest lands as long as they have been in continuous

39 Malabika Das Gupta, "Land Alienation among Tripura Tribals", Economic and Political Weekly, Vol XXVI, 1991, p 2112.

40 *T.N. Godavarman Thirumulpad* v. *Union of India and Others,* Supreme Court of India,, Writ Petitions (C) No. 202 of 1995 (Under Article 32 of the Constitution of India) with Nos. 171 and 897 of 1996, decided on March 4, 1997.

41 Arijit Mazumdar, "Back to the roots of violence" http://www.northeastvigil.com/articles/index.php?Itemid =109> , last accessed on 26/03/ 2015.

42 *Id.* at 1.

occupation of the land since December 31, 1993[43]. Tribal groups that have been occupying land since 1993, rather than the previous deadline of 1980, can acquire legal rights to the land rather than being evicted. The legal rights would only be granted on the condition that the forest department initiates an integrated tribal rehabilitation scheme, presumably to show tribals how to rehabilitate the forest. These two provisions provide an enormously positive change to the MoEF's previous policy. Obtaining these rights, however, is subject to the state taking the initiative to file proposals, but at least tribals have the opportunity for better protection which they lacked under the Supreme Court's decisions alone.

Although the MoEF (and the Forest Rights Act of 2006) improved national policy toward tribals, the Godavarman case provided it with ample opportunity to expand its powers, and it has vigorously done so. Similarly, the Central Empowered Committee has immense influence with the authority to issue orders consistent with the Supreme Court. The CEC consists of the former Secretary of the MoEF as its chairman, the Additional Director General of Forests of the MoEF as its MoEF representative, and the Inspector General of Forests as its member secretary[44]. As the MoEF has representation in every national forest-related committee, it continues to grow in power as new committees are constituted to manage forest issues that states have been unable to handle. The Supreme Court's judicial activism has distorted the balance of power and responsibilities among national and state organizations. The MoEF, for example, has become increasingly bureaucratic and less scientific since its inception, and although the Court-led centralization of its powers bypasses many state inefficiencies, the bureaucratic processes may occupy more resources and attention than are justified. The centralization of powers also increases the distance between the administrators of forest policy and the tribal people affected by it and inextricably involved with forest protection.

43 *Id.* at 2(i).

44 *Id.*

The Court's "continuing mandamus" in the case also leaves open the possibility for further judicial activism that might interfere with progress toward fair and productive human rights and forest management.

## 6. Conclusion

When the Supreme Court received the *Godavarman* case in 1995-96, India's environmental policy was in dire need of reform. The Court's actions, although extreme, addressed an issue vital to the human and natural health of the country, and gave heart to advocates of forest protection. However, in raising awareness of environmental issues and bringing them to the forefront of national and judicial concern, the Supreme Court began the disquieting practice of "continuing mandamus." In hearing over 1200 interlocutory applications since 1996, the Court increased its involvement in forest issues and hence increased the country's dependence on the Court for forest management. This dependence on a judicial institution that has already exceeded the boundaries of its responsibilities has been further complicated by the lack of monitoring of the Court's actions and the vagueness of the legislative and executive roles that it has assumed.

With its micromanagement of forest issues and the increasing number of Court-instituted organizations, the potential for conflict endures. How long will the Court maintain an active "continuing mandamus" and who will monitor the Court's hundreds of decisions, interpretations, and policy judgments to ensure it does not roam dangerously far beyond the boundaries of its constitutionally defined role (if it has not done so already)? As the centralization of power to government organizations like the Ministry of Environment and Forests increases, will the executive and judiciary succeed in cooperatively managing India's forests, or will the Supreme Court's far-reaching assumption of powers clash with the central government's policies? And amid the delegation, redistribution, and reorganization of responsibilities and powers, what will happen to India's forests and the tribal people who inhabit them?

In Democratizing Forest Governance in India (2014), Shomona Khanna has made these observations: The political economy of the Godavarman

case has remained obscured for a long time behind the posturing on all sides regarding the protection of the environment and forests. The Court seems to have spent an inordinate amount of time debating and deciding issues relating to the 'rights' of mining companies, sawmills, timber traders and private contractors constructing dams. The Court never seems to have the time or space to hear the submissions of the tribals, the marginalized, the poor, whose petitions are in any case few and far between. Others may have felt that the decisions of the Court in favor of Vedanta/Sterlite with regard to mining in the Niyamgiri Hills, in spite of repeated recommendations against the approval by the Central Empowered Committee itself, are an aberration.

Within existing forest boundaries, the treatment of forest dwellers' habitation and cultivation is treated as "encroachment", a term which is foreign to law, and yet so loaded that its mere use serves to prejudice the Court against the so-called 'encroacher' at the outset. The repeated use of the term 'encroacher' has resulted in diminished space for articulation of the symbiotic relationship between tribals and the forest. The Godavarman litigation, for all its avowed commitment to protection of forests and environment, in fact represents a space where the judiciary and the executive have joined hands with class interests represented by large capital.

Khanna argues that the process of concentration of control over the forests and all that they represent, through the devices of expanded definition of forests, increased monitoring over what forests are used for, and even the disempowerment of the administrative and statutory implementation machinery under the existing statutory forest laws, is nothing but an undisguised demonstration of the power of eminent domain of the state through the judiciary.

Khanna further argues that there is a need to unravel the manner in which the demolition of existing forest law regimes, biased as they already were against the poor and marginalized, has served the purpose of aggressive capitalist advancement in the country. However, the legislature has chosen to enact a historic statute in the Scheduled Tribes and Other Traditional

Forest Dwellers (Recognition of Forest Rights) Act 2006. A close analysis of this law reveals that while 'recognising and vesting' forest rights in forest dwelling communities which may or may not have been recognised in earlier statutory law, it strikes a body blow to the notion of eminent domain which suffuses the regime established by the Godavarman case by giving statutory recognition to the notion of ancestral domain of forest dwelling peoples over the forests. This portends a direct clash between the narrow world view adopted by the Court in the Godavarman case and the robust approach adopted by the Forest Rights Act.

In the decade following Godavarman, the diversion of forest land increased rapidly. In 2006 alone, 108,680.29 hectares of forest land was diverted.[45] This means that the December 1996 judgment of the Supreme Court has not had the expected results, and has in fact had the confounding effect of increasing forest diversion by 340%. It is time the smokescreen of forest protection is lifted from the proceedings in the Godavarman case.

The last Supreme Court Godavarman judgment was issued in 2014. Since then, the National Green Tribunal (NGT) seems to have become India's main forum for forest cases. The NGT has thus far favored tribals and workers and disfavored miners and other beneficiaries of the post-Godavarman conversion of forest lands to non-forest uses. But forest cases can still be appealed to the Supreme Court.

The Supreme Court's aggressive forest management in Godavarman incurred large economic, social and political costs. In my view, it exceeded constitutional boundaries far beyond the tamer Delhi Bus Pollution Case or the orders to the executive to interlink rivers. That's why I've focused so much time and space on this egregious case.

45 All figures from MoEF, as analysed by the Campaign for Survival and Dignity.

# 2

# AN INFERENTIAL OUTLOOK ON ROLE OF'DOCTRINE OF PUBLIC TRUST' IN SAFEGUARDING ENVIRONMENT, WITH SPECIAL REFERENCE TO INDIAN JUDICIARY

*Sairam Bhat & Rajesh Gopinath*

# 2

# AN INFERENTIAL OUTLOOK ON ROLE OF 'DOCTRINE OF PUBLIC TRUST' IN SAFEGUARDING ENVIRONMENT, WITH SPECIAL REFERENCE TO INDIAN JUDICIARY

*Dr. Sairam Bhat* & Dr. Rajesh Gopinath***

## 1. Introduction

The 'Doctrine of Public Trust' is a simple but powerful legal concept that obliges governments to manage certain natural resources in the best interests of their citizens. It hence provides a practical legal framework for restructuring, regulating and managing environment. Jurisprudence concerning the 'Doctrine of Public Trust' reveals that it is possible to discern public trust duties solely from rights of sovereignty.[1] The name of the doctrine itself hints at grandiose purposes. While in its origins, the doctrine addressed only a narrow category of public resources, today the

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1 David Takacs, The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property, New York University Environmental Law Journal, Vol. 16, (2008) p. 711.

'Doctrine of Public Trust' is an expansive doctrine that can be used to protect and promote environmental values.

## 2. Research Strategy

If properly adapted and understood, then the 'Doctrine of Public Trust' can be asserted to buttress the government's ineluctable responsibility to protect the 'Right to Life' and the ancillary rights that serve the fundamental right. Keeping this in mind, this article herein examines in detail the contours of the 'Doctrine of Public Trust', and extracts the environmental significance of the doctrine across the globe with Prolific Case Studies. The current research elucidates inference from global case-files in understanding the doctrine's effectiveness and the real potential for legal environmental crusades across India.

## 3. Literature Review

Outpaced by developments, somewhat surprisingly, the 'Doctrine of Public Trust' has become internationalized, and in the process, moved to the forefront of environmental protection in several countries.

In the United States, many Courts had used the doctrine to help the government and people to recover damages sustained due to the pollution of natural resources, and to regulate or prohibit activities that cause pollution to natural resources. This was enforced with the ruling that at a minimum, a state may not affirmatively act in derogation of the trust.[2] Although the 'Doctrine of Public Trust' is relatively well established in the legal system of the United States, it has not yet been formally incorporated in Canadian law. To date, the doctrine has not formed the basis of a judicial decision in Canada although there have been unsuccessful attempts to test its existence. However, the basic attributes of the doctrine are found throughout Canadian law. While the oldest Canadian decisions address public access rights to navigable waters, the more recent case law has

2 *City of Berkeley* v. *Superior Court,* 26 Cal.3d 515, 162 Cal. Rptr. 327, 606 P.2d 362, 1980.

expressly discussed the doctrine, although without fixing it in Canadian law.[3] The doctrine of Public trust which places natural resources under the custodianship of the state, in the post-constitutional era, has become a permanent fixture of African natural resources law.[4] Pakistan's public trust is embedded in Article 9 of its constitution, which declares that "no person shall be deprived of life or liberty save in accordance". Although neither the constitution nor Pakistan statutes expressly mention the public trust, the Supreme Court of Pakistan has concluded that the Article 9 guarantee of life includes environmental health and has issued protective orders to both private and government entities.[5] In Uganda, the public trust was the vehicle to prevent the transformation of the Butamira Forest Reserve into a sugar plantation.[6] In Kenya, the doctrine provided a remedy for the discharge of raw sewage into the Kiserian River[7], while in Nigeria the public trust has yet to be the subject of case law. [8]

In India, the Supreme Court imported (and applied with success) the American variant of the traditional 'Doctrine of Public Trust', and declared it to be part of Indian law after prefacing its lengthy exploration in *M.C. Mehta* v. *Kamalnath* with an acknowledgement of the historical contribution made by the 'English Common Law'. The Court declared that "our legal system-based on English Common Law includes the Doctrine of Public Trust as part of its jurisprudence"[9]. While in *M.C. Mehta* v. *Kamalnath* the court clearly looked to American jurisprudence and scholarship for its

3 A Short History of Public Trust in Canada, watercanada.net, 2010.

4 Loretta Feris, 'The Public Trust Doctrine and Liability for Historic Water Pollution in South Africa', 8/1 Law, Environment and Development Journal, 2012, p. 1.

5 Jona Razzaque, Public Interest Environmental Litigation in India, Pakistan and Bangladesh, 2004.

6 *Uganda-Advocates Coalition for Development and Environment (ACODE)* v. *Attorney General,* 2004, available at www.elaw.org/contents/uganda-advocates-coalition-development-and-environment-acode-v-attorney-general, last accesssed on 20/12/2015.

7 *Waweru* v. *Republic,* 1 K.L.R. 677, 677 (H.C.K.), Kenya, 2006.

8 *Green* v. *R.,* 34 D. L. R. [3d] 20 [Ont. H. C.], Nigeria, 1972.

9 *M.C. Mehta* v. *Kamal Nath,* 1996 (1) SCC 388

conception of the trust's purposes, content and scope; a few years later, in *M.I. Builders* v. *Sahu* the court ultimately concluded, however albeit without explanation, that "this public trust doctrine in our country, it would appear, has grown from Article 21 of the constitution"[10]. In *Reliance Natural Resources Ltd.* v. *Reliance Industries* (2010), the Court dispensed away with any reference to American law by merely quoting two paragraphs from *M.C. Mehta* v. *Kamalnath* and identified the 'Doctrine' as one of the 'constitutional concepts' implicated in the case. The Court concluded with Article 297, which declares that "certain offshore resources shall vest in the Union and be held for the purposes of the Union". [11]

Two more recent cases (Coalgate scam and Spectrum controversy) again demonstrated that Article 14 was not the only recourse available to the Court, and that the Indian judiciary can use the public trust doctrine as background principles to interpret constitutional and other provisions to confirm to their requirements.

In the first case, the petitioners contended before the Court that the coal block allocation violated statutory requirements under the public trust doctrine (apart from the Mines and Minerals Act of 1957, the Coal Mines Act of 1974 and Article 14). Court examined the statutory question and found that the allocation was illegal causing huge losses to the public exchequer in its coal allocations. The judgment in Coalgate scam is of greatest legal interest because of its significant contribution to one of the most important constitutional issues in contemporary India "the judicial review of the government's distribution of natural resources", or in other words the emergence of Doctrine of Public Trust as the strongest legal platform for 'public-good' against the vested powers of Government. [12]

10 *M.I. Builders Pvt. Ltd.* v. *Radhey Shyam Sahu,* 1999 S.C.C. 464

11 *Reliance Natural Res., Ltd.* v. *Reliance Industries., Ltd.,* [2010] 156 Comp Cases 455 (SC)

12 *Centre for Public Interest Litigation & ors* v. *Union of India & ors,* (2012) 3 SCC 1

In the second case, the doctrine was again argued and applied, to the 2G Spectrum controversy which arose out of the government's decision to allocate spectrum to telecommunications companies on a first-come-first-serve basis. The challenge itself, however, went far beyond simply impugning the specifics of the individual case: it invited the Court to rule on the standards generally applicable to government's alienation, transference, or distribution of natural resources as a question of policy, if it existed. The Court accepted the invitation and held that in distributing natural resources, "the State [is] bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest." Additionally, the Court then held that "when it comes to alienation of scarce natural resources like spectrum etc., it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest. [13]

Since its arrival on the global scale, the 'Doctrine of Public Trust' has been hauled in different directions and assigned different implications. To some, the doctrine is a means for public access in a world dominated by private ownership. To others it is a check on government attempts to give away or sell public-natural resources for short-term economic advantages. To yet others, it is a back-door mechanism for judicially captivating a private property without 'just-compensation' and through a clever argument that the property was never ever private in the first place. India now has the most substantial 'Doctrine of Public Trust' jurisprudence, as it has located it in the natural law; with the courts, legislatures and voters having expanded the it significantly beyond the reach of the traditional version (Mono Lake decision), and perhaps even beyond the Saxion vision.[14] The disparity between the Indian and traditional American variants of the 'Doctrine of Public Trust' in this regard is a function of how the Indian and American

13 *Natural Resources Allocation, In re, Special Reference* No.1 of 2012; (2012) 10 SCC 1

14 Joseph Sax, The Doctrine of Public Trust in Natural Resources Law: Effective Judicial Intervention, Michigan Law, Review, Vol. 68 (1970) pp. 471-570

central governments acquired their sovereignty in the context of their respective federations. Whereas the traditional American 'Doctrine of Public Trust' was developed primarily by accretion, the Indian variant was mostly the product of adoption and expansion. Though the Doctrine has become associated with environmental fortification with success, yet there are only just a few occurrences of Indian judicial pronouncements that have put it on the highest platform of the legal landscape such as in *M.C. Mehta* v. *Kamalnath, M.I. Builders* v. *Sahu, Reliance Natural Resources Ltd.* v. *Reliance Industries*. Nevertheless, the magnitude of involvement of doctrine in the aforementioned cases stress more on the emerging fact that the public trust is now much more fundamental to Indian jurisprudence than it is now in the United States itself.

Also the cases of Coalgate scam and spectrum controversy gave a newer and complex dimension to the role and impact of doctrine. What obligations does a Crown or State have when it decides to outsource the exploitation of natural resources to private parties? To what extent if at all can the Indian Judiciary enforce the obligations? These questions have come to the forefront from these two cases, wherein the Court's have battled within itself the 2 distinguished issues of what are the crown's/state's/government's obligations; and the Court's power (or lack thereof) to enforce the obligations. In response and defense to this concern perplexing the courts, it must be understood that the 3 major principles (equality, public trust and public interest) which act as major obligations governing the State's conduct, ought to be kept in mind while deciding public resources.

In support of the core arguments outlined above, the fact yet remains that the concept of doctrine of public trust has still played a key role as background principle guiding the interpretation of legal constitutional provisions. And, though it's very much obvious from the aforementioned evolutionary aspects in Indian Judgments that the Indian Supreme Court has clearly moved away from a reliance on American law as the touchstone for the trust's content, and also that the Court has clearly understood that each ruling Government has abandoned its trust obligations entirely by

adhering to one-sided agreements with the private developers (as observed from previously discussed Indian cases in Literature review); yet and still the Court's rationale for accepting & denying or identifying the constitutional provision (Article 21) as the likely source of the Indian 'Doctrine of Public Trust' is yet not truly evident and remains ambiguous and subjective to the personal outlook of Honorable Judge under scanner. While certain judgments has pronounced that the honorable Supreme Court has derived the doctrine of public trust from Article 39(b), which is a non-enforceable Directive Principle of State Policy, yet, Justice D.K. Jain gave the doctrine a quiet burial (in response to the inapplicability of the public trust doctrine to radio spectrum as strenuously argued in the 2G Reference);as he concluded that 'for the purpose of the present opinion, it is not necessary to delve deep into the issue', as the scope of judicial review in this case was best understood under Article 14.

Though again and again different court verdicts have stated that Article 14/39(b)/297 must be interpreted in the light of the 'Doctrine of Public Trust'; it clearly is however yet to identify an Article as the doctrine's true source , and the doctrine's function to provide guidance on the pricing of natural resources. Nevertheless in the broader context, putting the 'Doctrine of Public Trust' in service of constitutionally guaranteed 'environmental rights' shall not only embark upon new strictures on Indian Governments, but also place newer constraints on private property rights in India.

## 5. Conclusion

Though some courts speak about the 'Doctrine of Public Trust' as if it were a legitimate clause, it in fact lies somewhere between an ordinary "rule of law" and a constitutional prerequisite. The Indian Judiciary and Legal Crusaders need to appreciate the fact that the 'Doctrine of Public Trust' is essential to our jurisprudence, due to natural law and by terms of statutory interpretation. It can be and is one of the most effective legal tools which can be repeatedly frequented to conserve and empower the natural environment.

Any expansion of the doctrine should be scrutinized to the highest degree, and any furtherance of the doctrine must be based upon rational thinking and evolving 'common good'. In this manner, the doctrine is given both a directional focus and a level of needed judicial restraint, and this predominance shall largely play out in the realm of policy papers and legislation whilst dealing with natural resource protection; at India and World over.

# 3

# IMPACT OF THE NATIONAL GREEN TRIBUNAL ON ENVIRONMENTAL GOVERNANCE IN INDIA: AN ANALYSIS OF METHODS AND PERSPECTIVES

*Dr. Geetanjoy Sahu*

# 3

# IMPACT OF THE NATIONAL GREEN TRIBUNAL ON ENVIRONMENTAL GOVERNANCE IN INDIA: AN ANALYSIS OF METHODS AND PERSPECTIVES

*Dr. Geetanjoy Sahu*

## 1. INTRODUCTION

Much has been talked and debated about the National Green Tribunal (hereafter NGT) in India and rightly so. Since the enactment of the NGT Act in October 2010 till 31st January 2015, the total institution of cases before the National Green Tribunal and its four Zonal benches located in Kolkata, Chennai, Pune and Bhopal was 7768 cases. Of these, 5167 cases were resolved and 2601 cases were pending.[1] The speed with which environmental cases are resolved is also worth mentioning here. Almost 67% of the cases have been disposed of within nine months. Unlike its predecessor the National Environment Appellate Authority (NEAA), the NGT and its Zonal benches have wide ranging powers to adjudicate upon any dispute that involves substantial questions related to legal right to environment. This power of NGT coupled with technical expertise has exponentially dealt with a number of complex environmental problems. Such power and the amount of environmental cases resolved by the NGT

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1 For more details, see National Green Tribunal International Journal on Environment, Volume 3. February 2015.

has drawn the attention of legal experts, environmental groups, social science scholars and media to understand and examine what has been the impact of the NGT on the nature and process of environmental governance in India. Current studies and media reports view the role of the NGT in various ways.[2] Many have welcomed this relatively new role of the Green Tribunal in environmental protection for the good that it is perceived to have done; others are somewhat uneasy at this development; a few feel strongly that it is improper. Judging by the recent literature, this ambivalence is increasing. These studies, however, do not necessarily provide insight on the nature of environmental orders or illuminate broader patterns of the green tribunal orders and what kind of impact it has made on environmental governance in India.

In this paper, I seek to transcend these limitations and offer a critical analysis of green tribunal orders from 2010-2015 through a review of selective NGT orders. In doing so, I begin by explaining why and how the NGT was set up and what are the powers and functions of NGT. Then I discuss the nature and process of NGT decisions on environmental issues. Finally, I highlight the major impact of NGT orders on environmental governance in India.

## 2. Evolution of the National Green Tribunal: An Overview

Specialised authorities, courts and increasing number of tribunals are not unique features in the Indian political system. Over the last two decades, there has been a flurry of specialised tribunals and courts across the world to deal for example, with matters related to taxation, traffic, foreign intelligence surveillance, immigration, divorce and family matters, domestic violence, mine safety and water rights. There could be several reasons why

2 See, Ritwick Dutta & Sanjeet Purohit (2015), Commentary on the National Green Tribunal Act, (Universal Law Publishing Co. New Delhi), 2010; Shibani Ghosh (2012), Environmental litigation in India, The Hindu Business Line, 31st January, available at http://www.thehindubusinessline.com/opinion/environmental-litigation-inindia/article2848051.ece, accessed on 2nd October 2015; CSE (2014), National Green Tribunal: A New Beginning for Environmental Cases?, available at http://www.cseindia.org/node/2900, last accessed on 2nd October 2015.

specialised tribunals are created but the key reasons include: to speed up the process of adjudication and address the problem from a multi-dimensional approach.[3] The Indian Courts (both Supreme Court and High Courts at the state level) have played a major role in addressing environmental litigations; but of late the Courts in India expressed their inability to deal with complex environmental issues involving science and technical details. For example, in the *A. P. Pollution Control Board* v. *M V Nayadu*[4], the Supreme Court referred to the need for establishing a specialised environment court consisting of both experts and judicial members. On hearing this case, the Supreme Court observed that environmental cases involve scientific and technological aspects. In such a situation, considerable difficulty has been experienced by both the Supreme Court and the High Courts in adjudicating upon the correctness of the technological and scientific opinions presented to the Courts. Similar difficulties arise or in regard to the efficacy of the technology proposed to be adopted by the industry or in regard to the need for alternative technologies or modifications as suggested by the Pollution Control Board or other bodies. The difficulty faced by environmental courts in dealing with highly technological or scientific data appears to be a global phenomenon. Many scholars and legal experts are of the opinion that the judicial systems are not equipped to deal with complex environmental issues and there is a need for a specialised multi-disciplinary body. As Lord Woolf[5] pointed out "a multi-faceted, multi-skilled body should lead to faster, cheaper and more effective resolution of disputes in the environmental area. Citing Lord Woolf's argument put forth in his paper, the Supreme Court observed that its ability to handle complex science-rich cases has recently been called into-question, with widespread suggestions that the judicial system is increasingly unable to manage and adjudicate science and technology (S&T) issues. Critics have objected that

3 Ritwick Dutta & Sanjeet Purohit (2015), Commentary on the National Green Tribunal Act, (Universal Law Publishing Co. New Delhi), 2010.

4 AIR 1999 SC 812

5 Lord Woolf (1991), Are the Judiciary Environmentally Myopic?" Journal of Environmental Law, Vol.4, No.1.

Judges cannot make appropriate decisions because they lack technical training, that the Jurors do not comprehend the complexity of the evidence they are supposed to analyze, and that the expert witnesses on whom the system relies are mercenaries whose biased testimony frequently produce erroneous and inconsistent determinations. If these claims go unanswered, or are not dealt with, confidence in the Judiciary will be undermined as the public becomes convinced that the Courts as now constituted are incapable of correctly resolving some of the more pressing legal issues of our day".

Similar concerns were also made in the earlier *M C Mehta* v. *Union of India*[6], in which the Supreme Court held that in as much as environmental litigations involve assessment of scientific data, it was desirable to set up environmental courts on a regional basis with a professional judge and two experts, keeping in view the expertise required for such adjudication. The other judgement was Indian Council for *Enviro-Legal Action* v. *Union of India*[7] in which the Court observed that Environmental Courts having civil and criminal jurisdiction must be established to deal with environmental issues in a speedy manner. In response to these directions, the Government of India passed the National Environmental Tribunal Act in 1996 but it never got notified. Thereafter, the National Environmental Appellate Authority was set up in 1997. This authority was also not effective as it functioned without a Chairperson after the first Chairperson's tenure ended in 2000. In addition to this, the number of environmental litigations increased and the Courts in India, which were already overburdened with thousands of cases expressed its inability to expedite the process of adjudication on environmental matters. Additionally, there were inconsistencies in judgments and the Courts were increasingly dependent on expert members. All these factors led to the increasing demand for a specialised environmental court from various quarters ranging from the Court to environmental groups.

6 AIR 1987 SC 965

7 AIR 1996 SC 1446

The 186th Law Commission Report recommended that a separate environmental court be constituted to achieve the objectives of accessible, quick and speedy justice. The Government of India supported this idea and enacted the National Green Tribunal Act in April 2010 and the NGT was notified on 18th October 2010. At present, the Principal Bench of NGT is functioning from Delhi and its four zonal benches are functioning from Chennai, Kolkata, Pune and Bhopal. The National Green Tribunal as constituted today comprises judicial and non-judicial members. Section 4 (1) of the Act specifies that the Tribunal shall consist of a full time Chairperson; not less than ten but a maximum of twenty full-time judicial members and not less than ten but a maximum of twenty full-time expert members. As of 10th October 2015, there are eight judicial members including the Chairperson and eight expert members in all the benches. [8]

## 3. Jurisdiction of the National Green Tribunal

The role of the NGT in resolving disputes concerning environmental issues assumes great significance as there exists powerful competing claims and counter claims over the use and management of natural resources. Any alteration in the established institutional mechanisms governing the use of these resources (for example, those caused by a state or market-initiated development program) might not only have differing impacts on different strata of society, but might also result in social conflicts. Therefore, such potential conflicts need to be resolved through different social and institutional mechanisms, including the common property regime at a wider social level, regulatory measures taken by bodies like the pollution control boards the forest department, and adjudication by the judiciary at various levels. With respect to these conflicts, the Supreme Court of India is the most important and final arbitrator. However, with the enactment of the NGT Act in 2010, the Green Tribunals (both the Principal Bench in New Delhi and Zonal Benches at Chennai, Pune, Kolkata and Bhopal) have the power to hear all civil cases relating to environmental issues and questions

8 This information is obtained from the NGT website, Available at this site: http://www.greentribunal.gov.in/, last accessed on 27/12/2015.

that are linked to the implementation of laws listed in Schedule I of the NGT Act. These include: the Water (Prevention and Control of Pollution) Act, 1974; the Water (Prevention and Control of Pollution) Cess Act, 1977; the Forest (Conservation) Act, 1980; the Air (Prevention and Control of Pollution) Act, 1981; the Environment (Protection) Act, 1986; the Public Liability Insurance Act, 1991; and the Biological Diversity Act, 2002. The provisions under these laws allow civil society and environmental groups and citizens to resort to the Green Tribunals if there is any violation pertaining to these laws, or any order/decision taken by the Government under these laws.[9] The NGT has been empowered to adjudicate disputes relating to environmental protection. It also has the power to declare as illegal and invalid any administrative action that contravenes or undermines environmental laws. Also, the National Green Tribunal is empowered to review orders passed under all existing environment protection laws, including those involving water, air, forests and wildlife. No other court or authority can entertain any application, claim or action that can be dealt with by the tribunal.

Apart from resolving substantial environmental issues such as water pollution, air pollution, hazardous and solid waste management problems, and forest degradation, the role of the Green Tribunals, as envisaged under the Act, is not only to ensure that environmental clearance given to diverse development projects is in conformity with environmental protection and other laws, but also that any kind of degradation to environment and property of citizens need to be restored and compensated. The aim and objectives of the NGT are clearly laid down in the preamble of the Act which reads as: *"An Act to provide for the establishment of a National Green*

9 The Green Tribunals have not been vested with powers to hear any matter relating to the Wildlife (Protection) Act, 1972, the Indian Forest Act, 1927 and various laws enacted by States relating to forests, tree preservation. Therefore, specific and substantial issues related to these laws cannot be raised before the NGT. One has to approach the State High Court or the Supreme Court through a Writ Petition (PIL) or file an Original Suit before an appropriate Civil Judge of the taluk where the project that one intends to challenge is located.

*Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto."*[10] A detailed discussion on the powers and jurisdiction of the NGT is made in the subsequent section of this paper.

## 4. Understanding the Green Approach of the NGT: An Analysis

As mentioned earlier, the NGT and its Zonal benches have resolved more than 5,000 cases over the last five years. By hearing regularly environmental matters, the Green Tribunals have begun to transform the process of environmental governance and have raised several questions before the legislature and the executive to protect and improve the environment. Not a single day passes without an environmental judgment delivered either by the Principal Bench or Zonal Benches in different regions directing the implementing agencies concerned to protect and improve the environment. As a result, the Green Tribunal in India is regarded as one of the most powerful Green Tribunals in the world, particularly as compared to its counterparts in both developed and developing countries.[11] It is beyond the scope of this paper to discuss in a detailed manner the order and judgments of the NGT and its Zonal benches. In this section, however, I have made an attempt to unravel what has been the nature of green approach employed by the NGT with reference to (1) appeals against environmental clearance granted by the Ministry of Environment and Forests and Climate Change; (2) relief, compensation and restitution of environment; and (3) appeals and writ petitions filed on substantial questions related to legal right to environment.

10 For more details about the NGT, see the National Green Tribunal Act, 2010, Ministry of Environment, Forests and Climate Change, Government of India , New Delhi.

11 Over the last three decades, over 350 specialised environmental courts and tribunals have been established in 41 countries across the world. For more details, see George Rock Pring & Catherine Kitty Pring (2009), Greening Justice: Creating and Improving Environmental Courts and Tribunals, The Access Initiative Study Report, World Resources Institute, USA.

## 4.1 The NGT Approach towards Appeals against Environmental Clearances

Section 16 (Clause A to J) in Chapter III of the NGT Act clearly laid down that any person aggrieved by the above mentioned seven enactments under the jurisdiction of NGT can appeal to it within 30 days of the decision taken by the authority. A close look at the decisions of the NGT vis-a-vis appeals against the environmental clearance decision of the government of India to development projects suggests that the NGT and its Zonal benches have come down heavily against the environmental clearance authority i.e. MoEF & CC for violating norms and regulations laid down under the Environmental Impact Assessment Notification of 1994 in clearing development and infrastructure projects. Unlike the defensive and hands off approach of the Indian Supreme Court against development and infrastructure projects, the NGT and its Zonal benches have employed both the legal and scientific methods and assessed critically the clearance process and the environmental impact assessment reports before arriving at a decision.

No doubt the Supreme Court of India has played an important role as far as environmental protection is concerned but at the same time in contrast to its usual prioritisation of green concern in environmental litigation, the Supreme Court has recently adopted a defensive approach towards protecting the environment, upholding the rule of law and ensuring citizens' right to livelihood in cases involving state infrastructure development projects, thereby deviating from its own principles and precedents. The outcomes of the Tehri Dam case, Narmada Dam case, the construction of the thermal power plant at Dahanu Taluka, the Akshardham Temple and Commonwealth Games Village cases are some of the notable illustrations of the judicial defensive approach, which favours infrastructure and huge investment projects over environmental concerns. The grounds for challenging these litigations are generally very serious and include adverse environmental impacts, safety aspects, extraneous financial considerations, forced displacement and inadequate resettlement and rehabilitation of displaced peoples. However, the general attitude shown by

the Supreme Court with respect to such cases has been one of noninterference on the premise that they involve certain scientific and technical issues and policy matters which can only be effectively addressed by the expert authorities of the executive.[12]

An analysis of the NGT and its Zonal benches vis-a-vis appeals against the infrastructure projects reveals a contrasting picture. A number of orders of the NGT suggest that it has not only come down heavily against micro-structures such as urban and rural local bodies but has also challenged the big corporate sectors and the central and state governments for not following environmental regulations. For example, in the POSCO case[13], the NGT asked the Environment Ministry to review environmental clearance after some local villages refused to consent to the project under the Forest Rights Act, 2006. Officials say the requirement of mandatory consent from the gram sabha for initiating any project is the biggest hurdle in pushing infrastructure development in mineral rich, poor regions. The NGT has repeatedly rejected the views of its nominal master, the Ministry of Environment and Forests. For instance, in the case of *M.P. Patil* v. *Union of India*[14] wherein the Tribunal examined the details of the basis on which environmental clearance (EC) was obtained by the National Thermal Power Corporation (NTPC) Ltd, it was found that NTPC was guilty of misrepresenting facts to obtain the clearance. Similarly, in *Jeet Singh Kanwar* v. *Union of India*[15], the petitioners challenged the environmental clearance given to the respondents' proposal to install and operate a coal-fired power plant. The petitioners argued that the mandate of the various guidelines in the Public Consultation Process had not been complied with and had even been flouted in granting the clearance. Neither the executive summary of the EIA report in vernacular language nor the full EIA report had been made

12 Geetanjoy Sahu, Environmental Jurisprudence and the Supreme Court: Litigation, Interpretation and Implementation, (Orient Black Swan Publication Ltd. New Delhi), 2014.

13 *Prafulla Samantray* v. *Union of India,* Appeal No. 8 of 2011 dated 30-3-2012.

14 Appeal Number 12 of 2012 dated 13-3-2014.

15 Appeal No. 10/2011, dated 16-04-2013.

available, as required, 30 days prior to the scheduled date of public hearing. The NGT observed that according to the precautionary principle, the environment clearance should not have been granted by the Ministry of Environment, Forests and Climate Change (MoEF & CC). Moreover, it observed that the economic benefits of the project would have to defer to the environment if the project involved continuing and excessive degradation of the environment. The Tribunal further pointed out that the impugned order of the MoEF granting environmental clearance to the power plant was illegal and liable to be quashed.

Likewise, in *Adivasi Majdoor Kisan Ekta Sangthan* v. *Ministry of Environment and Forests*[16] the petitioner challenged the environmental clearance granted by the Ministry of Environment and Forests to Gare—IV/6 Coal Mining Project and Pithead Coal Washery of Jindal Steel and Power Limited located in the Raigarh District of Chhattisgarh. The petitioners argued that the environmental clearance had been granted to the project without properly conducting a public hearing as stipulated by the EIA Notification 2006. The NGT observed while giving its order that this was not a case where there had been a few insignificant procedural lapses in conducting the public hearing. This was, rather, a mockery of a public hearing, one of the essential parts in the process of deciding whether to grant an environmental clearance. It was, in fact, a classic example of violation of the rules and the principles of natural justice. Accordingly, the Tribunal considered it appropriate to declare that the public hearing conducted in the case was invalid.

Such a position of the National Green Tribunal vis-a-vis infrastructure projects is a significant departure from the earlier decisions of the Indian Supreme Court against large scale projects like big dams and power plants wherein the Supreme Court followed a more conservative and defensive approach and supported unequivocally the environmental clearance decisions of the government of India. These decisions are significant as far

16 M.A. No. 36 OF 2011, (Arising out of Appeal No. 3 of 2011).

as environmental governance in India is concerned as the NGT intervention has made the environmental clearance authority more responsible and accountable for their decisions. Also, these decisions created hope in the minds of the civil society groups that hitherto believed that the infrastructure projects even if they are violating rules and regulations cannot be stopped as the Indian judiciary maintained a distance from such kind of projects.

### 4.2 The NGT Approach Toward Appeals Filed to Restore the Environment

Section 15 of Chapter III (15) from clause 1 to 5 of the NGT Act emphasises that the NGT may, by an order, provide (a) Relief and Compensation to victims of pollution and other environmental damage arising under the enactments specified under Schedule I of the Act; (b) for restitution of the property damaged; (c) for restitution of the environment as the tribunal may think fit. Over the last five years, the NGT and its Zonal benches have time and again penalised the polluter for not following the norms and regulations laid down under various environmental laws. The polluters were asked not only to pay for the damage done to the environment but also were directed to pay compensation to restore the environment degraded due to the activities of the polluters.

For example, in the *Krishan Kant Singh* v. *National Ganga River Basin Authority,*[17] the petitioner raised a specific substantial question relating to environment with respect to water pollution in the River Ganga, particularly, between Garh Mukteshwar and Narora, due to discharge of highly toxic and harmful effluents. It is alleged that highly toxic and harmful effluents are being discharged by the respondent units into the Sambhaoli drain/Phuldera drain that travels along with the Syana Escape Canal which finally joins River Ganga. These units had constructed underground pipelines for such discharge. On the basis of scientific data of inspection by the Expert teams of the Pollution Control Board and the fact that the water

17 2014, ALL (1) NGT Reporter (3) Delhi (1)

in the Phuldera drain had turned brown, the extent of pollution caused by the units was apparent, the NGT concluded that right to carry on business cannot be permitted to be misused or to pollute the environment so as to reduce the quality of life of others. Exercising the powers conferred upon it under Section 15 read with the mandates laid down in Section 20 of the NGT Act 2010, the Tribunal under the Polluters Pay Principle, directed the unit to pay Rs. 25 lakhs for not seeking consent from the Board as prescribed by law as well as to pay compensation of Rs. 5 crores for restoration of the damage of environment already caused and in the event of default to pay a further compensation of one crore.

Similarly, in the *Vanashakti Public Trust and Stalin Dayanand* v. *Maharashtra Pollution Control Board and Others*[18], the petitioner appealed to the Green Tribunal claiming that Ulhas River and other water bodies are undergoing severe environmental and ecological damage due to illegal discharge of dangerous untreated effluents, sewage and pollutants in violation of environmental Laws. Hearing the appeal, the National Green Tribunal (NGT) in its order on 2 July 2015, directed the Central Pollution Control Board (CPCB) to ensure that the Maharashtra Pollution Control Board (MPCB) takes stringent action against polluting industries along Ulhas river and also asked Dombivili CETP, Ambernath CETP, Ulhasnagar Municipal Corporation and Dombivali Corporation to deposit 70 crores with the Konkan District Commissioner for restoration and restitution measures.

Likewise, in the *D K Joshi* v. *Union of India*[19], the National Green Tribunal (NGT) imposed a fine of Rs 1.41 crore on nine colonies and three builders in Agra town for polluting the Yamuna river. It also ordered Agra Development Authority to lay a pipeline to the sewage treatment plant at Jaganpur and said that the fine amount was to be utilised for that purpose. The colonies and multi-storied buildings were found to be discharging sewage directly into the river via a pipeline.[20] Some of the other important

18 Application No. 37/2013.

19 Original Application 145 of 2015.

orders of the NGT directing the polluter to pay to restore the environment include: the NGT has penalised the Bareilly city municipal corporation for dumping solid waste in an unscientific and unlawful manner near Razau Paraspur village in Bareilly district of Uttar Pradesh and slapped a penalty at the rate of Rs. 1 lakh per day on the municipal body for restoration of the site to its original condition as well as to prevent further damage to the environment;[21] the NGT has slapped a penalty of Rs. 15 lakh on a former sarpanch and a gram sevak for felling 3000 trees in the forest area of a village gram panchayat of Nagaur district in Rajasthan;[22] the NGT imposed a penalty of Rs 76.192 crore on seven private builders for raising unauthorised structures in Tamil Nadu;[23] the NGT imposed fine of Rs. 7.50 lakh each on Jaypee Siddarth, Piccadily hotel and Rs 5 lakh on Tirupati Infra projects Private Limited. It also imposed fine of Rs. 5 lakh each on the BM Gupta Hospital Private Limited, Jaipur golden hospital, Indraprastha Medical Corporation Ltd (Apollo Hospital and Santom Hospital and for Holy family hospital Rs. 3 lakh fine was imposed. Among the malls Lifestyle Builders Private Limited and Laxmi Buildtech Private Limited were fined Rs 5 lakh each and Upaj Buildcon Private Limited was fined Rs 3 lakh for failing to implement its previous orders for installing functional harvesting systems on the premises; etc. [24]

These and a host of other NGT orders clearly reveal that the NGT under Section 15 of the Act possesses wide range of powers not only to award compensation to the victims of pollution but also has power to order for

20 Business Standard, 11th September 2015, "NGT fines Agra builders, colonies Rs 1.41 cr for polluting".

21 Sreshtha Banerjee (2013), Bareilly civic body to pay for unlawful dumping of city garbage, Down to Earth, 29 October.

22 The Hindu, 31st July 2015, NGT slaps Rs 15 lakh penalty on sarpanch for felling trees.

23 NGT slaps Rs 76 crore fine on 7 builders for raising unauthorised structures, 8th July 2015, India Today, Available at http://indiatoday.intoday.in/story/ngt-illegal-private-building-penalise-fine-across-india/1/449874.html, last accessed on 27/12/2015.

24 For more details, see NGT imposes heavy penalties on five star hotels and hospitals, Available at http://www.newsviewslive.com/13774/, last accessed on 27/12/2015.

restitution and restoration of property and environment. The citizen groups and environmental organisations/activists have invoked the provisions under section 15 and made the polluters liable for the damage they have done to the environment and restore the environment to its original position. In the current environmental legal framework, the maximum penalty prescribed under the Water (Prevention & Control of Pollution) Cess Act 1977, is only, Rs. 1000 and under the Water (Prevention & Control of Pollution) Act, it is Rs. 10,000. The maximum penalty under the Environmental Protection Act of 1986 is Rs. 1 lakh for the polluter. By contrast, the power of NGT under section 15 allows it to decide that the measure of compensation in case of pollution and destruction of environment must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect.

### 4.3 The NGT Approach Towards Appeals/Writ Petitions Filed on Substantial Questions Related to Legal Right to Environment

Section 14 (1) of the NGT Act empowers the Tribunal to hear and decide two categories of civil cases where an application has been filed. These include: (1) raising substantial question relating to environment where such question arises out of enactments mentioned in Schedule 1 (seven environmental acts), (2) seeking enforcement of any legal right relating to environment. What all come under substantial questions relating to environment is further defined under section 2 (1) (m) of the Act which means an instance of violation of environmental obligation which leads to such environmental consequences which are affecting or may affect the community and not just an individual or handful of individuals; or substantially damages the environment or property, or damages public health which can be broadly measures.

A close look at the decisions of the NGT with reference to appeals and writ petitions filed related to legal right to environment suggests that the Green Tribunal has come down heavily against the polluter irrespective of nature of pollution, location, and parties involved. The NGT and its Zonal benches issued a number of directions against the polluter and uphold the

environmental law and rights of local community. The NGT and its Zonal benches issued directions regarding various environmental litigations with the understanding that the poor and disadvantaged sections of the society pay a heavy price because of environmental degradation and, therefore, that their rights need to be protected. This approach has been viewed by many environmental groups and activists as a recognition of the connection between social justice and human rights on the one hand and environmental protection on the other.[25] For example, in the Impulse NGO Network v. State of Meghalaya & Others (2014), the NGT prohibited rampant illegal rat-hole coal mining which had been in practice for many years in Jaintia, Khasi and Garo hills in the State of Meghalaya without being regulated by law. The NGT observed that illegal, unauthorised and unscientific mining had not only raised serious concerns of environment and ecology but even of human health of poor workers and children engaged in such activities. Right to healthy environment has become a central element of the NGT decisions.

The NGT's approach towards waste management is also worth mentioning here. For example, in the *Satish Kumar* v. *Union of India*[26], the petitioner filed a writ petition pertaining to the environmental pollution caused by burning of plastic, leather, rubber, motor engine oil and such other waste materials and continuous operation of illegal industrial units dealing with such articles on agricultural lands in village Mundka, New Delhi. In addressing the concerns raised by the petitioner, the NGT directed the Government of National Capital Territory of Delhi that all the plastic waste/scrap dealers and recyclers shall be restrained from carrying on their business of segregation of plastic waste and its eventual transfer to recyclers or disposal contrary to and without registration under the provisions of Plastic Waster (Management and Handling) Rule 2011, there shall be no unregulated open

25 This inference is based on discussion with Mr. Stalin, environmental activist and director of Vanshakti NGO in Maharashtra. Mr. Stalin has been engaged in filing litigation in NGT over the last four years.

26 2013 NGT Reporter (2) Delhi, 156

burning of plastic/rubber or such other articles anywhere in India. It also directed the concerned authorities to work out a plan for restoration of lands affected by illegal and unauthorised activity of segregation and disposal of plastic waste and submit its report to the Tribunal within one month of the order.

Likewise, in the *Manoj Misra* v. *Union of India*[27], the petitioner filed an application to address extensive pollution in river Yamuna. The petitioner alleged that despite the Supreme Court orders, the pollution in river Yamuna continuous due to illegal encroachment, construction activities, dumping of building debris and other solid waste in the river bed/flood pain and even into natural water bodies of the river over many years. After going through several reports and submissions made by the stakeholders, the Tribunal passed a series of orders. These orders include: prohibition of any construction activities on the floodplain, re-possession of floodplain from unauthorised and illegal occupation, full and optimum operation of the existing and proposed Sewage Treatment Plants so that water released be recycled and utilised for agricultural, horticultural and industrial purposes and least of this recycled water is discharged into the Yamuna, establishment of Common Effluent Treatment Plant, among other orders.

The NGT, through its interpretations, has made an attempt to reconcile different claims on behalf of development, environmental protection and human rights. The NGT holds that development activities which address the increasing demands of the people need to be carried out without unduly straining the available resources, and recognises the claims of the parties affected by pollution or environmental degradation. This stance reflects the principle of sustainable development in the outcome of environmental litigations. For example, in *Vinod Raichand Jain* v. *Union of India*[28], the application was filed against felling of around thousand trees for widening of Shikrapur-Chakna Highway No-55. Hearing the appeal, the Zonal bench, Pune held that widening of the road was absolutely necessary as there is

27 2015, ALL (1) NGT Reporter (1) Delhi (139)

28 Original Application 90/2014.

always a traffic problem at Shikrapur-Chakna Highway and vehicles leading towards Mumbai were required to trail behind for hours due to traffic congestion. The Tribunal held that expansion of State Highway is an important project in the public interest, which must not be stopped but at the same time the tribunal directed the authorities to make alternative arrangement for afforestation at the earliest to maintain the ecological balance.

In this way, the NGT and its Zonal benches time and again emphasised the duty and responsibilities of the implementing agencies to protect and improve the environment. The principles and precedents such as polluter pays principle, sustainable development, precautionary principle, inter-generational equity and intra-generational equity, right to a healthy environment as part of fundamental right to life laid down by the Supreme Court are reinforced by the NGT in a series of orders.

## 5. Process of the Green Tribunal Decision-Making

Over the years, the Judiciary has come increasingly to depend on science and technology, more environmental scientists, engineers, and hydrologists are asked to testify in courts of law on scientific and technical questions related to environmental problems. However, unlike the Indian Supreme Court and High Courts, the National Green Tribunal and its zonal benches consist of both judicial and non-judicial expert members from multi-disciplinary backgrounds. The inclusion of experts in the decision making process of NGT is a significant step as the Supreme Court earlier in resolving environmental judgments was seriously hampered in scientific and technical controversies by its inability to understand the true implications of the scientific evidence before it. As per the provisions of the NGT, the non-judicial members' role is to help the judicial members understand the complexities of an environmental problem well enough to make a reasoned decision. It has been observed that the presence of expert members in the decision-making process of NGT along with judicial members has made a huge impact as far as dealing with complex environmental issues are concerned.

The NGT has also been very flexible and evolved a number of innovative methods to address environmental cases. For example, in *Samata* v. *Union of India*[29], the NGT rejected the appeal of the Union of India alleging that the appellant had no locus standi to challenge the environmental clearance given to a coal based thermal power plant at Komarada village in Andhra Pradesh. In this case, the NGT went on to discuss the meaning of 'aggrieved person' as provided in the NGT Act of 2010 and held that any person aggrieved, either directly or indirectly, by the grant of an environmental clearance can maintain an appeal before the tribunal. The NGT's relaxation of the locus standi principle and its encouragement to petitioners to raise environmental issues has also been hailed as one of the most important factors for the evolution of environmental jurisprudence in India. Further, the NGT's efforts towards ensuring the implementation of its directions through monitoring committees have also been projected as a kind of an innovative method for improving environmental conditions.

Similarly, the NGT decisions in other areas of environmental litigation, such as deciding on the quantum of compensation for the damage done to the environment and to the victims of environmental degradation, giving an award to a petitioner for taking up the initiative to bring a case to the notice of NGT, setting up 'monitoring committees', applying polluters pay principle and precautionary principle for environmental protection have also been considered well-thought-out steps in the direction of strengthening environmental governance in India.

The NGT has taken suo motu interest to protect the environment. For example, the Tribunal after taking cognizance of a news item in The Hindu dated 21st November 2013, relating to felling of trees for establishment of a cricket stadium in the interest of protection of environment and ecology. The Tribunal passed an interim order with strict instructions to all the concerned Forest Department Officials to ensure that no further felling of trees is done by anyone in that area and also directed the Andhra Cricket

29 Appeal No. 9 of 2011.

Association to pay a sum of Rs. 96.40 lakhs as compensation for the environmental damage caused by applying the polluter pays principle.

The process of decision-making has also been very fast and as mentioned earlier, around 67% of cases are resolved within nine months. This has been hailed by environmental groups and activists as an important aspect of the NGT so far. Many believe that the NGT has been successful in speedy and effective settlement of environmental matters and when compared to the high courts regarding the handling of environmental matters, NGT has been a much better institution. The high court would normally not earmark more than three hearings in a year for an environmental matter. NGT, on the other hand, is much more regular in scheduling hearings, typically with time gaps of two to three weeks between two consecutive hearings.[30] This promptness in deliberating over cases is reflected in the increasing number of cases being settled by NGT. Environmental lawyers and activists are upbeat about the NGT's approach to resolve cases within a short span of time.

## 6. The Impact of NGT Decisions

The NGT decisions/orders have made a significant impact on environmental governance in India. Many environmental lawyers, NGOs and activists believe that the constitution of NGT and its active and consistent approach in resolving litigations in a speedy manner has created hope among the civil society groups working for the protection and improvement of environment. The implementing agencies like Pollution Control Boards also find their presence meaningful today as their notice to polluters has Tribunal sanction and do not depend on administrative bodies to execute and implement various environmental laws and policies.[31] The targets of most of the NGT orders have been the Ministry of Environment and Forests and Climate Change and environmental regulatory authorities

30 This inference is based on my discussion with Mr. Sankar Prasad Pani, Environmental Lawyer, Zonal Bench of NGT in Kolkata.

31 This information is based on my discussion with Legal Cell staff of Maharashtra and Gujarat State Pollution Control Boards.

and other implementing agencies like Pollution Control Boards which are supposed to enforce environmental law and policies.

However, the MoEF has not always been supportive of the decisions of the NGT, and in fact, has challenged its orders to protect and improve the environment. The NGT orders to phase out vehicles more than ten years old to control vehicular pollution in Delhi in November 2014 is a case in point. The Central government has already filed an application before it against phasing out vehicles more than ten years old.[32] The Central government's challenge to NGT order shows the conflict that arises when the NGT assumes other agencies' powers and responsibilities. In this case, the NGT issued policy decisions independently of the MoEF, making it awkward for the MoEF to develop and enforce its own policies. Such kinds of orders are viewed by the central government as interference in its power and functions. There are also reports that the MoEF is not happy with the increasing number of environment clearance cases getting rejected by the NGT and officials of MoEF & CC view it as a 'power-hungry' institution[33].

The NGT's demand to have suo moto power to protect the environment has already been rejected by the MoEF & CC. Similarly, its intervention on policy matters has also been criticised. For example, in the *Wilfred J. and another* v. *MoEF and Others*[34], the petitioner challenged the environmental clearance granted by the MoEF to the Vizhinjam Port in Kerala which was earlier protected under the Coastal Regulation Zone (CRZ) Notification of 1991 but later deleted under the CRZ notification of 2011. In deciding over the policy decision of the MoEF, the NGT while considering various laws and precedents relating to powers of judicial review as vested in a Court held that the NGT Act, 2010, nowhere explicitly prohibits the NGT from the powers of judicial review to examine the constitutional validity or

32 Ahead of NGT order, no clarity: Delhi willing, Centre opposes, The Times of India, 4th July 2015.

33 Yukti Choudhary (2014), Tribunal on Trial, Down To Earth, Centre for Science & Environment, Nov 30, New Delhi.

34 Appeal No. 14 of 2014.

legality of subordinate or delegated legislations. It held that judicial review is concerned with not only merits of a decision but also the decision-making process. The Tribunal further observed that the Original, Appellate and Special jurisdictions vested in the NGT as envisaged under sections 14, 15, and 16 respectively of the NGT Act, along with section 29, which excludes the jurisdiction of other civil courts to entertain any appeal or settle any dispute relating to environment, clearly spell out the mandate of the legislation, that NGT should exercise wide jurisdiction over all matters relating to environment. Though the Tribunal held that it will exercise limited powers of judicial review of delegated and subordinate legislation and it will perform the functions which are supplemental to the higher judiciary and not supplant them, its decision to overrule the decision of the MoEF has been under scrutiny.

Another growing and major concern has been that in recent years, the NGT decisions have been challenged in various High Courts under Article 226. Section 22 of the NGT Act, provides that the statutory right of appeal from NGT can only go to the Supreme Court, thus by-passing the high courts. But the Madras High Court has disagreed with this provision. It has stressed that the bar imposed on lower courts by the Act, excluding them from deliberating on environmental cases, does not extend to the high courts. This is because the jurisdiction of a high court under Article 226/227 of the Indian Constitution is part of the Constitution's basic structure. In other words, the court stressed that environmental appeals from NGT had to go to the high court first before going to the apex court. Other High Courts like Bombay High Court have also started entertaining appeals against the NGT orders and has asserted the superiority of a High Court over the NGT, saying, "High Court is a constitutional body while NGT is a statutory body. [35]

One may observe that the NGT gives orders but the execution of its orders, has not been effective. Although the NGT has always been active in

35 The Indian Express, September 11, 2015.

pronouncing landmark environmental judgments, constraints on their implementation are operative. Prima facie evidence suggests that compliance with the NGT orders varies from cases to case. Some attribute this to the ineffective implementing agencies and others point out that NGT decisions are not feasible to implement within a given time-frame. The NGT has no means for effectively supervising and implementing the aftermath of its orders and directions. It has also no method to reverse its orders if they are found unworkable or requiring modification.

## Conclusion

Notwithstanding the above challenges and criticisms, the National Green Tribunal has acted as an effective deterrent mechanism to address non-implementation of laws and violation of environmental rules and regulations indiscriminately by the polluters and implementing agencies. Unlike the Indian Supreme Court and High Courts, the Green Tribunal has been very consistent and aggressive in its approach towards environmental litigation irrespective of the nature of case and parties involved and has not rejected or dismissed petitions arbitrarily filed against infrastructure projects on the grounds that the problems concerned involve complex scientific and technical questions. The inclusion of different experts to deal with different aspects of environmental problems has undoubtedly helped the National Green Tribunal to look beyond overly simplistic cost-benefit considerations of a particular project or production unit in addition to serving several long term interests of environment and development. Though there are criticisms against the NGT for its intervention in policy matters and assuming review power and also for taking suo moto action to protect the environment, the credibility of the NGT will sustain as long as its decisions to protect and improve the environment are based on the idea of sustainable development with special emphasis on the principles of social justice and equity.

# 4

# GLOBAL CLIMATE JUSTICE AS A NEWER GOALPOST BEFORE THE NON-ALIGNED MOVEMENT

*Debasis Poddar*

# 4

# GLOBAL CLIMATE JUSTICE AS A NEWER GOALPOST BEFORE THE NON-ALIGNED MOVEMENT

*Dr. Debasis Poddar**

## 1. Introduction

Ever since sudden decline of erstwhile USSR, followed by consequential syndrome, e.g. emergence of CIS group, unification of Germany, regime change in East Europe to do away with socialism and mute but minute departure of China from Socialism, existential conundrum seems apparent on the face of record to pose threat to NAM as the largest cluster of almost all newly independent decolonized states the world has ever experienced - two out of every three member states of the United Nations (approximately) - to join a worldwide network of loosely connected peace movement and thereby transcended respective geopolitical diversities on the part of stakeholders in course of non-aligned movement. During the last two decades of experience, however, so called third world congregation emerges as writing of the wall to refute an otherwise increasing apprehension about its exhaustion in the post-bipolar world. Despite no longer being 'third' as such, loose congregation of states under the bannerof NAM resembles the otherness in hitherto international identity politics worldwide. In time ahead, there are reasons to hold, the NAM as a loosely connected movement will continue to pursue its game plan with newer goalposts ahead.

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Even in post-bipolar world, major postulates of the movement still persist to resist preponderance of power which NAM is meant for. Despite contemporary world got divided between privileged and impoverished, without rivalry between powerhouses, the Panchsheel principles - derived by its pioneers- still hold good, if not the best, for global good governance.[1] Also, from strategic studies perspective, non-alignment seems a jurisprudent antithesis to thwart Machiavellian diplomacy of group interests often than not being indulged in by the states clustered in rival power arrangements accordingly - the way twentieth century experienced outbreak of two pervasive wars. Despite association of a number with such underprivileged hemisphere of the world- the third world- the same seems more a metaphor to voice the concern of such states against the hitherto hegemonic international law[2] than to stand apart from the wrath of cold (read covert) war the then superpowers engaged the world by mutual conflict inter se at heavy cost international peace and security.

While the world did repose good faith on superpowers as the trustees of international peace and security, and thereby accepted their otherwise hierarchical positioning as permanent members of the UN Security Council despite gross departure from equality of sovereign states, the way such privilege got (ab)used, good faith seems on its way toward bankruptcy. In the globalized world, compared to erstwhile bipolar world, (dis)parity in power play got worsened and here lies potential for NAM to recover incidental setback, if any, in the emerging neoliberal world order.

In the then bipolar world, consecutive incidents of recent US highhandedness on Iraq and Afghanistan respectively - by and large unilateral course of action on its part- was next to impossible out of given

1 Vide pamphlet published by the Ministry of External Affairs, Government of India, New Delhi. Available at: <http://www.mea.gov.in/Uploads/PublicationDocs/191_panchsheel.pdf> last accessed on June 27, 2015.

2 For details, refer to Balakrishnan Rajagopal, Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy, literature without citation and date. Available at: <http://www.aalco.int/rajagopal2007.pdf> last accessed on June 28, 2015.

Soviet deterrence with potential to culminate into the apocalyptic World War III and thereby mark the end of human civilization. In the absence of such deterrence, as collective forum of the underprivileged states, NAM may and does offer residuary resistance whatever possible within its reach, e.g. through its contribution to generate global public opinion, rights advocacy, UN reform movement, peace negotiations, (under)development diplomacy, and the like. With the passage of time, despite inbuilt limitation of its own, the NAM has emergedas an international mass movement to get these otherwise powerful states handcuffed in the wake of issue-based consensus worldwide against preponderance of power whatever appears inimical to the Global South.

## 2. Insecurity Induced by Industry

In post-bipolar world, the world but grapples with an altogether divergent trajectory of vulnerability posed from a potential threat out of global warming and consequent climate change to the extent of apocalyptic end of civilization followed by extinction of life on the Earth in time ahead, by courtesy, contribution of GHGs to atmosphere- perhaps last and final anthropogenic input to comprehensive detriment of biosphere in the world. In technical sense of the term, climate change emerged as the first ever universal concern to leave alive none under the Sun. Not only human population, few- quite a few- other life forms also do face potential threat of their extinction alongside. Thus, as a movement, the platform nowadays stands stronger with wider support base of other (subhuman) stakeholders concerned including flora and fauna; by courtesy global climate change and the (humane) existential threat thereof. In deep ecology-[3] the way planetary perspective is drawn- diverse personified inanimate objects, e.g. mountain,

3 Adherents of the deep ecology movement share a dislike of the human-centric value system at the core of European and North American industrial culture. Deep ecologists argue that environmental philosophy must recognize the values that inhere objectively in nature independently of human wants, needs and desires. For details, refer to Michael P. Nelson, Deep Ecology, in Encyclopedia of Environmental Ethics and Philosophy, 2nd ed., 2008, p. 206-211. Available at: <http://www.uky.edu/OtherOrgs/AppalFor/Readings/240%20-%20Reading%20%20Deep%20Eco logy.pdf> last accessed on July 4, 2015.

hillock, ocean, river, forest, etc. also constitute part of humane existence with stakes of their own in larger eco-economic jurisprudence.

Here lies the point of resurrection for the NAM which stands no less imperative for maintenance of international peace and security in the post-bipolar world than it stood in the then bipolar world. Earlier the overarching arms-race in general, and that for weapons of mass destruction in particular, played instrumental for the NAM stakeholders toward alignment against alignment on the basis of power arrangement. In the then world, deadly arsenal as expression of political sovereignty of state used to pose threat to global peace and security. On the contrary, in contemporary world, otherwise lively arsenal- greenhouse gases (GHGs), etc.- also emerges as expression of economic sovereignty for state to put global peace and security to gross detriment. Thus, in the post-bipolar world, vulnerability of contemporary world got multiplied and thereby increased the relevance of NAM manifold in a way perhaps never thought of by the international community. Whether and how far NAM is prepared to gear-up its recent momentum for survival, if not revival, is a point apart.

In the post-bipolar world, the way clutch of climate change looms large poses threat to maintenance of international peace and security; albeit not the way it is provided for under the UN Charter,[4] but the same appears much more far-reaching in its effect. Also, unlike the way UN Charter provided for, such a newer threat to maintenance of international peace and security transcends the jurisdiction of UN Security Council since the given means and methods of mass destruction, by courtesy climate change, cannot be mitigated on the part of an otherwise omnipotent forum-Security Council. The security threat out of climate change deserves altogether different treatment and the United Nations Framework Convention on Climate Change (hereafter UNFCCC) got adopted in the larger occasion of the United Nations Conference on Environment and

4 Vide Preamble to the Charter of the United Nations, 1945, read with Article 1.1, 2.4, 39 and 99. Available at: <http://www.unic.org.in/items/Other_UNCharter.pdf>last accessed on July 5, 2015.

Development (UNCED) in Rio with universal representation in technical sense of the term. Thus, in the post-bipolar world, erstwhile polarization took topsy-turvy to turn the table upside down on the elite hemisphere for its industrial development at fateful cost- of carrying capacity for the planet.

## 3. Development versus Environment

Immediately after the bipolar world, the sense of relief apparent with the leadership for elite hemisphere- that hostile political struggle with 'the spectre of communism' being over- ended in smoke with the upheaval of psychosis out of climate change. To ever-increasing nightmare of the Occident, climate put as add-on to communism. Political challenge is supplemented by economic input in the wake of newer threat. After the bipolar world, NAM was presumed to suffer its natural death. By courtesy climate change, the political climate worldwide underwent metamorphosis to offer resurrection for the NAM with global climate justice as present political agendum- a newer goalpost to score mileage- against the privileged hemisphere of the world. Climate diplomacy thereby recharged NAM to get activated once again while uni-polar world collides with unique existential crisis; indeed self-induced by the West. As a dissident voice, NAM has had potential to this end.

Despite potential for resurrection as a dissident voice, NAM but lacks strong force for essential limitation of its own. The limitation on its part may be identified thus: (i) being non-aligned by default, even at its internal system of governance as well, NAM is yet to pose resistance before the organized power politics of elite states; (ii) with a huge number of stakeholders under its flag - about one hundred twenty states as members and nearly twenty states as observers - NAM as movement suffers setback out of its number in the absence of resource management expertise on its part that otherwise could have converted the same to its strength; (iii) with diverse systems of governance operative in these states, NAM has had no level-playing field so far for its stakeholders; (iv) once again, in the realm of climate diplomacy, circumstance stands dissimilar to these states with consequent divergence in respective interests; (v) also, out of their

ideological rivalry, these states often than not pursue competing- and at times conflicting- claims in (dis)respect of common minimum causes of NAM to carry forward its own agenda; (vi) last but not least, out of their respective regional realities, the stakeholders are at times left with no other option but to depart from the positioning of NAM movement in a way or other.

Here lies underlying constraint of NAM as a movement. Being so loosely organized, NAM represents a club of states whose climate diplomacy stands apart and at times at loggerheads with one another despite both being under the same NAM umbrella. For instance, least developed states including small islands and archipelagic states apprehending inundation out of sea-level rise on one side and fast emerging states like China and India aspiring for threshold of industrial development on the other. Under such circumstance, NAM suffers from inherent tension and thereby falls short of determining its position in global climate diplomacy. Also, there are stakeholders by and large victim of dependency syndrome on foreign aid with conditions implied to them not to take stand against national interests of donor (read elite) states even if the same may cost international public interest.[5] Despite being NAM stakeholders, the poor states are but handcuffed to this end.

No wonder that, in the wake of climate change, NAM is yet to attain its driving seat. In course of regular series of climate negotiations, despite states being stakeholders of NAM, they are too scattered into diverse interest groups - also subgroups - to serve respective national interests and thereby stuck to their mutually exclusive stands with little heed to their common obligations for NAM as a progressive movement.

5 For details, refer to OECD database vis-à-vis DCD-DAC assistance in recent years. Available at: <http://www.oecd.org/dac/stats/dataportals.htm> last accessed on July 11, 2015.

Few pieces of illustration are apparent, e.g. the way BASIC[6] and SIDS[7] had face-off inter se in the forum of UNFCCC despite most of them otherwise being stakeholders - either members or observers - of another forum (NAM) since long back; even before UNFCCC was born out of the Earth Summit in 1992. The author is jurisprudent enough to understand and appreciate all colliding national interests of these clusters and still strives to advance his humble argument that prior negotiation between them as stakeholders of the same old NAM was what seems desired sharing the third world concern together rather than splitting apart and thereby exposing an avoidable void before rest of the world. After all, lack of unity among the NAM stakeholders ought to strengthen elite hemisphere of the world to bargain their narrow national interests better even at heavy cost of the collective interests for underprivileged hemisphere in general along with these BASIC and SIDS interregional geopolitics in particular. After all, key to success for both these clusters lies in number game through unity and lack of unity is bound to affect their collective interests to gross mutual detriment of both perpetrated by each of them. Consequently, all elite states are likely to score on rest of the world; neither BASIC nor SIDS succeeds out of crabbing competition inter se while getting engaged in bargaining with the unparallel professional expertise developed states generated since long back. Merger of these two clusters, therefore, stands imperative for collective interest of the third world.

Rather than mutually defeating interregional geopolitical alliances, the author has had a suggestion for both of them- with reasoning of his own- to turn negotiation desk upside down for crusade on sustainable development with habitable environment and thereby club together against the existing dark development agenda followed so far. If the given mode of development and the dwindling environment (read climate) are put together

6 Vide BASIC policy brief. Available at: <http://www.seiinternational.org/mediamanager/documents/Publications/SEI-PolicyBrief-Olsson-BASIC ClimateChangeConundrum.pdf>last accessed on July 12, 2015.

7 Vide SIDS official website. Available at: <http://www.sidsnet.org/>last accessed on July 18, 2015.

face-to-face, irrespective of other counts of divide, no sane foreign policy- of even omnipotent states- can afford to indulge in irreversible damage worldwide. Thus, instead of comparative mileage to have strategic advantage upon one another, prudence lies in taking resort to functional approach and thereby allowing UNFCCC working for the common cause of humanity and carrying forward the maintenance of international peace and security while the threat of climate change looms large to leave the UN Security Council at bay despite the same being its original domain. Climate change regime hereby replicated the UN Security Council on one side and the UN Economic and Social Council including allied institutions on the other. NAM, therefore, needs brainstorming for regaining relevance. In the age of globalization repetition of history for NAM to resurface itself with two-third majority of states requires leadership quality the way first generation statesmen accomplished the same. Also, rivalry between the then superpowers turned its voice decisive. At present, want of all these variables reduces the voice to de minimis, if not dead.

## 4. Realignment within Nonalignment

Despite its nomenclature, strategic alignment between NAM leadership and USSR- if not others in the second world- was apparent secret in the then diplomatic world. Afterwards, even in the post-bipolar world, the same old spectre of capitalism still haunts NAM movement to condemn the elite hemisphere for any sundry predicament along with wild rush for panacea in the fantasy of self-sacrifice of the Global North in favour of the Global South; something like grandeur to sound heroic but too hard to happen in morbid world. Regrettably, NAM succumbed to the same psychosis while the same evoked its climate concern in last summit.

Perhaps out of colonial hangover, as a club of newly independent decolonized states, NAM has internalized the cliché of finding fault(s) in the elite state governmentality of the Global North on all hitherto crises the contemporary world has experienced till date. While this being state of the affairs in affairs of the state, climate change- despite being culminated out of emission indiscipline since industrial development- has emerged like a

bolt from the blue on these industrially developed states while contribution to climate change without understanding impact of industrial emission on sustainable climate cannot reasonably be criminalized in criminal jurisprudence. In climate diplomacy, however, NAM took no stone unturned to crucify the North on the ground of climate sin and stands upon consistent claims to extract climate costin favour of the South sans heed to catastrophic climate change as central concern.[8] Rather than inter-hemispheric contest in the court of climate change, what stands imperative is disaster management on the basis of its own strength through law and policymaking for coordination inter se to minimize climate change in time ahead. The same but appears latter while this lies well within reach of all its stakeholders.[9] Reversal of priority, without questioning the jurisprudence in diplomatic beating, has had potential to initiate a clarion call of the crisis hour.

A more fundamental concern vis-à-vis priority is awaiting getting addressed before. In its last Final Report, climate change found no place in Chapter I- otherwise meantto deal with global issues before NAM in 2012- while the same poses potential threat to humanity and, if not addressed before it is too late to lament for, is likely to leave none under the Sun. Instead, climate change found place in Chapter III (last chapter) as part of development

8 The Heads of State or Government reaffirmed the fundamental principle that developed countries shall take the lead in combating climate change, and expressed their serious concern at the limited progress in negotiations under the AWG KP, and reemphasized the urgent need for the establishment of quantified emission reduction commitments for the 2nd and subsequent commitment periods under the Kyoto Protocol. They urged developed countries with no commitments under the second commitment period of the Kyoto Protocol, to undertake comparable ambitious emission reductions pursuant to the Bali Action Plan. 16th Summit of Heads of State or Government of the Non-Aligned Movement, Teheran, Islamic Republic of Iran, 26-31 August 2012, NAM 2012/ Doc. 1/ Rev. 2, p. 132, paragraph 568. Available at: <http://namiran.org/Files/ 16thSummit/FinalDocument(NAM2012-Doc.1-Rev.2).pdf> last accessed on July 19, 2015.

9 The Heads of State or Government encouraged the intensification of South-South cooperation to support developing countries in addressing the impacts of climate change through technical cooperation and capacity building programs; … *Supra* n. 8, paragraph 572.

social and human rights issues and that also in its later half.[10] Likewise, in Tehran Declaration, climate change found place after security threats.[11] In practice, however, climate change appears the gravest security threat for humanity with enough potential to reduce our planet as graveyard of humanity in its entirety; something unlikely for any other head alone in the array of hitherto security threats. President of the UN General Assembly put more importance on climate for NAM.[12] As an international organization, NAM seems yet to resurface with political relevance in the post-bipolar world. In the wake of climate change, as a veteran UN bureaucrat, Head of the General Assembly thereby offered a lifeboat for the third world forum to float against ever-increasing tide of globalization

10 The Heads of State or Government also reaffirmed that urgent measures were needed to support adaptation and voluntary mitigation actions undertaken by developing countries, in accordance with their national capabilities and circumstances as well as the level of support they are receiving, and to strengthen cooperation at the global level to address, inter alia, desertification, land degradation and deforestation, and called upon the international community to prioritize the needs of the developing countries, taking into account the needs of those that are particularly vulnerable, in accordance with the criteria set in the UNFCCC, and to provide long-term, non conditional, adequate, scaled-up, predictable, new and additional finance, technology development and support as well as capacity-building. Priority will be given to particularly vulnerable developing countries, especially low-lying coastal, arid and semi-arid areas, LDC's, SIDS and Africa, land-locked countries, and developing country parties with areas prone to floods, drought and desertification, with fragile ecosystems, and facing increased frequency of extreme and catastrophic events and trends linked to climate change. *Supra* n. 8, paragraph 570.

11 To build a fair, inclusive, transparent and effective system of joint global governance, based on justice and equitable participation of all countries and to address present challenges and risks stemming from global security threats, environmental hazards, climate change, migration, contagious diseases, extreme poverty, among others, the NAM Member States should coordinate their positions and join force in pressing on the interests of the developing world. Tehran Declaration; of the XVI Summit of Heads of State or Government of the Non-Aligned Movement, issued on 30-31 August, 2012, paragraph 1. Available at: <http://www.voltairenet.org/IMG/pdf/DeclaracionTeheran_anglais.pdf> last accessed on July 25, 2015.

12 While the geopolitical context for which the NAM was formed over fifty years ago, namely, one of competition between the two existing superpowers for the hearts and loyalties of the new states coming into being, the movement continues to be about independence of action, which was its original purpose, and it has steadfastly

with its agenda for spread over of corporate power worldwide to gross detriment of the underprivileged hemisphere. Climate change, subject to jurisprudent maneuvering of core issues involved therein, seems a Trojan horse for NAM as a movement, pregnant with politicking questions, to penetrate into the elite castle with its deadly combat force. In the wake of change worldwide, issues of nonalignment need realignment to (pro)posede novo challenge before the world in general and before the West in particular.

And few, quite a few, NAM stakeholders did the same indeed. For instance, the way an Indian UN bureaucrat expressed, India runs multi-alignment in its diplomacy. [13]

advocated a principled approach to the various issues on the international agenda. More importantly, in the face of numerous complex global challenges, both enduring and emerging, the solidarity of the member States of the NAM is more critical than ever. Against a backdrop of increasing impacts from climate change, inequality between and among countries, and more than a billion people still living in extreme poverty, cooperation among and between the member States of NAM will be imperative for improving socio-economic development for the citizens of the planet.His Excellency Ambassador John W. Ashe, President of the 68th Session of the UN General Assembly, in Ministerial Meeting of the Non-Aligned Movement on the margins of the UN General Assembly, 27 September 2013. Available at: <http://www.un.org/en/ga/president/68/ pdf/statements/09272013 Ministerial_Meeting_of_the_Non-Aligned_Movement_final.pdf>last accessed on July 26, 2015.

13 In the second decade of the 21st century, India is moving increasingly beyond non-alignment to what I have described … as "multi-alignment"- maintaining a series of relationships, in different configurations, some overlapping, some not, with a variety of countries for different purposes.

Thus India is simultaneously a member of the Non-Aligned Movement and of the Community of Democracies, where it serves alongside the same imperial powers that NAM decries. It has a key role in both the G-77 (the "trade union" of developing countries) and the G-20 (the "management" of the globe's macroeconomic issues).An acronym-laden illustration of what multi-alignment means lies in India's membership of IBSA(the South-South cooperation mechanism that unites it with Brazil and South Africa), of RIC (the trilateral forum with Russia and China), of BRICS (which brings four of these partners together) and of BASIC (the environmental-negotiation group which adds China to IBSA but not Russia). India belongs to all of these groupings; all serve its interests in different ways. Shashi Tharoor, VIEWPOINT: Is the Non-

Albeit not antithetical *per se,* the traditional trajectory initiated by NAM since 1955 was adhered to an altogether divergent discourse;[14] something no longer operative for India as fast developing- and thereby emerging-economy to walk with elite states hand-in-hand. Consequently, characterizing the same- whether India is a stakeholder of NAM in practice- poses conundrum of global governance. In last count, however, the spirit of NAM cannot be diluted with such eventual departure from its tradition. Besides its institutional identity, NAM but resembles aspiration for like-mindedness among its stakeholders irrespective of being otherwise poles apart in their features.[15] So long as consensus remains upheld as its spirit, such departure- be the same multi-alignment or realignment- hardly hurts NAM as an institution. On the contrary, now, realignment stands a need of the hour to do away with archaic stand-alone position in isolation of one another by stand-together position out of international solidarity in general

Aligned Movement relevant today? BBC News- India, uploaded on 30 August 2012. Available at: <http://www.bbc.com/news/world-asia-india-19408560>last accessed on August 1, 2014.

14 NAM, however, does embody the desire of many developing countries to stake out their own positions distinct from the western-led consensus on a host of global issues- energy, climate, technology transfer, the protection of intellectual property specifically in pharmaceuticals, and trade, to name a few. In its determination to articulate a different standpoint on such issues, NAM embodies many developing countries' desire to uphold their own strategic autonomy in world affairs and the postcolonial desire to assert their independence from the West.

15 "… since the first non-aligned conference was held, practices and procedures have evolved with a view to synthesizing and harmonizing the views of various countries on important issues, and decisions have, as a rule, been arrived at by 'consensus'. This term has a certain indefinable quality; it is hard to to express in words, although we all know instinctively what it means. It presupposes understanding and respect for differing points of view including those in disagreement and implies mutual accommodation on the basis of which agreement can emerge by a sincere process of adjustment among members with different opinions in the true spirit of nonalignment. In other words, it simply means a convergence of views." A. N. Singham and Shirley Hune, Nonalignment in an Age of Alignments, the College Press Pvt. Ltd., Harare, 1986, p. 115. Available at:<http://www.freedomarchives.org/Documents/Finder/Black%20Liberation%20Disk/Black%20Power!/SugahData/Books/Singham.S.pdf>last accessed on August 2, 2015.

and against elite highhandedness worldwide in particular.

On the occasion of realignment, stakeholders need to work out the areas of emphasis with care and caution. Rather than repetition of archaic demands against elite states, prudence lies in identifying areas of concern and carrying forward priority agenda for NAM on its own. Thus, compliance to its own commitments vis-à-vis so-called South-South cooperation to support developing countries in addressing evil impacts of climate change through technical cooperation and capacity building programmesis imperative with immediate effect. Introspection for default of its own commitment, in lieu of agitation for default of others, may facilitate the movement perform better than ever before. On the occasion of multi-alignment, likewise, stakeholders ought to set aside commitment elsewhere inimical to the movement.

Last but not the least, in course of about six decades of the movement, the universe of third world mushroomed nearly six times in terms of number of its stakeholders. Original demographic character of the third world as underprivileged hemisphere thereby got diluted to such extent that, within the topography of so called third world in global governance discourse, the readership does decipher a meta-real third world to stand as subject to highhandedness of others from within the surreal third world. No wonder that, despite both being part of NAM fraternity, one emerging economy bargains for carrying forward its dark development agenda beyond carrying capacity of the Earth while substantial terrain of its immediately neighbouring state is subject to inundation in the wake of roaring sea level rise in time ahead. While otherwise vocal against climate sin of the elite hemisphere, its original realpolitik, NAM turns blind eye on climate sin of its own stakeholders to gross detriment of other siblings. Sin is but a sin and cannot turn clean since committed by rouge states of the same team. Besides classic firebrand imagery hyperlinked to NAM, as a responsible stakeholder of international community, the movement needs to follow rule of (international) law through dealing with cases of climate delinquency alike; resort to nondiscrimination among states on the basis of their respective positioning in geopolitical polarization being one of them. Be the

same alignment, nonalignment, realignment, and the like, in whatever way given diplomatic adjustment may be, the same ought to correspond to good faith before rest of the world to appear worthy to get defended by reasoning. Regrettably, NAM has had too long way ahead to reach there.

## 5. Crossroads Of (Non) Alignment Ahead

In its ordeal to arrive at a just world, meanwhile NAM did cross plenty of hurdles. Plenty others are no less threatening for the movement to grapple with besides those on its rise with the passage of time. One among them is diplomacy of plurilateralism in the movement. Plurilateralism of states with fast-emerging economy in general, and of India in particular, hit the movement hard. One of its original leaders,[16] India has had reasoning of its own to shift its position- albeit without official association being severed- toward plurilateralism. The neighbouring states in South Asia, out of regional geopolitics of their own, did not share the Nehruvian idea of third worldism the way India advocated peace-building process through 'Panchsheel' and the like. On the contrary, India was forced to defend itself against aggression and proxy war waged by some of them to prompt the same shift its foreign policy to original track as a giant power in its region and even beyond.[17] Perhaps in retaliation, the defence on its part, India put

16 It should be noted that the Bandung Conference projected, for the first time, the consciousness of third worldism. The term 'third world' was first used as a political category at this conference. The conference's main figures- Nehru, (India), Nasser (Egypt), Zhou Enlai (China)- were already in power. This consciousness led to the movement of global solidarity among the countries located in the Global South. TukumbiLulumba-Kasongo, Rethinking the Bandung Conference in an Era of 'unipolar liberal globalization' and movements toward a 'multipolar politics', Journal of the Global South, Bandung, 2015, p. 14. Available at: <http://www.bandungjournal.com/content/pdf/s40728-014-0012-4.pdf> last accessed on November 21, 2015.

17 The Indian prominence in South Asia was balanced by Pakistan's military alliance with the USA and China, which was instrumental in triggering a reorientation of India's foreign policy in the direction of the USSR. Therefore, India's post-independence foreign policy under the Congress Party was driven by two sometimes contrary stands: first, power and national interest and, second, the idea that an activist role ('non-alignment') in international affairs would secure not only the interests of India but also of harmony at large. However, with the outbreak of the Indo-Chinese War in

add-on to worsen the spirit of nonalignment with its neighbours further through intervention in East Pakistan and thereby indulged in the emergence of Bangladesh in 1971.[18] Thus, through a series of incidents, circumstance forced India to shift its earlier position without definite intent to depart from nonalignment in classical sense of the term. Dilution of the spirit of nonalignment in foreign policy of an original leader like India weakened the movement from within.

The consecutive conflicts with its neighbours with outside indulgence from the West prompted India to address the matter at its root. To neutralize the Western support to its neighbours, India turned friendly face to the Western front and thereby engageda newer discourse of nonalignment through North-South dialogue for durable peace.[19] Since then, India initiated its conversation with the West including USA. The source of inspiration for

1962 and subsequent clashes with Pakistan, the emphasis has moved away from Southern solidarity to a more pronounced expression of nationalism. Chris Alden and Marco Antonio Vieira, The New Diplomacy of the South: South Africa, Brazil, India and Trilateralism, Third World Quarterly, Vol. 26, No. 7 (2005), p. 1087. Available at: <http://www.jstor.org/stable/pdf/4017805.pdf?acceptTC=true> last accessed on November 21, 2015.

18 Balance of power theory is flawed in its application to the Third World because it ignores internal threats, that is, it overlooks the most likely source of challenge to the leadership of Third World states. Balance of power theory therefore also cannot accurately assess the strength of external threats because such threats usually depend for their effectiveness on internal conditions that are susceptible to outside manipulation. In 1971, for example, the Pakistani leadership believed it had to counter a secessionalist threat from the East Bengalis in order to remain in power. This meant confronting India, which supported the secessionalist movement. India alone posed a considerable but manageable external threat to Pakistan. What made India threat unmanageable and led to the decisive Pakistani defeat in the 1971 Indo-Pakistani War was Indian power combined with the massive internal threat mounted by the East Bengalis. Steven R. David, Explaining Third World Alignment, World Politics, Vol. 43, No. 2 (January, 1991), p. 244. Available at: <http://isites.harvard.edu/fs/docs/icb.topic1188138.files/Week%206/ David_1991.pdf> last accessed on November 21, 2015.

19 Since 1976 India has played a very active role in the North-South dialogue. Instrumental in formulating the economic resolutions at the Colombo Summit of the NAM and in securing repeated affirmation of those resolutions, Indian leaders have also argued forcibly within the NAM for a policy of cooperation, rather than

armed conflict in South Asia, USA is thereby neutralized though the same took decades to produce result in reality. After its own territory got affected by terrorism, USA appreciated better the UN caution that threat to peace anywhere poses threat to peace everywhere. Two democratic systems of governance by default put USA and India to proximity with effect on the movement to face queer crossroads of diplomatic conundrums ahead.[20] In the post-bipolar world, the same got fortified with few newer areas of alliance like civil nuclear deal, etc.

Thus India did away with archaic anti-alignment in diverse ways: (i) foreign policy of India thereby underwent from the partisan nonalignment to strategic realignment; (ii) keeping earlier polar apartheid aside, India engaged dialogue with the West; (iii) along with its counterparts across the Global South, India initiated diverse alliances with similarly situated states, e.g. Brazil, China, Russia, South Africa, and the like, to establish BASIC, BRICS, etc. on respective themes to suit their common interests, e.g. climate, trade, to name some of them. A new trend of plurilateralism is on its rise well within the NAM world to fragment hitherto issues involved therein.[21] Likewise, all small island states (SIS) have had interregional alliance of their own. Whether and how far the same is inimical to the

confrontation, with the developed countries. Stanley A. Kochanek, India's Changing Role in the United Nations, Pacific Affairs, Vol. 53, No. 1 (Spring, 1980), p. 59. Available at: <http://www.jstor.org/stable/pdf/2756961.pdf?acceptTC=true> last accessed on November 21, 2015.

20 As an increasingly free market economy and as a democracy India is virtually pinned to the USA's side. At last what one or two augurs were predicting as early as beginning of the 1990s appears to be coming true: the USA and India are natural allies. … The anti-Americanism which persists in sections of Indian society appears against this background to be an atavistic relic of a long-gone age and is already in the process of decline. Katherine Hughes (tr.), Carsten Rauch, Farewell Non-Alignment? Constancy and Change of Foreign Policy in Post-colonial India, Report No. 85, Peace Research Institute Frankfurt, 2008, p. 33. Available at: <http://www.hsfk.de/downloads/prif85.pdf> last accessed on November 21, 2105.

21 The Declaration of Brasilia, which created India- Brazil- South Africa Dialogue Forum (IBSA), was signed in June 2003 by the Foreign Ministers, of Brazil, South Africa and India following conversations held by the three heads of state during the

movement seems too early to comment upon. However, what may be reduced from given development is a metamorphosis in NAMtoward ocean change in its jurisprudence. Thus, the NAM today stands renewed with epistemology and metaphysics of its own to grapple with fresh areas of concern and, needless to mention, global climate change appears one among them.

## 6. Conclusion

The six-decade history of NAM, 1955-2015, is the history of growth in the quantity of its stakeholders- both members and observers- rather than quality of its presence in global governance.[22] Except easy axiom- quantity being the reflection of quality- NAM did little so far beyond strong resistance to misdeeds of the elite hemisphere in UN General Assembly. Indeed NAM succeeded since resistance was imperative to stop arms race, etc. The then resistance was by and large negative in its essence, e.g. press release, etc. In the post-bipolar world, climate change deserves resistance in positive sense of the term, e.g. disciplining emission, reducing deforestation, soil erosion, recharging groundwater, combating desertification, greening coastal zone, etc. For NAM, penetration through the newer goalpost like climate change regime needs newer game plan rather than jugglery of number game to win by mere majority; the way NAM succeeded in the floor of UN General Assembly. Till identification,it went hardly well since NAM is yet to put global climate justice at the top of priority. Even if NAM succeeds to prioritize, hurdles for its climate concern lie thereafter. A mouthpiece of the so called third world since its beginning, NAM is a known name for its speech rather than its reach to serve the underprivileged. In terms of its reach, therefore, the UNFCCC system stands way ahead. After all, despite being otherwise jurisprudent to put

G-8 meeting in Evian in June 2003. Mbeki, Da Silva and Vajpayee officially presented IBSA to the international community at the 58th session of the United Nations General Assembly in September 2003. *Supra* n. 16, p. 1088.

22 Vide Nuclear Threat Initiative (NTI) database on Non-Aligned Movement (NAM). Available at: <http://www.stratfor.com/image/status-non-aligned-movement>last accessed on August 8, 2015.

diplomatic pressure on errant emitters, serving hands are better than shouting lips while sustainability seems at real stake.

In the post-bipolar world, NAM needs to appreciate ever-evolving reality of the world with its major features, e.g. liberalization, privatization, globalization, and the like. Six decades after its inception, 1955-2015, NAM sails through with next generation-with newer wisdom of newer era- that hardly shares archaic issues of the third worldin the then post-war world to prompt the same get together at an alternative forum of Bandung and stay least connected to the bygone generation of NAM leadership. The globalized generation deserves issues relevant to the same and climate change, being one among them, has had potential to attract attention of its stakeholders alike the way metaphor in literature reflects upon a generation of particular time and place concerned.[23] The existential challenge underlying in global climate change is such that all are left with no other option but to respond to the same with positive note. What seems imperative is social engineering through South-South diplomacy to set a symphony for majority, if not all, of stakeholders in the third world to facilitate NAM states stand together for crusade. Climate diplomacy of the NAM stakeholders ought to emerge as litmus test for the movement worldwide.

23 Midnight's Children enters its subject from the point of view of a secular man. I am a member of that generation of Indians who were sold the secular ideal.Salman Rushdie, Imaginary Homelands: Essays and Criticism 1981-1991, Penguin Books, New York, 1992, p. 16. Available at: <http://philosophy.ucsc.edu/news-events/colloquia-conferences/ Rushdie1992ImaginaryHomelands.pdf> last accessed on November 21, 2015.

In an essay written in 1987, seven years after the publication of Midnight's Children, Salman Rushdie finds that "the novel's title became, for many Indians, a familiar catch-phrase defining that generation which was too young to remember the Empire or the liberation struggle". Jennifer Wenzel, Remembering the Past's Future: Anti-Imperialist Nostalgia and Some Versions of the Third World, Cultural Critique, No. 62 (Winter, 2006), p. 27. Available at: <http://www.jstor.org/stable/pdf/4489234.pdf?acceptTC=true> last accessed on November 21, 2015.

As an international movement, NAM ought to keep the pace with its competitors and, if possible, to exceed them in their own ballgame. Thus, learning rules of the game stands sine qua non for NAM to retain its relevance. Until the movement succeeds to demonstrate accomplishment of climate commitments on its own, the third world cannot rely on the same in the wake of survival threat to loom larger in time ahead. The onus now lies on NAM to prove its worth better through bringing in supervision for disciplining its stakeholders and thereby safeguard its members and observers from climate sin of others - beyond and within - under the (dis)guise of development. An emergent need of the hour lies in safeguarding lesser NAM from mightier NAM and megalomaniacs involved therein.

# 5

# RAIN WATER HARVESTING - A GLIMPSE

*Diana John*

- *Introduction*
- *The Meaning and Concept*
- *The Legislative Arena*
- *Scope of the Law and Policy on rainwater harvesting in India*
- *International Scenario*
- *Conclusion*

# 5

# RAIN WATER HARVESTING - A GLIMPSE

*Diana John**

## 1. INTRODUCTION

The word 'harvest', echoes a concept with which it was associated in the past namely sowing and reaping of food grains and the like. When there is a good harvest people are always happy. Little did mankind think that the very term would be used relating to water, the very essence of life. Water, the special property of which is, if contained by correct means it can be stored and used well rather than letting it be wasted without properly doing so. Water collected in a cup is more available for use than running water which flows in different directions; this being the basic idea behind harvesting of rainwater. Be that as it may, harvesting water, in particular rainwater is a concept that has gained increasing importance in the past several years. Rain water harvesting is enjoying a renaissance of sorts in the world, but it traces its history to biblical times. Rainwater harvesting dates back to Minoan times i.e. 3200-1100 B.C, the simple reason being the shortage of water experienced by ancient civilizations.[1] Extensive rain water harvesting apparatus existed 4000 years ago in the Palestine and Greece[2]. In

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1 Historical Development of Technologies on Water Resource Management and Rainwater Harvesting in Hellenic Civilizations, Nicholas Kathijotes, International Journal of Water Resources Development 04/2014, available at www.researchgate.net, last accessed on 30.11.2015.

2 www.waterjournal.cn, last accessed on 28.11.2015.

ancient Rome, residences were built with individual cisterns and paved courtyards to capture rain water to augment water from city's aqueducts[3], the last one having been built, namely Aqua Alexandrina in 226 AD.[4] As early as the third millennium BC, farming communities in Baluchistan and Kutch impounded rain water and used it for irrigation dams.[5] India is known to have a rich tradition of water harvesting system dating back to Vedic times. Any reference to the Indus Valley civilizations, one of the greatest Indian civilizations located on the banks of river Sarasvati does not go without mentioning the "Great Bath" a means of water storage. Ages back, when people moved to an agricultural society, rain and river water was the main source for farming, drinking, and routine activities.

## 2. The Meaning and Concept

Rainwater harvesting is the accumulation and deposition of rainwater for reuse on-site, rather than allowing it to run off. [6] This is the simplest definition that can be given for the above concept. Usually the water that is so harvested is collected and stored and reused for a variety of purposes like watering the gardens, toilet flushing, washing for replenishing swimming pools, washing vehicles agricultural/landscape irrigation and to provide water to livestock for drinking and cleaning them etc the storage structure for water stored and collected varies depending on several factors. For example, hospital buildings etc. have huge storage tanks when compared to the underground storage tanks constructed for domestic households. Before being utilized for various purposes, proper treatment of the harvested water is necessary if the purpose of rainwater harvesting and the supporting legislations must bear fruit. During summers in states that are otherwise blessed with rain and in most times the desert regions in the north western parts of India, the practice of legalized rainwater harvesting

3 A water supply or navigable channel constructed to convey water.

4 www.unrv.com, last accessed on 28.11.2015.

5 www.legalindia.in,/rainwater-harvesting-as-governments-public-policy-decision/last accessed on 20.02. 2015.

6 en.wikipedia.org/wiki/Rainwaterharvesting, last accessed on February 19, 2015.

coupled with several traditional methods for harvesting water is a boon to man. Ancient India had several methods for harvesting rainwater harvesting namely, paar system in Rajasthan region, talabs/bhandis in Bundelkhand region, sazakuvas in eastern Rajasthan particularly in the Ararvilli hills side, Chandela tanks and similar bigger Bundela tanks, Johads (eartherns pots, Naada (stone check dam)), Kunds, Beris, Baoris/bers (community wells), Jhalaras (human made tanks )these systems for harvesting water mainly in Rajasthan, Gujarat, and Thar desert regions. Tobas (local name for ground depression with catchment area., Nadis (village ponds) are some among the many methods used for harvesting water. Rainwater harvesting was considered as an optional reform under JNNURM [7]

There are a few systems of rain water harvesting. [8] They include:

- Roof Catchments System in which water falling on the roofs and terraces in rainy season are collected into a storage tank by way of pipes in to covered storage tanks which is then properly treated to prevent contamination, water harvested this way is usually made available for a small community of people
- Ground Catchments System is used for small individual families where water is stored from catchment area, usually built in places where water scarcity prevails
- Subsurface Dyke: is built in an aquifer to obstruct the natural flow of groundwater, thereby raising the groundwater level and increasing the amount of water stored in the aquifer.
- Ground water recharge Rainwater may also be used for groundwater recharge, where the runoff on the ground is collected and allowed to be absorbed, adding to the groundwater. In the US, rooftop rainwater is

7 http://jnnurm.nic.in/wp-content/uploads/2011/01/Optional_Primer_primer.rainwarter.pdf, last accessed on 24.10. 2015.

8 www.legalindia.in,/rainwater-harvesting-as-governments-public-policy-decision/last accessed on 24.10. 2015.

collected and stored in sump. In India, this includes Bawdis and johads, or ponds which collect the run-off from small streams in wide area. In the US, rooftop rainwater is collected and stored in sump. In India, reservoirs called tank as were used to store water; typically they were shallow with mud walls. Ancient tank as still exist in some places. [9]

## 3. The Legislative Arena

As a result of this importance attached to rainwater harvesting, several states in India have enacted legislations pertaining to the same, Tamil Nadu being the first state to adopt an amendment to section 215(a) of the Tamil Nadu District Municipalities Act, 1920, and the Building Rules 1973 to making it mandatory to have rainwater harvesting structures in all new buildings.[10] Others have amended existing legislations pertaining to Municipal Building Rules to include the concept of rainwater harvesting and guidelines for storing, collection etc of the same. So far there are fifteen legislations at the state level (including Union Territories) on rainwater harvesting namely in Haryana, Rajasthan, Mumbai (Maharashtra), Ahemadabad (Gujarat), Chennai (Tamil Nadu), Himachal Pradesh, Karnataka, Hyderabad (Andhra Pradesh), Kanpur (Uttar Pradesh), Indore (Madhya Pradesh), New Delhi, Chennai, Port Blair and Bangalore (Karnataka). In the present article the state of Kerala has been chosen as an example for discussion on the law relating to rainwater harvesting. This is mainly due to the reason that there are good opportunities for Rainwater harvesting in Kerala being blessed with two rainy seasons, due to its geographical location. Despite its favourable geographical location for welcoming monsoons and forty four rivers to cater to the water needs, the state faces severe scarcity of water between February and mid May every year the current year being no exception to the turmoil. In the summer months, people in the state face acute shortage of drinking water.

9 *Ibid.*

10 www.tn.gov.in, last accessed on 30.11. 2015.

Though the water well density, per capita surface water and ground water availability of the state is lower than that of arid states of India, Kerala has one of the lowest per capita rainwater availability in the Indian sub-continent and it is still decreasing over the time, even though it receives 3000 mm of rainfall, which is around three times the Indian national average. The high variations in spatial and temporal rainfall add to the complexity of problems associated with water management faced by the State.[11] The government has, in principle, decided to make rainwater harvesting mandatory for new buildings and houses as part of efforts to conserve water and overcome its shortage.[12] The Kerala Municipality Building Rules, 1999 was amended by a notification dated January 12, 2004 issued by the Government of Kerala to include rainwater harvesting structures in new construction. [13]

The rules relating to rainwater harvesting was included by amending the Kerala Municipality Building Rules, 1999 by inserting specifically mentions that a "workable" Rooftop rainwater harvesting arrangements to include compulsorily i) Roof catchment area ii) Roof gutters iii) Down pipe and first flush pipe arrangement iv) Filter unit and v) Storage tank with provision for drawing water and spillover was made mandatory and stipulated to be an integral part of all new building constructions, the occupancies which can be grouped into eight namely the following.

| **Groups:-** | **Category** | **Minimum capacity of the storage tank in litres/sq.m** |
|---|---|---|
| A1 | Residential | 25 |
| A2 | Special Residential | 25 |
| B | Educational | 50 |
| C | Medical/Hospital | 50 |

11 http://en.wikipedia.org/wiki/Rainwater_harvesting_in_Kerala, last accessed on 24.02.2015.

12 The Hindu, dated March 21, 2013.

13 Extraordinary Gazette No. 92/2004, dated 12-01-2004,GO.(MS) NO. 19/2004/LSGD.

| | | |
|---|---|---|
| D | Assembly | 50 |
| E | Office/Business | 50 |
| F | | Nil |
| G1 & G2 | Industrial | 50 |
| H | Hazardous | 50 |
| I | | Nil |

In the residential category the rule is mandatory for occupancies having floor area more than 100 sq.m and floor area 200 sq.m. In the Groups relating to industry the rule is mandatory only for workshops, assembly plants, laboratories, dry cleaning plants, power plants, Gas plants refineries, diaries food processing units and any other occupancies notified by the Government from time to time. Hazardous includes Automobile wash stall automobile Service Stations, Service Garages with repairing facilities and any other occupancies notified by the Government from time to time. Municipalities were given further powers to enforce workable artificial ground water recharging arrangements as an integral part of all new building constructions through collection of roof top rainwater to which was to compulsorily include the following components namely, i) Roof catchment area ii) Roof gutters iii) Down pipe iv) Filter unit v) Recharge well/percolation pit[14] But no rules are without exceptions, in that, rainwater harvesting arrangements is not mandatory for thatched roofed buildings, constructions specifically stipulated to be exempted in town planning schemes. [15]

The rainwater harvesting movement in the state of Tamil Naduwas launched in 2001 under the auspices of the then Hon'ble Chief Minister Smt. Jayalalitha. The legislation which was enacted on the mottos, "Harvesting Rainwater Harnessing life and catch the water where it drops"[16] deserves special mention due to the fact that the law not only made

14 Sub rule (4), Rule 109 A, *Ibid.*

15 Sub rule(1), *Ibid.*

16 www.tn.gov.in/dtp/rainwater.htm, last accessed on 16.03.2015.

rainwater harvesting mandatory but adopted a penal measure, in that if the owner of a building specified in the legislation[17] fails to provide a rainwater harvesting structure before August 31st in Chennai, water supply to such a building can be disconnected under the legislation till the structure is provided. The system was effected through an ordinance titled Tamil Nadu Municipal Law Ordinance, dated 19th July, 1993.[18] Amendments were made to Rule 3-B of Tamil Nadu District Municipalities Building Rules, 1972 and Rule 16-BMulti-storeyed and Public Building Rules, 1973 in exercise of the powers conferred under Section 191 and section 303 of the Tamil Nadu District Municipalities Act, 1920. [19]

## 4. Scope of the Law and Policy on Rainwater Harvesting in India

The scientific aspects of rainwater harvesting is frequently and elaborately debated and discussed. But, for any system to see a proper implementation, it has to inevitably be backed by a comprehensive legislation or policy framework. Otherwise the only way to redress any counter situations regarding the same would be to approach the courts. India, unfortunately has no national legislation to solely address the concept of rainwater harvesting in that, water being a State subject. [20]

Despite the absence of a national legislation, rainwater harvesting has been included as a significant component of the Watershed development Programme (WSD) initiative taken up under different schemes and programmes by the Government of India and the state governments namely, the Desert Development Programme (DDP), Drought Prone Areas Programme and Integrated Watershed Development Programme later modified as Integrated Watershed Management Programme (IWMP).[21] The

17 According to the amended Chennai City Municipal Corporation Act, 1919.

18 http://www.tn.gov.in/acts-rules/maws/municipal_ord 2003.htm, last accessed on 24.10. 2015.

19 GO.MS.No. 56 Dt. 21.7.2003 of MAWS Department.

20 Entry 17, List II, Part XI-Constitution of India.

21 Ministry of Rural Development, Government of India, www.rural.nic.in, last accessed on 15.11.2015.

National Water Policy 2002[22] as adopted by the Parliament while elucidating the need for bringing water resources available in the country into the utilizable water resources category to the maximum possible extent, also states that the traditional water conservation practices such as Rainwater harvesting (RWH), including rooftop rainwater harvesting inter alia needs to be practiced to further increase the utilizable water resources. The Policy further added the need to promote frontier research and development for these techniques in a focused manner[23] The National Water Policy, 2012 states two aspects concerning rainwater harvesting: that in urban and industrial areas, rainwater harvesting wherever techno-economically feasible should be encouraged to increase availability of utilizable water, and implementation of rainwater harvesting should include scientific monitoring of parameters like hydrogeology, groundwater contamination, pollution and spring discharges. [24]

The National Policy for farmers, 2007 has one of its major goals as protection and improvement of water, the Policy also stresses upon the importance of rainwater harvesting and improving the efficiency of water use, considering the highly skewed distribution of the total rainfall in our country.[25] The Policy further states that by giving priority to rainwater harvesting and aquifer recharge for ensuring stability of water supply, steps would be taken for augmenting the availability of water as well as its efficient use.[26] The National Agricultural Policy mentions that the subsequent step to creating awareness about value of water and its sustainable use is to ensure that the policy leads to concrete measures for

22 First adopted in September 1987 , reviewed and updated in 2002.

23 'National Water Policy 2002', Government of India, Ministry of Water Resources, New Delhi, April 2002,at p. 2, paras 3.1 and 3.2.

24 The National Water Policy (2012), Government of India, Ministry of Water Resources at p.10, para 11.4.

25 The National Policy for Farmers, 2007, Department of Agriculture & Cooperation, Ministry of Agriculture, Government of India, at p. 5, para 4, sub-para 4.3.1.

26 *Ibid,* 4.3.4

the conservation of water resources through measures like rainwater harvesting and groundwater recharging and ensure judicious use of water.[27]

The Indian judiciary, more specifically the courts can be considered as the sanctum sanctorium from which flows, justice, equity and good conscience into the nook and corner of our motherland. The importance attached to rainwater harvesting by the Indian judiciary is evident from the favourable judgement involving rainwater harvesting in *Kranti* v. *Union of India.*[28] In this case, while dealing with problems faced by the tsunami affected population in Andaman and Nicobar Islands, the court ordered the local administration to take urgent steps for rainwater harvesting and construct cement tanks for capturing and storing rainwater. Rainwater harvesting was considered as a sustainable and viable solution and the only alternative for improving the potable drinking water supply on the island.[29]

## 5. International Scenario

The practices adopted in rainwater harvesting is not confined within the boundaries of our nation alone which is clearly revealed when we peek into the history of this system. It is not possible to delve elaborately into the law and practices on rainwater harvesting in every nation due to constraints of space and time; nevertheless it is possible to get a glimpse of some interesting aspects regarding the same.

Every person who has visited Singapore, particularly the Changi airport might surely have had a taste of the water flowing from the pipes. It is supposed to be so clean that you can actually drink it. It definitely leaves us wondering how long the journey would be to achieve the same in our country. Changi airport has an elaborate rainwater harvesting system."Rojisun" a community level rainwater utilization technique set up

27 India's National Agricultural Policy, , Ramesh Chand, at p. 11.

28 On 16 May, 2007.Judgement Order Civil Appeal No. 2681 of 2007 (Arising out of SLP(c)No. 4716/2006).

29 The island of Andaman and Nicobar islands was hit by tsunami on the 26th of December, 2004.

by the local residents in the Mukojima district of Tokyo in Japan caters to private water needs like gardening, even drinking water requirements in emergencies and public purposes like fire fighting."[30] Germany, considered to be the present world leader in modern rainwater harvesting [31]though lacking in a comprehensive and systematic legislation on rainwater harvesting, rain taxes are collected for the amount of impervious surface cover on a property that generates runoff directed to the local storm sewer. The less the runoff, the smaller is the storm sewer needed to be constructed and consequently less construction and maintenance cost. Germany has this interesting system where people get a rain tax reduction by converting their impervious pavement /roof into a porous one. [32]

There is little legislation in the United Kingdom specifically relating to rainwater harvesting systems. Hence water supply companies and the UK Rainwater Harvesting Association think that there is a need for legislation.[33] Rainwater harvesting practices are ensured and implemented through a Code for Sustainable Homes, first introduced in 2006 only to be withdrawn in 2015 by the government of England and consolidated with the Building Regulations.[34] The State Governments of Victoria, South Australia, Sydney and New South Wales, Gold Coast Queensland etc, in Australia have taken active steps to ensure that newly constructed houses are designed with the latest energy and water efficient designs and products.[35] In Srilanka, rainwater harvesting has been the popular method for obtaining water for

30 "An Environmentally Sound Approach for Sustainable Urban Water Management: An Introductory Guide for Decision Makers", www.unep.or.jp, last accessed on 24.11.2015.

31 Learning Legacy-Rainwater Harvesting at Velodrome, (PDF), Olympic Delivery authority, October 2011, last accessed on 01.12.2015.

32 International Water Harvesting and Related Financial Incentives, www.rainwaterharvesting.org , last accessed on 01.12.2015.

33 Rainwater Harvesting in the UK-A Solution to Increasing Water Shortages? Cath Hassel at p.4.

34 www.gov.uk., last accessed on 29.11.2015.

35 International Water Harvesting and Related Financial incentives, available at www.rainwaterharvesting.org, last accessed on 01.12.2015.

agriculture and drinking purpose and the legislation to promote it was enacted through the Urban Development Authority (Amendment) Act, No. 36 of 2007. [36]

In the United States until 2009, through water rights laws almost completely restricted rainwater harvesting, at present residential well owners that meet certain criteria may obtain permission to install a rooftop precipitation collection system.[37] In contrast, the state of Texas has a very comprehensive piece of legislation[38] with special features which even allows financial institutions to make loans for developments that will use harvested rainwater as the sole source of water supply,[39] encourages each municipality and county to promote rainwater harvesting at residential, commercial and industrial facilities by giving incentives such as providing a discount for rain barrels or rebates for water storage facilities,[40] etc.

Rainwater harvesting has been considered to be an efficient, low tech and cost effective technology that will increase community and household access to safe water, ultimately causing to achieve the target of the Millenium Development Goal 7 (MDG)[41] which states that increasing resources and appropriate and affordable technologies for efficient water use is a policy priority[42]. Most European Countries have national water bye-laws which put strict controls on rainwater harvesting systems to prevent

36 Parliament of the Democratic Socialist Republic of Sri Lanka, available at www.lankarainwater.org, last accessed on 30.11.2015.

37 Rainwater collection in Colorado. Colorado water law, notices. Colorado Division of Water Resources. Available at www.water.state.co.us, last accessed on 27.11.2015.

38 Texas HB 3391 of 2011, An Act relating to rainwater harvesting and other water conservation initiatives.

39 *Ibid,* sec. 59.012.Available at www.capitol.state.tx.us., last accessed on 02.12.2015.

40 *Ibid,* sec.580.004, as amendment to chapter 580.

41 www.un.org, also www.unmilleniumproject,org & www.undp.org, last accessed on 02-12-2015.

42 The Millenium Development Goals are a United Nations initiative. There are totally eight goals which were adopted following the Millenium Summit of United Nations in 2000 and subsequent adoption of the United Nations Millenium Declaration.

contamination of mains supplies by rainwater or inadvertent drinking of rainwater (of unknown quality) by individuals.[43] The first international conference on rainwater harvesting took place in Honlulu in Hawaii in 1982 concerning the use of rainwater cisterns for domestic water supply which marked the beginning of a series of such conferences over the years in several other countries. [44]

## 6. Conclusion

Rainwater harvesting, an atom in the molecule of environmental laws, is a very important concept that must be well implemented through effective legislations if we are aiming for a sustainable environment. In today's trying times when the demands and needs for water are increasing to a very high level much beyond what can be met, it is inevitable that we make sincere efforts in achieving the aims of the legislations, both from a personal level as well as community level. Both persuasive and legislative measures are necessary if we need to attain the goals behind effective rainwater harvesting concepts namely, water security and ecological security and sustainability. A decentralized approach, that is to say the people themselves be made players in putting the system into effective use backed by sanctions for violation of law and incentives for successful measures could see the practice in better lights.

Digital sources like government websites of the concerned public department could be harnessed to create awareness among the digital users. Displaying bilingual flex boards English and the state language, leaflets accompanying local newspaper issued by the authority which ensures implementation of the rainwater harvesting system and roping in the executing authorities into department level seminars/workshops on the practices adopted in other countries could be positive steps in the awareness drive. Further, encouragement to think for out of the box solutions for

43 Rainwater Harvesting and Utilisation', Blue Drop Series, Book I: Policy Makers, UN Habitat Publication, at p.12.

44 *Ibid,* at p.5.

implementing the same to suit the needs of the people in our country will go a long way in addressing the diverse water needs of the country and the people. Children are the strong pillars on which the future of every country lies; provided they are rightly aware and educated on the various issues by which they are surrounded. Arousing curiosity in students, sensitizing them about our water concerns and making it an educational movement will definitely yield positive results in the successful implementation of the rainwater harvesting practices. Time has not yet run out to moot on a national legislation that makes it mandatory for establishing workable rainwater harvesting systems, that would provide incentives for positive steps taken and sanctions for failure to obey the same. The areas, particularly the villages, much less the peri-urban areas where people lead a hand-to-mouth existence and face acute shortage of water, could be identified by a local level committee through a district wise survey and listed out in the order of priority for submission to the government and based on the acuteness of the problem subsidies can be granted for buildings implementing rainwater harvesting structures. Not leaving it at that, the committees set up must ensure on a regular basis the proper working of the rainwater harvesting structures. This can help us expect that there will be a reduction in the number of school dropouts of girls, and channelizing women power for more productive vocations resulting in their empowerment and the economic growth of the country. Also As far as possible, wherever there is a government drinking water supply system in place separate pipes could be setup and marked for using water from the rainwater harvesting systems. Despite all initiatives and measures be it in the form of in the form of legislations, policies, or guidelines what we ultimately need is a society with an unparalyzsed conscience sensitive to the magnitude of water demands in the country. A progressive legislation coupled with human efforts could well address the problems and go a long way in catering to the water needs of the people. Above all, our constitutional duty envisaged under Article 51A g, requires us to protect and improve the natural environment.

# 6

# TOXIC WASTE COLONIALISM:

## A REEVALUATION OF GLOBAL MANAGEMENT OF TRANSBOUNDARY HAZARDOUS WASTE

*Dinkar Gitte & Nainy Singh*

# 6

# TOXIC WASTE COLONIALISM:

## A REEVALUATION OF GLOBAL MANAGEMENT OF TRANSBOUNDARY HAZARDOUS WASTE

*Dinkar Gitte* & Nainy Singh***

### 1. THE DELHI POLLUTION CASE

The hazardous waste generated by the industrialized countries worldwide is exported to the developing countries who derive monetary benefit unaware of the perilous effect and ecological damage caused to the environment. "Toxic colonialism" was the term created to label this activity and invite international attention to the disproportionate risks faced by the developing countries in this area of international environment law.[1] The term was first coined by Jim Puckett of Greenpeace, who described it as "dumping of the industrial wastes of the west on territories of the third world."[2] However, the term 'toxic colonialism' does not refer to all the problems associated with transboundary movement of hazardous waste from the developing world's perspective.

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1 Tam Dalyell, Thistlediary: Toxic wastes and other ethical issues, New Scientist, July 2, 1992, at 50.

2 *Ibid.*

In 2006, over five hundred tons of hazardous waste was discovered at twelve different sites in Côte d'Ivoire, Abidjan. The sites unleashed toxic waste that became a major health hazard and represented failure of states in waste management. This incident, now also known as, the Côte d'Ivoire toxic waste dump,[3] involved several countries, namely, Mexico, Switzerland, Panama, Greece, United States and other European countries. In 2002, Pemex, a Mexican Oil Company, had accumulations of coker gasoline containing Sulphur and Silica at its Cadereyta refinery. When the storage capacity was full, the refinery was sold to a Swiss Company called TrafiguraBeheer BV, which loaded the toxic waste onto a Panamanian tanker at Texas and was owned by Greek shipping company. Trafigura sought to dispose the residual hazardous waste left after the caustic wash of the coker gasoline. Instead of bearing disposal charges, the company offloaded the toxic material at Côte d'Ivoire resulting in fatal deaths of twelve people and injury to at least thirty thousand people as a direct consequence of exposure to the toxic elements. In a civil action against Trafigura, compensation of $198 million was awarded to Ivorian government as clean-up costs and a $30 to the citizens for the harm suffered.[4] It cannot be forgotten that the effects of such crisis on people are generally long-driven who may face difficulties in resuming normalcy. Despite being a blatant violation of United Nations Stockholm Declaration,[5] the dumping of hazardous waste in developing countries continues to be a common event. However, Côte d'Ivoire toxic waste dumping and growing electronic waste is a harsh reminder of the need for persistent efforts to reevaluate the international systems for better implementation of solutions for remedying the ill effects of transboundary movement of hazardous waste.

3 See, e.g.,Cote d'Ivoire Toxic Waste Dump Victims Reflect on "Small Victory," Amnesty International (Nov. 10, 2009), http://www.amnesty.org/en/news-and-updates/news/côte-d'ivoire-toxic-waste-dump-victims-reflect-quotsmall-victoryquot-20091110.

4 *Supra* n. 1.

5 Stockholm Declaration of the United Nations Conference on the Human Environment, June 5-16, 11 ILM 1416 (1972).

This article attempts to give an overview of hazardous waste trade and, domestic and international response to the transboundary movement of hazardous waste. Interesting beginnings laid foundation for the Basel convention revered as the most comprehensive and far-reaching international agreement, bringing consent systems and global notification for the transboundary movement of hazardous waste. This article will reevaluate the current global management systems of hazardous waste, focusing on the possible issues and recommendations for ensuring effectiveness of these actions.

The underlying objectives for transboundary movement of toxic waste is to identify potential disposal sites for "resource recovery, recycling, or reuse."[6] Many developing countries lack the technology, "training, funding and administrative infrastructure" to properly carry out these tasks.[7] Without the capacity to properly handle the waste, it is simply dumped in piles, either in public areas as in Abidjan or in other areas barely qualifying as landfills.[8] In either case, the waste results in environmental impact or human exposure.[9]

Many developing countries lack adequate resources and funding to implement solutions for cleaning environment and disposing the hazardous waste so received leading to the situation of toxic disaster.[10] Dumping puts developed countries at a better position to release their perilous industrial waste to other territories which are unfamiliar with its adverse effects on the environment as well as human health.[11] The inhabitants of these countries

6 ZadaLipman, A Dirty Dilemma: The Hazardous Waste Trade, Harvard International Review, 67 (2002).

7 Jennifer R. Kitt, Note, Waste Exports to the Developing World: A Global Response, 7 Georgetown International Environmental Law Review, 486 (1995).

8 *Id.* at 486, 492.

9 *Id.* at 486.

10 Bogonko Bosire, UN Seeks Help to Clean up Ivorian Toxic Waste Dumps, Agence France Presse (Nov. 23, 2006), http://www.terradaily.com/reports/UN_Seeks_Help_To_Clean_Up_Deadly_Ivorian_Toxic_Waste_Dump_999.html.

11 Charles W. Schmidt, Trading Trash: Why the U.S. Won't Sign on to the Basel Convention, Environmental health perspectives, Vol. 107, No. 8 A410 (1999).

do not share the benefits generated by the waste in the industrialized countries although get exposed to its adverse effects at the maximum. The penetration of toxic waste colonialism in the modern world is the result of the economic pressures that developed nations faced to foster economic prosperity. For achieving capitalistic economic progress, these countries resorted to hazardous waste production which consisted of variety of substances, such as contaminated medical waste, industrial sludge, radioactive materials, old ships, electronic waste, incineration ash, and military equipment.[12] 'Hazardous waste' is defined by Miller as "any substance or material that may pose a substantial risk or possible threat to an individual's wellbeing or the atmosphere when managed inappropriately".[13] It includes acids, cyanides, pesticides, solvents, compounds of lead, mercury, arsenic, cadmium, and zinc, fly ash from power plants, infectious waste from hospitals, and research laboratories, obsolete explosives, herbicides, nerve gas, radioactive materials, sewage sludge, and other materials which contain toxic and carcinogenic organic compounds.[14] In the recent times, the boycott on the transfer of toxic waste has led to stricter regulations in the developed nations and is hence more expensive to recycle in industrialized nations than in the developing countries.[15] On the contrary, costs of disposal in poor countries is associated with low costs due to lack of stricter enforcement mechanisms. This gives leeway to developed countries for cost-effective disposal in these countries. However, hazardous waste disposal contracts are often used as tools to further fraudulent or illegal dumping transactions where developing

12 Lisa Mastny & Hilary French, Crimes of a Global Nature: Forging Environmental Treaties is Difficult. Enforcing them is Even Tougher., World Watch, (Sept.–Oct. 2002), http://www.worldwatch.org/node/523, last accessed on 20/12/2015.

13 Jang B. Singh & V. C. Lakhan, Business Ethics and the International Trade in Hazardous Wastes, Journal of Business Ethics, Vol. 8, No. 11, 889 (1989).

14 *Id.*

15 Mutombo Mpanya, The Dumping of Toxic Waste in African Countries: A Case of Poverty and Racism, in Race and the Incidence of Environmental Hazards, 204, 209 (Bunyan Bryant & Paul Mohai eds., 1992).

countries accept improperly classified or mislabeled hazardous waste.[16] Developed countries allege that since the developing countries lack capacities to recycle toxic waste, illegal methods of disposal prove cheaper and receive much encouragement in these countries. [17]

Need for international control for disasters resulting from improper disposal of toxic waste was felt by the public before the Basel convention. This was mainly due to the events such as explosion by release of toxic gas from a chemical manufacturing plant in Bhopal, India; explosion in a chemical plant near Seveso, Italy where a large toxic cloud was released in the atmosphere and the dumping event of Khian Sea where thirteen thousand tons of incinerator ash was dumped in Haiti and other unknown places. [18]

The import of Le Clemenceau, the French warship in Indian waters also highlighted the obliviousness of various environmental challenges caused by dumping of hazardous waste in developing countries.

In 1977, Le Clemenceau, was decommissioned at Toulon and it lay there until 2005 as French authorities were struggling to locate suitable site for dismantle and disposal. The ship contained massive amounts of asbestos and Polychlorinated biphenyls (PCB) which are highly toxic and, as such, no country was interested to accept it. Subsequently, in 2004, the Ship Decommissioning Industry Corporation (SDIC), a French decommissioning firm, entered into an agreement with Shriram Vessels and Scrap Pvt. Ltd., a ship breaking company, situated at Alang, on the west coast of India. The dismantling industry in Alang is notoriously famous for polluting the environment and subjecting its workers and surrounding communities to perilous health hazards. Indeed, most of the ships that are

16 *Supra* n. 7, at 490–91.

17 *Id.* at 488.

18 Diana L. Godwin, Comment, The Basel Convention on Transboundary Movements of Hazardous Wastes: An Opportunity for Industrialized Nations to Clean up Their Acts?, 22 Denver University Law Review 193 (1993).

dismantled at Alang contain huge quantities of toxic wastes such as asbestos and PCBs. Since this ship-scrapping site faces intense competition from other ship breaking industries of Bangladesh and Pakistan, it greatly suffers from poor safety and environmental standards.

When Le Clemenceau was decided to be dismantled at Alang, concerns were raised about massive quantities of toxic asbestos which would potentially harm the health of the poor workers and aquatic life. Several protestations from Trade Union workers urged Greenpeace, an international activist organization to make necessary interventions to block the said transfer. Despite its efforts, French court ordered for sending the warship to India loaded with more than 500 tons of asbestos and rejected the petitions filed by environmental activists. This act of French authorities was in clear violation of the Basel Convention on transboundary movement of waste and their disposal, 1989.[19] Workers, who awaited the arrival of Le Clemenceau, were assured of safety masks and safety equipment by the authorities on ship breaking yard. Even the Gujarat Pollution Control Board (GPCB) decided to extend cooperation to the Ship Breakers Association, for bringing the ship to Alang beach, in hopes of industry's revival. Earlier, the industry was not fully functional which was attributed to the shortage of raw materials that had adversely affected the industry from the last few years. Expecting revival of industry's fortunes, while considering the fact that Le Clemenceau was to yield 22,000 tons of steel, it was decided to station the ship at Alang. Meanwhile, the ship breakers negotiated with the SCMC, GPCB and Gujarat Maritime Board (GMB) for implementing safety standards for dismantling the ship. A private firm specialized in dealing with hazardous waste was also contracted for handling the toxic waste present in Le Clemenceau.

Owing to its toxic contents, the French warship was initially stopped by the Egyptian government at the Suez Canal. Despite resistance, French

19 The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, opened for signature Mar. 22, 1989, 1673 U.N.T.S. 126, 28 I.L.M. 649 (4 U.N. Doc. UNEP/IG. 8013) [hereinafter Basel Convention].

government was able to get permits to pass through the canal by producing documents, stating that, the ship did not contain any toxic material. French government claimed that the ship carried only 95 tons of asbestos, while a French decontaminating company, called Technopure, claimed that, instead, the ship carried at least 500 tons of asbestos and 800 tons of PCB. Being in clear violation of the Basel convention, the Supreme Court of India decided to set up a five member panel to give opinion on the entry of Le Clemenceau in India. A monitoring committee called Supreme Court Monitoring Committee (SCMC) was formed to assume responsibilities for ensuring compliance of Le Clemenceau with the prevalent rules and regulations relating to hazardous waste management in India. The committee decided against the French warship to ban its entry in India. Eventually, on February 2006, French President ordered the return of 'Le Clemenceau' back to France. While the issue was settled, the Supreme Court on February 17, 2006 asked the Central government to report on the safety standards that were followed in the ship breaking industry at Alang. Thus, the Clemenceau controversy brought forth the need to focus on poor safety standards of Indian workers and the deliberate attempt of the developed nations to transfer hazardous waste to developing countries for using them as a dumping yard. French authorities had misrepresented the true facts to both the Egyptian and Indian governments thereby violating various international conventions which regulate transboundary movement of hazardous waste namely the Basel convention, Rotterdam convention[20] and the Stockholm convention.[21] Under Basel convention, it is for the developed country to manage the waste to the best of their capacities before taking the decision to export the waste to other countries. However, the prevalent current practice reveals non-adherence to such obligations as higher costs are involved in decontaminating these ships, and are therefore,

20 Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, 2244 U.N.T.S. 337; 38 I.L.M. 1 (1999) [hereinafter Rotterdam Convention].

21 Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 2256 U.N.T.S. 119, 40 I.L.M. 532 (2001) [hereinafter Stockholm Convention].

chosen for dumping in developing countries like India and Bangladesh where law enforcement is a major problem.

## 2. International Response

Basel Convention has in conjunction with regional hazardous waste regimes has assisted in national execution of environmentally safe toxic waste management strategies.

### 2.1 Basel Convention, 1989

The efforts to minimize the transfer of waste from rich nations to poor ones began during the 1980s. However, a broader initiative began sooner with the assistance of United Nations Environment Programme (UNEP) leading to culmination of a treaty called the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989. Guidance from existing laws and decisions that governed two years of negotiations at UNEP conference held in Basel, Switzerland between one hundred and sixteen countries compiled the Basel convention, being one of the first agreements of its kind, to regulate the waste between countries. It was originally signed by thirty five countries at the conference[22] and was subsequently ratified by twenty countries on May 5, 1992. By November 2009, one hundred seventy countries became party to the convention with forty nine countries ratifying it. Until September 2010, United States, Afghanistan and Haiti are the only countries who did not ratify the convention and therefore, are not considered as parties to the convention.

As Basel convention regulates transboundary movement of 'hazardous waste and other wastes' between parties, it becomes crucial to define these terms for ensuring better implementation of its provisions. A very broad meaning is assigned to 'hazardous waste' which includes wastes from particular waste streams in manufacturing processes or hazardous constituents of materials, as well as wastes that are considered hazardous

22 *Supra* n.18.

under the domestic laws of the country of export, import, or transit.[23] Furthermore, certain "other wastes" under Annex II, including household wastes or household incinerator wastes, are also covered by the Convention.[24] Article 2 also defines "wastes" as those requiring the disposal operations as defined in Annex IV, which includes recovery and recycling operations.[25] Since discharged waste from ship operations and radioactive materials are subject to other international control systems, they are excluded from the purview of Basel convention.[26]

The convention, undoubtedly, forbid toxic waste exports to Antarctica and countries which were non-parties to convention including the ones which had already imposed the ban.[27] It emphasizes upon the need for written consent of the importing country. It bestows upon countries a right to ban or boycott the trade at its own volition at any given time. It stresses on notification system and prior consent to be taken from relevant transport authorities in accordance with Organization for Economic Cooperation and Development (OECD) and European Economic Community (EEC) principles. Article 4 of the convention does not permit trade with countries who are not party to the contract under any circumstance. However, the consensual requirements may be superseded if the trade is found to be

23 *Supra* n. 19, Art. 1, Annex I, Annex III. Article I, paragraph 1, states that "the following wastes that are subject to transboundary movement shall be "hazardous wastes" for the purposes of this Convention: (a) Wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and (b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of import, export, or transit".

24 *Id.* at Art.1, para. 2 states that "wastes that belong to any category contained in Annex II that are subject to transboundary movement shall be 'other wastes' for the purposes of this Convention".

25 Basel Convention, *Supra* n. 19, at Art. 2 defines "wastes" as "substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law," and defining "disposal" as "any operation specified in Annex IV to this Convention."

26 *Supra* n. 7, at 495; Basel Convention, *Supra* n. 19, at preamble, Art.4, para. 2.

27 *Supra* n. 19, Art. 4, para. 5.

environmentally safe.[28] Hence, an exporting country is authorized to dispose the waste when it lacks the capacity to handle the waste material in an "environmentally sound and effective manner or for the purposes of recycling."[29] These provisions are based upon proximity principle that the waste should be deposited as close as possible to the generator. [30]

As such, trade with non-parties may be permitted in circumstance where the agreements for waste disposal provide for environmental protection of the levels as stated in Basel convention itself.[31] Moreover, the convention encourages the countries to initiate steps towards minimizing waste by assisting the developing countries which lack adequate resources.[32] Though the convention does not completely ban the export of hazardous waste, but attempts to control its movement through system of notification, prior informed consent and tracking requirements.[33] If a party chooses to ban entry of waste in its national territory, the other countries have no choice but to comply with the ban. [34]

Despite these developments, the convention turned a failure in achieving its ends. Many hurdles stems out from the structural features of toxic waste, prior-informed consent, documentary mode of regulation in a liberalized trade system encompassing different sovereign regulatory cultures and implementing an authentic cradle-to-grave.[35] Basel Convention does not completely prohibit transboundary movement of hazardous waste and has been, therefore, subject to harsh criticism. It is alleged that a complete ban would eliminate toxic waste colonialism worldwide but has been opposed

28 Brian Wynne, The Toxic Waste Trade: International Regulatory Issues and Options, Third World Quarterly, Vol. 11, Issue 3, (1989).

29 Basel Convention, Art.4, para. 9.

30 *Supra* n.7, at 495; Basel Convention, at Preamble, Art. 4, para. 2.

31 Basel Convention, Art. 11.

32 Basel Convention, Art. 10, para. 2(d).

33 *Supra* n. 6, at 68.

34 Basel Convention, *Supra* n. 19, Art. 4, paras. 1–2.

35 *Supra* n. 28.

on grounds of not providing incentives for fair trade and sound methods of recycling and reclamation.[36] The convention shows no way in eliminating trade of radioactive substances and also makes it possible to override the rule of informed consent by virtue of party agreements under article 11. Convention has also failed in giving a concrete definition of 'waste'. Trade continues and ban remains ineffective owing to non-ratification of the treaty by United States and other contributing factors, such as resort to the pretext of recycling or reuse or lack of assistance to poor countries in developing solutions. As the convention did not impose stricter punitive actions, it led to environmental groups taking stronger actions and initiatives to protect the environment. Ban was felt not to be an appropriate solution. First, each country has its own way of managing and handling its resources and manners of waste management.[37] Second, importing country's site of disposal alone was being kept open for inspection leaving behind the point of exit of the exporting country from inspection. Probable solutions would be in relevance of principle of proximity requiring the state to dispose waste where it is produced thereby reducing the environmental impact and converting the issue from an international to a local one.[38] Provisions of consent and prior notification should be given adequate respect. It becomes pertinent to prevent trade situation of a country to escalate due to absence of control which may in turn lead to an international dispute.[39] Convention stresses on the need to ensure technology capabilities and mechanisms of weak nations when importing from developed nation making it incumbent to either reuse or

36 Rebecca A. Kirby, Note, The Basel Convention and the Need for United States Implementation, 24 Georgia Journal of International and Comparative Law 281, 296 (1994).

37 Kate O'Neill, Out of the Backyard : The Problems of Hazardous Waste Management at a Global Level, The Journal of Environment Development 139 (1998), http://jed.sagepub.com/content/7/2/138, last accessed on 20/12/2015.

38 Rob White, Toxic Cities: Globalizing the Problem of Waste, Social Justice, Vol. 35, No. 3, 114, War, Crisis & Transition (2008-09), http://www.jstor.org/stable/29768503, last accessed on 20/12/2015.

39 *Supra* n. 28.

recycle the waste. This assists in ensuring that no waste trade begins between countries who are non-signatories to the treaty and that developed nations take the responsibility to improve its facilities. Also, determining criteria for 'toxicity' varies between countries. For instance, United States specifies 'toxic waste' as consisting of chemical elements while European Community mentions wastes as 'pesticides' and 'biocides'. It also has a precise list for defining the waste. So, United States follows a detailed and meticulous test to determine coverage of 'waste' under its suitable laws. Major consequence of the Basel ban, notably, has been the European legislation as European community banned export of all toxic waste to non-OECD states though the protection applied only to vessels for final disposal.[40] An alternate legislation was enacted by Europe in 1997 which banned all exports of hazardous waste, even for the purposes of recycling or reclamation. The main objective was to promote capacity building to enable the developing countries to deal with the waste in an environmentally friendly manner.

Basel convention failed to achieve full compliance from its signatory states and did not deal with the question of waste production and management effectively. It downplayed with the holistic approach towards hazardous waste management problems from the country's perspective, the reasons for which are bounty. The convention neglects effective controls at the downstream end and focuses only upon midstream part of waste cycle. Also, with growth of industrial base in developing countries, there is likely to be larger production of hazardous waste. Taking into consideration the fact that developed countries are under extremely difficult position for handling waste, it has assumed the character of a global problem.

### 2.2 Rotterdam Convention, 1998

The Rotterdam Convention was adopted in 1998. During the 1980s, voluntary code of conduct and, information and exchange systems were developed by UNEP in coordination with Food and Agriculture

40 *Ibid.*

Organization of the United Nations (FAO). This paved way for introduction of Prior Informed Consent (PIC) procedure in 1989. The convention came into force on 24 February 2004 and replaced the voluntary arrangement with a mandatory PIC procedure on hazardous chemicals and pesticides.

Article 5 of the convention compels the parties to notify final regulatory actions taken by the Secretariat in respect of banned or severely restricted chemicals for the information of other parties. Further, the listing of severely hazardous pesticide formulations may be proposed both by the developing countries and countries with economies in transition.[41] For implementing export and import controls, the convention, for instance, makes PIC procedure compulsory for future import of hazardous chemicals. [42]

### 2.3 Stockholm Convention, 2001

Stockholm Convention on Persistent Organic Pollutants was adopted in 2001 with the objectives of eliminating and restricting the production and use of Persistent Organic Pollutants (POPs) internationally. The convention became effective on 17 May 2004. It seeks to minimize POPs which are highly toxic chemicals and move long distance in the environment. Basel, Rotterdam and Stockholm conventions together provide for "cradle-to-grave" management of hazardous chemicals, particularly, in case of POPs. The Stockholm convention requires the parties to take into consideration the POPs screening criteria as enumerated in Annex D of the convention for assessing chemicals or pesticides that are currently in use.[43] The parties are to prevent production and use of pesticides and industrial chemicals which exhibit the characteristics of POPs.[44] It prohibits export and import of POPs and stresses the need for stricter compliance with international

41 Rotterdam Convention, Article 6.

42 Rotterdam Convention, Article 10-12.

43 Stockholm Convention, Article 4.4.

44 Stockholm Convention, Art. 4.3.

rules and guidelines in the event of any transportation across international boundaries.[45] The parties have the obligation to initiate steps for managing POPs in an environmentally sound manner[46] and eliminate releases of POPs from intentional[47] and unintentional productions[48] and stockpiles and wastes.[49] The convention promotes information exchange and research on developing POPs alternatives. [50]

## 2.4 Bamako Convention, 1989

As Organization for African Unity (OAU) strongly felt that transboundary movements of waste under the pretext of recycling may create an ambiguity for unlawful movements, they decided to draft an African convention on hazardous waste in 1989 called the Bamako convention. It imposed a complete ban on importation of waste in African continent. It provides that all parties shall take appropriate legal, administrative and other measures within the area under their jurisdiction to ban the import of all hazardous waste, for any reason into Africa.[51] The purpose of the convention is to strictly regulate the handling of waste generated from industries and hospitals in a manner which is environmentally safe. It imposed limits on the flow of hazardous waste to non-convention countries so as to disable them from taking undue advantage at the cost of damage to people and environment. At the outset, the convention controlled the international movement of hazardous waste by introducing several formalities to be adhered to and certain procedures to be followed, such as, need for prior notification by exporting country to the importing country. It incorporates

45 *Id.* at Art. 6.1.

46 *Id.* at Art. 6.

47 *Id.* at Art. 3.

48 *Id.* at Art. 5.

49 *Id.* at Art. 6.

50 *Id.* at Art.9 and 11.

51 Dire Tladi, The Quest To Ban Hazardous Waste Import Into Africa: First Bamako And Now Basel, The Comparative and International Law Journal of Southern Africa, Vol. 33, No. 2, 210 (2000).

rule of informed consent making it indispensable for the developing country to recognize the trade. [52]

Bamako Convention, unlike Basel Convention, puts a complete ban on radioactive waste, ocean dumping, incineration and contains provisions on clean manufacture and strict liability. Bamako Convention incorporates inputs of Greenpeace who acted as legal advisors to African governments during negotiations. Without a legal definition of 'waste', it becomes difficult to trace and allocate the liability to the original producer. All attempts to define and establish clear legal liability rules even for simple waste life-cycle models have been disappointing. [53]

Article 4 (3)(i) of the Bamako Convention does not allow the states to export waste to a state which cannot handle it in an environmentally sound manner or forbids such imports to its territory. Moreover, the convention reiterates that a transboundary movement of waste is possible only when the state of export clearly establishes lack of scientific capabilities and necessary facilities of waste disposal in an environmentally sound and efficient manner.[54] Under any circumstance, the state of import and/or transit cannot be compelled to take responsibility for managing waste in an environmentally sound manner. Both Basel and Bamako Conventions strongly supports this view.[55] At the same time, article 8 of both the Conventions emphasize that in the event of non-compliance with the terms of the contract, it becomes the responsibility of the exporter to take back the waste to its own state of export. Both the conventions give utmost significance to stringent regulation of toxic waste trade with the difference that Basel Convention specifically excludes radioactive wastes from its ambit. However, these wastes are governed by international agreements as well as have been included in the Bamako.[56] These conventions do not

52 *Supra* n. 11.

53 *Supra* n. 35.

54 Art. 4(3) (n) Bamako convention and Art.4(a) of Basel Convention

55 Art. 6(1) Basel Convention and Art.6(1) Bamako Convention.

56 *Supra* n. 51.

cover 'wastes which derive from the natural operation of a ship' as under International Convention for the Prevention of Pollution from ships (1973) and the Protocol (1978). Hence, Bamako convention seems much broader in its application when compared with the Basel Convention. Major criticisms given to these conventions is the introduction of national legislation in defining and determining 'hazardous waste' which rather varies as each country has its own definition of hazardous waste. [57]

OAU understood the limited scope of definition of 'hazardous waste' under Basel convention as the substances are subject to many conditions thereby restricting only fewer materials. Conversely, Bamako convention stressed on minimal compliances and broadened the scope of 'hazardous waste'. The two lists in Bamako convention are used to widen the application of convention rather than closing it down.[58]

Article 6(3) of Basel convention and Bamako convention insists upon written consent and confirmation of the state of import about existence of contract between the exporter and importer to environmentally sound management of waste. When these two conventions are compared, both emphasizes upon notification, by state of export to inform the state of import and state of transits of any prospective transboundary movement of hazardous waste.[59] Some industrialized countries, such as Norway and Italy, had already imposed such a ban through national legislation in the late 1980s. The written consent of the state of transit is indispensable before any waste reaches the importing country. In such a scenario, state of export will have to give a common notification regarding hazardous waste, with same physical and chemical characteristics, being shipped regularly to the same disposer.[60] Here, the movement of waste would be through the same customs exit of the exporting state, the same customs admission of the

57 Art. (1)(b) Basel Convention and Art. 2(1)(b), Bamako Convention.

58 Art. (1)(b) Basel Convention and Art. 2(1)(b), Bamako Convention.

59 Art. 6(1), Basel Convention and Art.6(1), Bamako Convention.

60 Basel Convention Art.6 (4).

importing state and same customs entry and exit of the transit state.[61] Multiple shipments are possible through a single notification within a span of twelve months while Bamako convention stresses upon notification by state of export every time a shipment is made. [62]

### 3. Regional Agreements

In the wake of regional movements prompted by environmental activists, between 1991 and 1993, several conventions and protocols were adopted to ban waste trade between industrialized and poor countries in the respective regions. For instance, protocol within the Barcelona convention for the protection of Mediterranean Sea was adopted in 1995 for banning waste trade for countries in Mediterranean region. Many such movements witnessed direct intervention of Greenpeace with local environment groups.

It was in December 1991 when additional protection was granted to poor nations under the Lome IV convention signed between European Community and sixty nine African, Caribbean and Pacific (ACP) states. This convention extended greater regional protection to ACP states against toxic waste trade. Initially, European Community was reluctant to these terms as it emphasized upon export of toxic waste to ACP countries with the condition that these wastes are to be accompanied by advanced hazardous waste management technology. The obstinacy of ACP states led to a compromise where European Community states agreed not to export toxic wastes to ACP states and that ACP states will not accept such wastes from any non-European Community states. This earnest commitment by developed countries not to export waste to relevant countries is reflected under article 39 of the Lome IV agreement.

The Lome IV convention expired in February 2000 and European Community and seventy nine ACP countries together chose to ratify

61 *Id.* at Art.6 (4) and Art.6(6).

62 Basel Convention Art.6(4) and 6(6), and Art.6(6), Bamako Convention.

Cotonou Agreement.[63] This agreement is a deviation and a departure from toxic waste trade ban and instead encourages the parties to "cooperate on environmental protection and sustainable utilization and management of natural resources…taking into account issues relating to the transport and disposal of hazardous wastes."[64] Cotonou seeks to protect poor countries against adverse effects from hazardous shipment but without a total ban and is considered much weak. [65]

Other agreements governing hazardous waste include agreements between neighboring countries such as Germany and France, or United States and Canada or Mexico. Besides, several other regional agreements exist, such as Izmir Protocol of the Barcelona Convention regulating waste trading in the Mediterranean area and signed in 1996. The Waigani Convention, which was signed in September 1995 addresses waste dumping issues of the South Pacific.[66] A number of European Community directives also form a major component of waste trading regulations with OECD Secretariat located at Paris giving significant push to issuing pertinent rules and guidelines. OECD has formulated guidelines for national Waste management strategies, 2013 which focuses on developing and implementing a national strategy and solutions for governance challenges. Besides, OECD has issued Guidance Manual for the control of transboundary movements of wastes destined for recovery operations, 2009 which provides for Green control procedure and Amber control procedure. It also serves to guide transboundary Movements for laboratory analysis and recovery operations.

## 4. Implications for World Trade

Basel convention despite its existence was found to be incompatible with international trade and environment issues especially after Khian Sea

63 About the ACP Group, The Secretariat of The African, Caribbean and Pacific Group of States, http://www.acpsec.org/en/about_us.htm (last visited 18 Nov., 2015).

64 ACP-EC Partnership Agreement, Art.32, para. 1.

65 *Id.* at title I, Art. II.

66 ZadaLipman, A Dirty Dilemma: The Hazardous Waste Trade, Harvard International Review, Vol. 23, No. 4, 67 (2002).

Disposal Incident and other debacles. In waste trade regulation and its disposal, 'waste' has been transformed into a 'commodity' which could be bought and sold in the market. While the objectives of World Trade Organization (WTO) is to liberalize trade in goods and services, it is not clear if 'waste' would qualify as 'goods' or 'products' within the jurisdiction of WTO. WTO does not provide any definition of 'product' and so, if 'waste' is a 'product', it is likely to lead to a conflict between WTO and Basel convention. In fact, many developing countries, mainly from Africa along with non-governmental organizations such as Greenpeace, continued with their efforts to ban North-south trade of hazardous waste as a form of colonial misuse. The negotiating process for the Basel convention has been so far alleged to be dominated by North-south political interests as may be inferred from the fact that a complete ban on waste trade was not imposed. It was suspected that waste dumping was largely motivated for economic reasons or illegal trafficking or for 'sham' and 'dirty' recycling.[67] Ban on toxic waste export for the purpose of recycling has now sparked a major debate with reference to the harmony of Basel convention with the WTO. For instance, the trade in metal scrap and metal bearing residues used as 'secondary materials' in some industries had an average value of $37.2 billion for year between 1980 and 1993. However, the value of export of metal scrap traded between OECD and developing countries was $2.9 billion in the year 1993.[68] Since, trade statistics does not distinguish between hazardous and non-hazardous metal scraps, the extent of transfer of hazardous waste to developing countries becomes unfathomable. [69]

International waste trade is supported by arguments that such trade justifies a more progressive change at the point of production and is meant to satisfy ever increasing consumer demands while ensuring higher

67 Jonathan Krueger, The Basel Convention and the International Trade in Hazardous Wastes, Yearbook Of International Co-Operation On Environment And Development, 43 (2001).

68 H. Alter, Industrial Recycling and the Basel Convention, Resources, Conservation and Recycling, 19: 1, 29–53 (1997).

69 *Supra* n. 67.

environmental quality at the same time. However, transforming these local wastes and emissions into tradeable waste and eventually dumping them on distant societies who do not gain access to even to the little of the consumption that generates these wastes is disturbing. Instead of waste treatment, the toxic waste are merely redistributed geographically which is an undeniable fact.[70] The developing countries are not adequately compensated for the risks they undertake as costs cannot cover the damage caused to its people and community as a whole. Developed countries often bribe the authorities to dump the waste in their territory and no longer bother about its effects on the importing country.[71] N. Johnstone, on his study conducted on trade of non-ferrous metal bearing waste containing, for example, copper, zinc, or lead, has given the finding that majority of non-ferrous metal waste with secondary value is outside the purview of Basel Ban.[72] With these being the major international instruments to regulate waste trade, the main challenge lies in distinguishing between what is banned and what is not banned, directly emanating from Basel convention at the WTO.

## 5. India's response

India has an extensive legal framework in place to address the issues of hazardous waste management. At present, about 200 laws are in place which relate to environmental protection.[73] However, there is a need to overcome the challenges in enforcement and compliance in ensuring proper management of hazardous waste.

70 *Supra* n. 35.

71 *Supra* n. 35.

72 N. Johnstone, 'The Implications of the Basel Convention for Developing Countries: The Case of Trade in Non-ferrous Metal-bearing Waste', Resources, Conservation and Recycling, 23: 1–2, 1–28. (1998).

73 Organization for Economic Cooperation and Development (OECD), Environmental Compliance And Enforcement In India: Rapid Assessment, http://www.oecd.org/environment/outreach/37838061.pdf last accessed Dec. 5, 2006.

The Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008 (the "Hazardous waste Rules") are the foremost regulations dealing with hazardous waste management in India. These rules are made under the Environment Protection Act, 1986 ("EPA") which empowers the Central government to take necessary measures for protection and improving the quality of the environment and preventing, controlling environmental pollution.[74] The rules have assigned a broader definition to 'hazardous waste' to include any waste that "causes danger or is likely to cause danger to health or the environment, whether alone or when in contact with other wastes or substances."[75] However, certain exceptions are made in form of wastes already covered under the Air Act, Water Act, Merchant Shipping Act, Bio-Medical Waste (Management and Handling) Rules, Batteries (Management and Handling) Rules and Municipal Solid Wastes (Management & Handling) Rules. The Hazardous waste rules allow the State Pollution Control Board (SPCB) to grant authorizations to persons handling hazardous waste, and registrations for persons recycling or reprocessing it, provided that the set-up facilities meet certain requirements. To begin with, the State government, occupier, operator of a facility or any association of occupiers are responsible, individually or jointly or severally, for identifying sites to establish facilities that treat, store, and dispose hazardous waste.[76] They must also obtain necessary approvals from CPCB first, in case they intend to convert hazardous waste into energy.[77] The rules help fix responsibilities for packaging and labeling of hazardous waste among different actors, namely, occupiers, operators and recyclers for ensuring that the wastes are safely handled.[78]

74 Indian Parliament, The Environment (Protection) Act 1986, http://envfor.nic.in/legis/env/env1.html, last accessed Dec.26, 2015.

75 Ministry of Environment and Forests, the Hazardous Wastes (Management, Handling and Transboundary movement) rules, 2008, Rule 3(1)(l), Govt. Of India, http://www.cpcb.nic.in/divisionsofheadoffice/hwmd/mhtrules2008.pdf, last accessed Sept. 24, 2015.

76 Rule 18(1), *Supra* n. 75.

77 *Id.* at Rule 11.

78 *Id.* at Rule 19.

For the import of hazardous waste from different countries, the rules set forth contain procedures to be followed that directly emanate from India's obligations under the Basel Convention. The Ministry of Environment and Forest (MOEF) along with other entities, which includes SPCB, deals with these procedures. For instance, an application for import of hazardous waste has to be send to the relevant SPCB which takes the responsibility to forward it to MOEF within a period of thirty days.[79] If the permission is granted, the SPCB has to ensure compliance with the conditions for safe handling of hazardous waste[80] and the importer must also inform the SPCB of the time and date of arrival of the hazardous waste ten days in advance.[81] In the event of any illegal import, SPCB has to ensure its re-exportation. [82]

### 5.1 Other Rules

In addition to Hazardous Waste Rules, several other rules seek to address the issue of hazardous waste management in India. For instance, the Manufacture, Storage and Import of Hazardous Chemical Rules, 1989 (the "MSIHC Rules") regulate the manufacture, storage and import of hazardous chemicals. These rules require the occupier to identify, prevent and limit the impacts of potential major accidents.[83] Occupiers are also required to prepare and maintain emergency plans and report activities before the start of operations as well as following any major accident. They must ensure accurate labeling of hazardous chemicals. [84]

For the purpose of safe handling of batteries and their components, requirements under the Batteries (Management and Handling) Rules, 2001

79 *Id.* at Rule 16(1).

80 *Id.* at Rule 15(3); see also Rule 16(3).

81 *Id.* at Rule 16(8).

82 *Id.* at Rule 17(2).

83 Ministry of Environment and Forests, Manufacture, Storage, and Import of Hazardous Chemical Rules, 1989, Rule 4(2)(b)(i), Govt. of India, http://envfor.nic.in/legis/hsm/hsm2.html, last accessed Dec. 27, 2015.

84 *Id.* at Rule 13, Rule 7, Rule 5(1), and Rule 17(4).

(the "Batteries Rules") needs to be adhered to.[85] Specific responsibilities of importer, assemblers, manufacturers and re-conditioners have been fixed with prescribed procedures for collection, transportation and recycling. [86]

In the event of chemical accidents, Central Crisis Group (CCG) has been established under the Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996 (the "CA Rules"). The CCG acts as connoisseurs in assisting with the issues of funding and infrastructure in case of an accident.[87] However, these rules do not cover accidents caused by radioactivity or war. [88]

The E-Waste (Management and Handling) Rules, 2010 (the "E-Waste Rules") apply to disposal of electronics. The rules require prior authorization to be obtained by SPCB or Pollution Control Committee (PCC) before commencing the disposal process. The application for authorization may be made by the producers or recyclers or collection centers or other dismantlers.[89] Apart from e-waste, Bio-medical wastes are strictly regulated by Bio-Medical Waste (Management and Handling) Rules, 1998 (the "Bio-Medical Rules") which apply to the generation, collection, receipt, storage, transport, treatment, disposal, or handling of biomedical waste.[90] The state government has the authority for granting authorizations to Health Care establishments for handling and receiving bio-medical waste.

85 Ministry of Environment and Forests, Batteries (Management and Handling) Rules, 2001, Govt. of India, http://www.envfor.nic.in/legis/hsm/leadbat.html, last accessed Dec. 26, 2015.

86 *Id.* at Rule 2(I), Rule 2(k), Rule 2(b), Rule 2(n), Rule 4.

87 Ministry of Environment and Forests, The Chemical Accidents (Emergency Planning, Preparedness, and Response) Rules, 1996, Rule 2(a), Govt. of India, http://envfor.nic.in/legis/hsm/gsr347.htm, last accessed Dec. 26, 2015.

88 *Id.* at Rule 5.

89 Ministry of Environment and Forests, E-Waste (Management and Handling) Rules, 2010, Govt. of India, www.moef.nic.in/downloads/rules-and-regulations/1035e_eng.pdf, last accessed Dec. 26, 2015.

90 Ministry of Environment and Forests, Govt. of India, Bio-Medical Waste (Management and Handling) Rules, 1998 Rule 2, Govt. of India, http://envfor.nic.in/legis/hsm/biomed.html, last accessed Dec. 26, 2015.

Besides the various rules, India on January 13, 2006 ratified the Stockholm Convention wherein the parties are obligated to develop a national implementation plan for giving effect to the obligations under the convention in respect of POPs. In 2011, MOEF drafted a National Implementation Plan for the Stockholm Convention ("NIP"). NIP sets certain priorities in handling POPs and divides them into three phases, namely, immediate priorities, medium-term priorities and long-term priorities. These priorities are expected to be achieved by 2022. Under NIP, SPCB are given powers and responsibilities to establish bodies for granting authorizations for disposal, or, for handling and processing of hazardous waste and ensuring compliance with Hazardous Waste Rules. Emergency response centers are established for focusing on managing chemical disasters in coordination with CPCB. Moreover, certain guidelines have also been issued by MOEF and CPCB together for furthering better implementation of solid waste regulation. These include Guidelines for Management of Hazardous Waste, 1992, Guidelines for setting up of operating facilities, Ready Reckoner for Hazardous Waste Management, 1998, Criterion for Hazardous Waste landfills, 2000 and Code of practice for environmentally sound management of lead acid batteries, zinc ash/skimming & waste oil, 2000.

## 6. Challenges with the Current System

Basel convention was not only expected to bring down the flow of toxic waste colonialism but also eradicate it.[91] However, the disagreements and opposition among countries point towards the inefficacy of the current systems to regulate transboundary movement of hazardous waste. Post Basel ban, it was coveted that improper disposal would discontinue which seldom happened. Clearly articulated concerns which stems out of the present international regime beg to be addressed.

### *1. Illegal trafficking and concealed shipments*

Hazardous waste still moves under the guise of false permits, bribes,

91 *Supra* n. 12.

improper labels or reuse and recycling.[92] This indicates a dangerous trend with unsuccessful efforts made so far. Though broadening the definition of 'illegal' waste trade may cover more shipments, they have not been able to ensure complete elimination. [93]

Moreover, many countries lack legislative controls and enforcement mechanisms to ensure unity and uniformity in controlling toxic waste trade.[94]

*2. Vague definition of 'waste'*

Since the definition of waste is unclear, it prevents exporting countries from classifying a waste as 'non-hazardous' and leaves much scope for subsequent inclusion of substances that may qualify as 'hazardous' for improper handling during disposal.[95] In fact, many novel substances are being generated by the industries today which are yet to be reflected in the definition.[96]

As stated earlier, lack of distinction between 'waste' and 'product' has also contributed towards export of hazardous waste under the label of commodities or raw materials.[97] This also gave much autonomy to the countries to propound their own definitions within their domestic laws making global management of transboundary shipment increasingly difficult. [98]

*3. 'Total ban' controversy*

Imposition of total ban on import or export of hazardous waste has been one of the most controversial issues in north-south negotiations. Many

92 *Ibid.*

93 Mark A. Montgomery, Banning Waste Exports: Much Ado About Nothing, 1 Buffalo Journal of Gender, Law & Social Policy 197, 200–01 (1994).

94 *Supra* n.12., at 18–19.

95 *Supra* n. 7, at 494–95.

96 *Supra* n. 37.

97 *Supra* n. 6, at 68–69.

98 *Id.* at 69.

proponents claim that a total ban would be a big step towards eliminating toxic waste colonialism worldwide. However, the opponents hold that it may weaken recycling and reclamation operations which promotes natural resource conservation. [99]

Since a complete ban and prohibition of waste trade is not supported by both developed and developing nations, the solutions for the same may appear futile from a practical point of view. Hazardous waste continues to be exported from many European countries to developing nations, making it difficult to implement and enforce a complete ban.

*4. Failure of Bamako Convention*

Bamako convention has also not witnessed much success in putting up a complete ban on transboundary movement of hazardous waste. The convention has been criticized for lack of legal force attributed much to the failure of weak governments to implement its provisions.

Many African nations have not been able to build consensus to support the convention. It has only been ratified by twenty five nations. Reasons cited for this scenario is the forced pressure to which these countries have been subject, to direct their limited resources, to issues of higher importance. But with the growing significance of recycling technologies and waste treatment methods among African nations, it is now felt that it also has great potential to generate additional revenue for these nations. [100]

Since the convention is yet to gain universal acceptance, it has not been coercive enough to be accepted and enforced by majority of the African nations.

Also, many developing and non-developing European countries are not supportive of the convention. [101]

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99 *Supra* n. 93, at 210–211.

100 Alan Andrews, Beyond the Ban – can the Basel Convention adequately Safeguard the Interests of the World's Poor in the International Trade of Hazardous Waste? , 5/2 Law, Environment and Development Journal 167 (2009).

101 *Id.*

*5. Disparities in cross-border regimes*

As stated before, many countries follow their own systems of classifying 'hazardous' waste and 'non-hazardous' waste. There is no "international clearing house for information"[102] regarding the movements of wastes, countries of origins, ultimate destinations, and treatment operations.

Despite a well-developed legal framework, most industrialized nations face issues of over-burdened domestic agencies while the developing economies may choose to escape from the responsibilities of evolving sound national legislations and environmental awareness. [103]

*6. Non-ratification by United States*

United States is the largest generator of hazardous waste but has not yet ratified the Basel convention. Instead, it has entered into several bilateral and multilateral agreements and has a well-developed domestic law requiring prior notice and consent for hazardous waste shipments.[104] United States also requires a notification to be made to Environmental Protection Agency (EPA) within sixty days by the exporter.[105] EPA, then awaits written consent from the importer before granting permission for the shipment.[106] EPA is empowered to impose massive fines in case of violations.

Since the United States government is split in its decision to ratify Basel convention, the international community is yet to witness a strong positive impact against international movement of toxic waste.

## 7. Possible Solutions

In pursuit of environmental justice, toxic waste colonialism may be corrected, possibly, by introducing policy changes and implementation systems in conformity with the principles of international environment law.

102 *Supra* n. 37, at 142–143.

103 *Supra* n. 93, at 209.

104 *Supra* n.36.

105 40 Code of Federal Regulations § 262.53 (2009).

106 40 Code of Federal Regulations § 262.53(e), 262.52 (2009).

*a. Changes in Implementation*

Basel Convention began with lofty ideals of reducing transboundary shipments of hazardous waste and promoting waste management in an environmentally sound manner. However, the discrepancies in the definition of 'hazardous waste' failed to keep pace with the changes in the last two decades. First, a uniform meaning should be attributed to 'hazardous waste'. Second, some inclusion systems be developed to address future additions of harmful substances in the definition. Third, the countries should invest in the areas of recycling and reuse, and devise national law to put a complete ban on certain toxic wastes. This would allow the countries to handle substances in consonance with the international system.

Asian countries generate massive electronic waste (e-waste). If we take the example of India, the legal framework is not uniformly conducted despite some enforcement. E-waste inventory lacks information and data though e-waste is well collected by local collection mechanism such as Municipal Corporation. Pilot separation and collection system have been set up. The plans to set recycling technology and facilities are underway.[107] Recycling and reuse promotes sustainability of natural resources but have not been considered as a valuable alternative. [108]

Basel Convention though stresses on domestic waste management practices, but refrains from making any reference to recycling or reclamation.[109] Present international system does not allow developing countries to either export hazardous waste to developed countries for recycling or pursue other alternatives.[110] Focus on 'recycling' than just 'disposal' holds the possibility

107 Richa Agarwal and Arupendra Nath Malik, E-waste Management in India - The Corporate Imperative, Yes Bank Ltd. And Teri BCSD (Oct. 2014), http://cbs.teriin.org/pdf/researchreports/EWasteManagementReport.pdf, last accessed on 20/12/2015.

108 Chris O'Brien, Global Manufacturing and the Sustainable Economy, 40 International Journal of Production Research 3867, 3867–69 (2002).

109 Basel Convention at Art.4, para.2 and Art. 10.

110 Sejal Choksi, The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal: 1999 Protocol on Liability and Compensation, 28 Ecology Law Quarter 509, 516 (2001).

of United States ratification, as has been witnessed in its industries.[111] However, it is also reiterated by the proponents of the convention that it is not only the question of United States ratification but that the convention has also not been ratified by many developing countries such as India, Pakistan and Brazil, who are considered as major actors in international waste trade. This is because hazardous waste is a major source of income for these countries and are sites for waste disposal and recovery.[112]

The current system also speaks little of the means to implement the principle of notification and prior informed consent in light of disparities in the social and economic means of implementation among countries. It is crucial for the developed countries to formulate plans and facilities for waste reduction owing to congested disposal facilities. However, several attempts to enact new measures by the private companies and national agencies were made in the past.[113] Lastly, international pressure to minimize hazardous waste production is indispensable if toxic waste colonialism has to be completely eradicated. It is often reiterated that "midstream" regulation of hazardous waste life cycle and controlling transboundary shipments does little to eliminate disposal problems and prevent pollution.[114]

L. Widawsky offers a solution to the problem of prior informed consent. He suggests establishing an independent body which should be accountable for inspecting disposal before the commencement of transboundary shipment. Such a body should be bestowed with the power to take decision to allow a transboundary shipment upon proof of reasonable facilities.[115] This would also keep a check on the relevant authorities from

111 *Id.* at 535–37.

112 *Supra* n. 100.

113 *Supra* n. 37, at 149.

114 *Supra* n. 112, at 520.

115 L. Widawsky, In My Backyard: How Enabling Hazardous Waste Trade to Developing Nations Can Improve the Basel Convention's Ability to Achieve Environmental Justice, 38/2 Environmental Law 606 (2008).

misrepresenting the capacity of their facilities. It may not completely assist in safeguarding the interests of the poor nations as it leaves no scope for questioning the exporting countries about the nature and description of the waste. Questioning becomes important in the light of increasing e-waste trade under the pretext of reuse or recycling. If inspection and verification of e-waste is ensured before its export, it can help prevent accumulation of e-waste. Inspection at large scale requires a well-arranged and funded organization to perform these functions effectively. A team of connoisseurs placed at all major ports, airports, railways and road terminals worldwide can further the inspection and recovery process.[116] At the same time, it would be conducive for the parties to consider models for alternative funding. The Compliance Committee may also consider the ways to strengthen financial resources to carry out its activities. Instead of focusing on voluntary contributions, a compulsory system may be installed making it mandatory for all parties to contribute money in fixed proportion. This would help the committee to compel non-compliant parties to give effect to the provisions of the convention.[117] UNEP may also assume the role of an informed facilitator which can provide details to countries about waste and disposal methods. It can also provide assistance in standardizing definitions and interpretations. UNEP can also play the role of a facilitator in ensuring technology transfer and compliance to enhance the implementation of the principles of the convention. UNEP can help expedite the process of technology transfer and easier identification of transboundary movement of hazardous waste. [118]

Moreover, proper enforcement requires availability of vast resources with national enforcement agencies which, otherwise, may be directed towards reforming institutions and procedures prescribed under the Basel convention. The parties should make diligent efforts in developing

116 Andrews, *Supra* n. 100.

117 *Id.* at 182.

118 Hackett, David P., An Assessment of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, American University International Law Review 5, No. 2 (1990).

pragmatic solutions to ensure that the objectives of the convention are realized. Procedures for prior informed consent should be strictly enforced to ensure that the exporting country receives genuine consent and complies with the requirements of reuse and recycling. An independent body may also be set up for physical inspection of the waste both at the point of exit from the state of export and of recycling facilities or disposal at the point of entry in the state of import.[119] This evades the possibility of any corrupt practices and also prevents abuse of recycling processes. It is important to ensure that the compliance committee is empowered with financial resources to effectively enforce the ideals of the convention. At the same time, resources should also be directed towards poor countries in their endeavor to develop technological capabilities to treat hazardous waste. This would help in reaping economic benefits generated from waste management and mitigating risks to human health and environment.[120] In cases of non-compliance, the committee can play a crucial role in enforcing financial penalties and implementing convention obligations. Such reforms can assist the signatories to realize the goals and objectives of the convention thereby bringing economic prosperity to developing countries who can gain competitive advantage by developing disposal and recycling facilities. Besides, a compulsory system of allocating financial resources to the Basel Secretariat would also help in enforcing 'polluter pays' principle under the international environment law. This is in consonance with the ideals of the convention as it contributes to waste reduction and reduced transboundary movement of hazardous waste. However, implementing these reforms is likely to augment costs, in particular, for installing domestic systems for waste inspection and disposal. It remains doubtful whether the proposed reforms would get adequate political support to achieve its ends.

*b. Policy Considerations*

Certain principles of international law may be resorted to in future discussions on transboundary movement of hazardous waste. To begin

119 *Supra* n. 100.

120 *Id.* at 184.

with, an obligation not to cause harm to environment should not only be an international obligation but also a national responsibility.[121] Barring the accusations of impeaching state sovereignty rights, it is the state's responsibility to promote sustainable development and minimum harm within its borders. The focus should be shifted from 'origin of waste' to 'waste management'.[122] It needs to be understood that the goals of healthy environment cannot be achieved by simply putting a ban on hazardous waste shipments. Hazardous waste is harmful for the environment irrespective of its location either at the site of generation or disposal. As such, need for public participation in environmental decision making helps in enhancing public awareness. Public cooperation in activities promoting environmental protection at local, regional, national and international levels is indispensable.[123] Public and private sector participation can assist in addressing the economic issues and information sharing in toxic waste management.[124] Also, it increases the chances of public participation in hazardous waste management. Moreover, Basel convention provides for transfer of technology but only few exchanges have actually taken place so far.[125] Promoting international investment and technology transfer to allow poor countries to recycle the waste might assist in handling economic pressures to accept toxic wastes.[126] There is a great potential for companies to make profits in such technology exchanges.[127] At the outset, it seems toxic waste colonialism has imbibed fear in poor nations for developing proper disposal methods. This should be addressed through proper international mechanisms. Policies that provide for filing of complaint and redressal systems in the area of transboundary movement of hazardous waste can

121 Stockholm Declaration, *Supra* n. 5. See also Rio Declaration on Environment and Development, June 13-14, 31 ILM 874 (1992).

122 *Supra* n. 93, at 214–15.

123 Stockholm Declaration, *Supra* n. 5.

124 *Supra* n. 37, at 156.

125 *Id.* at 156.

126 *Supra* n. 6, at 71.

127 *Supra* n. 37, at 156.

help augment public participation and problems relating to toxic waste colonialism.[128] A review mechanism would also help in addressing citizens' concerns of both importing and exporting countries.

## 8. Conclusion

Toxic waste colonialism continues to be a global problem despite several international agreements in the past decades. Basel convention, being the most prominent agreement in this arena, still lacks proper implementation and faces crucial policy issues. Global management of hazardous waste needs to address issues of technological capabilities, adequate funding, proper administration and training in handling hazardous waste.

Transboundary movement of hazardous waste is attributed to the global increase in hazardous waste production and therefore, it is incumbent for the international community to draw its attention towards increased harm to human health and environment. Though the scope of Basel convention was widened by subsequent amendments, protocols and agreements, there still exists loopholes responsible for toxic waste trade to continue. Illegal shipments are not easy to monitor. International laws have failed in reflecting the recent changes in waste disposal. Issues relating to definitions under international agreements have failed to address the opportunities of recycling and reclamation. Moreover, imposing a complete ban may not be an appropriate solution as it may result into loss of source of livelihood for people which it is intending to protect. With this, and lack of uniformity in cross-national regulations is also a loophole in the system. There is no mechanism to monitor international movement of hazardous waste and treatment operations leading to retardation in environmental awareness. These differences prevent effective implementation of the current system. Lastly, United States ratification is also necessary to bolster the efforts against transboundary movement of hazardous waste.

128 Noah Sachs, Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law, 55 UCLA Law Review 838, 844–45 (2008).

Though immediate solutions are not possible as international agreements take time to negotiate and even longer to execute. However, the recommendations in this article attempts to explore the changes in policy and implementation which might be able to increase the effectiveness of current international system. The international community should focus on possible ways towards better implementation of existing system worldwide with the hope for successful management of hazardous waste in the future.

# 7

# EMANCIPATING THE ROLE OF LOCAL POPULATION IN PROTECTING NATURAL ENVIRONMENT IN INDIA: A CRITIQUE ON ECOLOGICAL AND LEGAL ASPECT

*Siddiqui Saima J.A.*

- *Introduction*
- *Association of Local Population with the Natural Environment*
- *Contribution of Local Population towards Environmental Conservation in India*
- *Indian Legal System on Local Population and Conservation of Natural Environment*
- *Increasing Involvement of Local People in Protection of Natural Environment*
- *Conclusion and Suggestions*

# 7

# EMANCIPATING THE ROLE OF LOCAL POPULATION IN PROTECTING NATURAL ENVIRONMENT IN INDIA: A CRITIQUE ON ECOLOGICAL AND LEGAL ASPECT

*Siddiqui Saima J.A.**

## 1. Introduction

Local population comprises of set of people that exhibit distinct lifestyle and reside in some particular locality. Such group of people must not be necessarily understood as primitive in nature. They possess some peculiar features that distinguishes them from other groups/sections of the population. One of such remarkable features is their indissoluble bond with the natural environment and resources found therein. Local communities like rural folks, tribes, hunters and gatherers reside in close affinity with the natural environment. The natural environment and its ecological services have a significant impact on the lives of local population. It provides them with habitat, livelihood, sustenance, dignity and occupation to name some.

The association of the local people with the environment is not limited to their life and living conditions; it has many more things to offer. Various social values, customs and culture which forms the basis of life of local

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communities develops from this association. The association also gives rise to the legal conception of common property in certain natural resources that are freely available in nature. The local population enjoys a common control over such pool of resources like forests, lakes, seashores, streams, ponds and fragile lands. In the ecological context, the relationship of local population with the natural environment has been a contentious one. While some research suggests that local population devastates the natural environment, the other line of reasoning concludes that affinity between the two leads to the sustainable use of natural resources and preservation of the natural environment. The second line of reasoning argues that the pattern of living of local population and their traditional affinity with the natural environment has the potential to conserve nature in its pristine form.

The discussion on association of local population with the natural environment remains incomplete without examining the approach of Indian legal system in this regard. There are important provisions in the Indian Constitution under Article 48-A, 51A (g) for the protection of natural environment; however they are completely silent on the role of local communities therein. It is worth noting that some special provisions have been made under the Fifth and Sixth Schedule of the Indian Constitution to administer the Schedule Areas and Schedule Tribes keeping in view their unique habits and affinity with natural environment. The Fifth and Sixth Schedules are appended to the Indian Constitution for the preservation of tribal life and their natural resources through the exercise of constitutional powers by the Governor and autonomous councils respectively.

On the other hand, various statutes and regulations on natural resources like forest, rivers, and coastal zones have showed a dismal approach by failing to recognize the appreciable association between the local population and natural resources. The forestry laws in India have created history of more than a century in ignoring the dependence of tribal over the forest resources. The goal of forest conservation had been superseding the traditional rights of local communities over forest resources since colonial times. In practice, the local communities have not even received the right of

adequate hearing and representations in environment impact assessments while granting clearances to projects that brutally affects their lives. Finally, it has been the judicial reasoning and wisdom of the Supreme Court of India which has played a pivotal role in upholding the interests of local communities in natural environment and also duly recognizing the sustainable relationship between the two.

Recently, it is being witnessed that community-based initiatives have become widely popular to conserve the natural environment and its resources. Community participation is encouraged, especially in the ecologically lesser-productive areas of India, to facilitate the resource management. Local population is seen as means to achieve the end of preserving the natural environment. It is also seen as an efficient measure to protect the pool of common resources for the community and common good of the people of India.

## 2. Association of Local Population with the Natural Environment

The local population resides close to nature and has been dependent on it for their survival and living. There are scientific evidences available that show that the organisms, populations and communities interact with their environment and proceed to foster a relationship with it.[1] The extent and nature of dependence of local population on its natural environment varies as per situations, necessity and availability of resources. The natural environment on the other hand has the potential in terms of natural resources and ecological services to cater to the basic needs and comfort of humankind. The extent to which the natural environment attains to the needs of the local population varies from case to case basis in India.

The association between the local population and its surrounding natural environment can be demonstrated with the living pattern of rural folks in India. Majority of the rural folks in India lives in the vicinity of natural environment. The association of rural population with natural environment mainly subsists for two important reasons. Firstly, the rural livelihood or

1 N.K. Oberoi, Environmental Management 14 (1st ed. 1999).

sustenance is supported by different elements of natural environment. The requirement of fuel, wood, fodder, dry leaves and twigs for domestic purposes like cooking, domestication of animals is met from the nearest forests, farm or vegetation. So also the water required for different purposes can be obtained from rivers, lakes, streams, ponds, wetlands etc. The life and livelihood of the rural population of India cannot be imagined without the natural environment and its resources.

Secondly, majority of the rural population in India depends on land, water and forest resources for their occupation. Land is primarily utilized for occupations like agriculture, cultivation and cottage industries in the rural areas. In many regions that are not irrigable or irrigated, the water for agricultural activities and related occupations is drawn from rivers, lakes and other water resource. On the other hand, forests provides commercial items like wood, bamboo, herbs, gum, leaves and forms an alternative source of land for related activities like pasturing and grazing in rural India. Thus, natural environment offers all possible amenities to the rural population to practice the traditional occupations like agriculture, pasturing, grazing and livestock farming.

Another illustration of association of local population with its natural environment can be seen through the tribal life in India. Land and forests is the mainstay of tribal life in India. They are the primary sources of other natural resources for the tribal people. The tribal groups share a symbiotic relationship with forest just like the entire humankind once depended on forest resources in early history.[2] Forest is a natural habitat of the tribal communities and offer diverse services to them. Tribal people derive sustenance and livelihood from the forests and related resources. Their routine requirements of fuel, shelter, bamboo, dry leaves, and twigs are also met from the forest regions. Some of the prominent occupations of tribal people like agriculture, shifting cultivation, pastoral activities and grazing livestock are also sought therein.

2 Devendra Thakur & D.N. Thakur, Tribal Life and Forests 133 (2nd ed. 2009).

It shall not be out of place to mention that some closed-group of population like the hunters and gatherers also rely on their immediate natural environment for carving their living. For these groups, the best and conducive natural habitat happens to be the dense forests, grasslands and places of vegetation which are rich in flora and fauna. No other abode or destination can act in substitution of the natural habitat for them. The traditional avocation of hunting and gathering has to be executed in the natural environment; just like the rural folks and tribal groups, the closed-groups also live in close association with the nature.

Thus, the local population has an ecological and legal relationship with their natural environment. In the ecological sense, the association between the local population and nature can be termed as interdependence, mutuality or stability in an ecosystem; however in the legal context it is far more comprehensive in nature. In the legal sense, this relationship between the community and nature gets shifted to another paradigm of rights and duties. The community and individuals enjoys a variety of rights[3] derived from the natural environment/ natural resources with moral and constitutional duties to protect and conserve them.

The rights enjoyed by the local population over the natural resources have a unique jurisprudential characteristic. The local population exercise community rights over the natural resources.[4] These community rights enshrine common possession, control and enjoyment of the community over the pool of resources. Such rights prevent the misuse of common resources and keep a check on the individual usurpation. Hence common resources like forests, forests produce, rivers, and shores are not subject to the will of any particular individual. Community rights also recognize and protect individual rights but generally the latter is subject to the former.

3 Variety of rights here refers to cauldron of basic rights like livelihood, dignity, clean and pollution free environment, occupation to name some.

4 Subhram Rajkhowa and ManikChakraborty, Indigenous People and Human Rights: The Quest For Justice 207-08 (1st ed. 2009).

## 3. Contribution of Local Population towards Environmental Conservation in India

The academic discourse on the role of local population in preserving and conserving natural environment has been too divided. One set of reasoning suggests that the local population, especially the rural poor, have devastated the condition of natural environment. They have unsustainably used the natural resources to satisfy their basic needs. Similar allegations have been leveled against the tribal population; they are condemned as encroachers over the forestland and related resources.

However, another set of reasoning believes that the affinity of the local population with the natural environment makes them the best agents to manage and conserve the bounty of nature and its precious resources. It also argues that no one can better manage the environment and natural resources than the local population. Thus, it becomes essential to take into account both the diametrically opposite projections to understand whether the poorer local population ruins or accountably manages the natural environment and its resources.

The first line of research draws on the United Nations Development Programme (UNDP) claims which suggest that poorer are the victims and agents of environmental degradation. Around 72% of the population of India resides in rural areas; they live in the vicinity of natural environment. And, it is not an astounding fact that they belong to the poorer sections of the Indian society. Poverty has been predicted as the major cause of the environmental degradation at the national and global level. Poorer local population is termed as short-sighted and short-term maximisers. They try to meet the needs of present at the cost of needs and requirements of the future generations. The poor and hungry often tend and in fact destroy their immediate environment for their survival.[5]

The research conducted in the past three decades at the international and national level suggests that the local population heavily depend on the

5 Dr. Md. Fakhre Alam, Poverty and Environment Sustainability 145 (1st ed. 2012).

natural resources for their sustenance. They cut down forests, their livestock overgraze the grasslands, they over-use marginal lands and crowd the cities to the extent of congestions. The main reason for the extensive dependence of the local population on natural resources is the minimal rights and guarantees to foster a normal living. They indeed possess very weak property rights, less access to credits and insurance and insufficient capital.[6]

The first line of research further imbibes that the local people heavily dwell on open access resources like forests, pastures, water that further aggravates the over-exploitation of the environment. This view believes that there is a vicious link between poverty and environment. Both become the cause and effect of the occurrence and persistence of the other. Environment degradation affects the poor in the worst forms with destruction of forests, fuel and timber, degradation of land, air and water and sole dependence on jhum cultivation.[7]

Despite the dominant view in literature that poverty causes environment degradation, there are certain striking contradictions to the same. Various studies suggest that poor population living close to nature have efficiently managed the resources while some suggest that the main culprit of depletion of natural resources and pollution of environment are the non-poor people of the society.[8] Burdening the local communities with the allegation that they always tend to disturb and spoil the nature undermines their potential symbiotic relationship with the natural environment and ecological services.

Human communities worldwide have played a significant role in shaping nature's diversities and its related functions. Natural environment shares cohesion with human communities in generating and sustaining vast array of genetic species and ecological diversities. Dynamic and complex rural livelihoods depend on the plant, animal and ecological diversities of the natural environment. The communities living close to nature practice their

6 *Id.*

7 *Supra* n. 5, p. 146.

8 *Id,* p. 147.

occupation and derive livelihood and food security from the adjacent natural environment at the same time promoting biodiversity. Many times such biodiversity also contributes in the socio-economic functions along with its ecological benefits. [9]

On analyzing the above-mentioned two approaches, it can be seen that the former view seems more of a sheer criticism of local population than a concern or means to prevent them from devastating environment. It cites some economic and legal factors like weak property rights, lack of financial aid to poor as the reason for haphazard use of environment. Ironically, it is the welfare state that has failed the poor by failing to uplift their living standards than the poor themselves choosing to become poorer and pollute the environment.

It must be acknowledged that the status of poverty may lead to pollution of environment from case to case basis, however, that does not imply that the poor population of India necessarily degrades the environment. In fact some major environment degradation in few past decades like Silent Valley case, Dehra Dun Lime Quarries, Bhopal Gas Disaster, Sriram Fertilizers Oleum Gas Leakge, tanneries polluting Ganga shows that non-poor have more potential to actually pollute the environment and cause deadly hazards.

The second line of reasoning is a pragmatic approach supporting the fact that local population like tribes are better equipped in protecting the nature than anyone else. With the help of some examples in recent past, it can be seen that the welfare legislations and Indian judiciary have taken resort to the second line of reasoning to protect the environment. To exemplify the preceding argument it can be stated that legislations like Panchayat Extension to Schedule Areas Act, 1996[10] and Forest Dwellers Act, 2006

9 Ranjay K. Singh & Amish K. Sureja, Community Knowledge and Sustainable Natural Resources Management: Learning from The Monpa of Arunachal Pradesh, 2 Southern Africa TD J. 1, 74 (2006).

10 Bikas Rath, The Fuctioning of PESA in Odisha, in Report of National Institute for Development Innovation, Bhubaneswar, 7 (2013).

have been enacted to empower the tribal communities to participate in controlling the natural resources and confer rights over forest resources onto them respectively. Similarly, the Supreme Court of India has recently observed that local community have a vital role to play in the ecological management through their traditional knowledge and practices. This realization makes it necessary to protect such practices for the conservation of nature and its resources. [11]

## 4. Indian Legal System on Local Population and Conservation of Natural Environment

The position of Indian legal system in envisaging the relation between local population and natural environment can be traced from the following- The Constitution of India, the Statutes and Notifications on certain natural resources like forest, water seashores and public hearing and the judicial reasoning of the Supreme Court and High Courts in India.

### 4.1 The Constitutional Position

The Indian Constitution is founded on the touchstone of values like justice, liberty, equality and fraternity. These values are expected to inform all walks of life of every individual and local communities are no exception to this. Under Part IV on Directive Principle of State Policy of the Indian Constitution, the state has a duty to distribute the control and ownership of the material resources in such a way as to subserve the common good.[12] This clearly shows that certain natural resources like forests, streams, fragile lands are public property that has to be managed by the state as trustee for the common good of the people. Local population's sustainable and judicious use of natural environment supplements the state's goal of seeking common good and effectively discharging the trust.

The Indian Constitution has made adequate measure to safeguard all traits, usages, customs, mores and folkways of the local communities that are

11 *Orissa Mining Corporation* v. *Ministry of Environment and Forests,* (2013) 6 SCC 476.

12 Constitution of India, Art. 39 (b).

traditionally linked with nature. It envisages safeguarding the culture of local communities under Article 29 of Part III. This Article confers right on every section of population having distinct set of culture to preserve and conserve the same.[13] This is an important entitlement for the local communities who have countless cultural traits that are closely associated with the natural environment. By means of this right, the local communities have an entitlement to rightfully practice all the habits closely dependent and involved with the natural environment.

The Fifth and Sixth Schedules appended to the Indian Constitution contain certain special provision to safeguard the relation between the local population and natural environment. The Fifth Schedule contains provisions as to the administration and control of Schedule Areas and Schedule Tribes. The Governor is the sole repository of the Schedule Area; he has the power to restrict the application of any Act made by the Parliament or the State Legislature to the Schedule Areas.[14]

This constitutional power can be envisaged as a repository of faith in the Governor to administer these areas for the wellbeing of the local communities residing therein and protecting the natural resources from alienation or usurpation by the non-local people. Fifth Schedule also provides for setting up of the Tribal Advisory Councils in each state having Schedule Area and/or Schedule Tribes. It is the duty of tribal advisory Council to advice the Governor on such matters as may be referred to it by the latter. [15]

The provision to administer the tribal areas in North-Eastern states[16] is made under the Sixth Schedule of the India Constitution. The Sixth Schedule divides the tribal areas in India's north-east into autonomous regions, each of which belong to different tribes. Land and community

13 Constitution of India, Art. 29.

14 Constitution of India, Para. IV, Fifth Schedule.

15 Constitution of India, para. IV & V, Fifth Schedule.

16 Assam, Meghalaya, Tripura and Mizoram.

resources of Schedule Areas of North East can be preserved and protected by the laws made by District and Regional Council on different subjects like tribal land rights, forest management, water course, cultivation, social customs and inheritance. Though the scheme of Sixth Schedule entitles all the legislative and executive decisions to be taken by the council nevertheless it is subject to the approval of the provincial governor. [17]

In comparison with Fifth Schedule, the Sixth Schedule has given considerable autonomy and adequate participation to the tribal community. It has conferred self-rule on the tribal people to protect them from ecological and economic exploitation from the outside encroachers. It also empowers the gram sabha to take important eco-decisions while exercising self-governance. [18]

The 73rd and 74th Amendments, which brought three-tier representation in governance in India, were seemingly excellent initiatives to ensure community participation in decision-making process. Representative constitutional bodies like Panchayat and Municipalities were created for the rural and semi-urban areas respectively. The Eleventh and Twelfth Schedules were inserted so that Panchayat and Municipality could exercise their powers and responsibilities respectively on the subjects mentioned therein. Many subjects in the above-named Schedules are closely related to the natural environment. The Eleventh Schedule consists of subjects like agriculture, land, fisheries, minor forest produce and drinking water; while Twelfth Schedule contains urban planning, land use, water supply, urban forestry and cattle ponds. Articles 243-G and 243-W also empowers the Panchayat and Municipality to function as institutions of self government and exercise powers and responsibilities with regard to the above-mentioned subjects.

Ideally, the local bodies seems to be equipped with the constitutional mechanism to protect natural environment and resources therein, however, there are many flaws in this process. Initially, the local bodies have to depend on the Legislatures of states to endow them with power to function as institutions of self-government. Framing of Article 243-G and 243-W

clearly shows that it is the discretion of the legislature to decide on whether power is to be devolved on local bodies and if so to what extent. This shows that the third tier of governance in rural India is operative only on basis of devolution of power by the state government. Another stark fact is that, inspite of introduction of Panchayati Raj system in India since 1992 there has not been substantial improvements in the condition of local communities in managing the natural resources. To add to this, legislations on land acquisition and forests have added to the plight of local communities. The rights of local communities over natural environment often gets sacrificed to give way to land acquisition for public purpose or preservation of forest as reserved forests.

## 4.2 Statutes and Notification on Conservation of Natural Resources

### 4.2.1 Forest Legislations in India:

Prior to the advent of British rule in India, forest was under the management of the local population residing therein and its vicinity. The local population exercised collective rights over the forests and related resources like ponds, rivers, wastelands and pastures. The collective rights exercised by the local population imbibed the rights of exclusive ownership and possession of the community over the forest resources.[19] However, the advent of British rule in India and the consecutive colonial legislations on the subject 'forest' eroded the rights of local communities, especially tribal over the forests and related resources.

The tribal customary practice relating to forest resources was restricted for the first time by the enactment of Forest Act, 1865. This legislation governed the use, exploitation, management and preservation of forests in India; it also thereby regulated the collection of forest resources. With this legislation 'forest' was dwindled as a state subject rather than a natural resource.

19 R.N. Patil & Jagannath Das, Tribal and Indigenous People of India : Problem and Prospects 383-84 (1st ed. 2002).

Soon the Act, 1965 was replaced by some additional regulations in 1878. Different forest areas like state and private forests were marked under the new Act, 1878. It also increased the forest cover under the government control. Forest offences and penalties were prescribed for the first time under this Act.[20] Naturally, such piecemeal efforts of the government paved way for the complete exclusion of local communities form their natural habitat and deterred them with sanctions to use the same.

The more comprehensive version of colonial legislation on forest was the Indian Forest Act, 1927. This legislation has been viewed by some authors as a bonafidemeasure of conservation of forest by the colonial government while some others believe that it was enacted to augment state revenue from the forest. Without getting much into the debate on the real motive behind the enactment of Act, 1927, it is important to point out that it does not acknowledge or recognize the interest of local communities derived from forest. Surprisingly, some of the activities like pasturing, grazing animals and clearing forests which are essential for rural and tribal sustenance are completely forbidden and penalized in the reserved forest.[21] The Act, 1927 gives no recognition to the customary rights of local communities over the forests and related resources and bars the accrual of forest rights too. [22]

The Forest (Conservation) Act, 1980 further consolidated the position of state (The Central Government) as the conservator of forest and did nothing towards recognizing the rights of local communities over the forest resources. This legislation is mainly sanction-based that conserves forests by avoiding any intrusion for non-forest purposes. [23]

Lately, the state enacted a landmark law called Schedule Tribes and Other Forest Dwellers Act, 2006 that finally recognizes the right of traditional

20 Justice Kuldip Singh, Handbook Of Environment, Forest And Wildlife Protection Laws In India 19 (2nd ed. 1999).

21 Section 26, The Indian Forest Act, 1927.

22 Section 5, The Indian Forest Act, 1927.

23 Section 2, Forest (Conservation) Act, 1980.

forest dwellers and schedule tribes over the forestland. This statute makes provision for the recording of forest rights of the dwellers along with due evidentiary value. The forestland has been finally recognized as a community forest resource of the tribal communities along with the right to access the same. [24]

Chapter II of the Forest Dwellers Act, 2006 provides a long list of forest rights that have been vested in the tribes including right to hold land, minor forest produce, in situ rehabilitation, protecting biodiversity, right over water bodies, pastoral activities, regeneration and protection of community resources.[25] The Act has also made provision for the resettlement of tribes in other areas as per the consent of Gram Sabha whenever the community resources falls under the wildlife habitat and coexistence is not possible.[26] Thus, the forestry laws in India have evolved with the static and parochial approach of ignoring rights of local communities until the enactment of Act, 2006.

### 4.2.2 Legislation on Water and Notifications on Coastal Areas in India

Just like any other statute on environment, the Water Act, 1974 and Coastal Regulation Zone (CRZ) Notification, 1991 stress on the fact of conservation of streams, rivers and coastal areas respectively. Water Act, 1974 has more of an instrumental approach and confers power and duties on the instrumentalities like Pollution Control Boards at the Centre and States to control and abate water pollution. On the other hand the various Coastal Regulation Zone Notifications have more of a sanction based approach to protect the coastal zone from the haphazard developmental activities and detrimental use.

24 Preamble, The Schedule Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006.

25 Section 3, The Schedule Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006.

26 Section 4, The Schedule Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006.

The Water Act, 1974 and CRZ Notifications nowhere involve the local communities in the process of preserving water or coastal zones from pollution. There is a fairly large population of people living in the coastal and riverine regions who thrive on these resources for their livelihood purposes. Traditional fishing still subsists as a customary practice and no specific provisions have been actually enacted to protect it from the repercussions of developmental activities and environmental hazards. Thus, the laws on conservation of water and coastal resources neither protect the rights of local communities over these resources nor does it involve them in the conservation strategies to protect environment.

### 4.2.3. Environment Impact Assessment Notification, 2006 and Right to Public Hearing

Infrastructure, industrial and other development project has been on India's agenda of nation building since the last decade. However, unsustainable developmental projects have the potential to degrade the environment in nature of pollution, loss of biodiversity and deterioration of natural resources. They also affect the lives and livelihood of local communities. Such impact can range from polluting their surroundings to permanently displacing them. Unplanned and ruthless development projects affect the local population-directly or indirectly. Keeping in view the trail of consequences of developmental projects, the process of granting them clearance includes preparation of Environment Impact Assessment (EIA) Report as well as organizing public hearing. [27]

The EIA is a favorable legal option to weigh ecological-social consequences of any plan, project or operation before it is implemented in action. Under the EIA Notification, 2006 which replaced the 1994 Notification, both State and Central agencies are given the power to make impact study for projects of separate types with threshold limits. The Notification, 2006 also includes Public Consultation; it is a process by which concerns of local population

27 Manju Memon and Kanchi Kohli, Environmental Decision-making : Whose Agenda? 2490 EPW (2007).

and stakeholders are ascertained to take into account all the aspects of the project in a given ecological condition. Public consultation involves a two pronged process: giving right of public hearing and seeking public responses in writing. [28]

Such provision of giving an opportunity of hearing and responding to the local communities with respect to any project or plan proposed to be executed in their natural habitat is a remarkable component of natural justice. However, the practice in India has been contrary to these measures, especially in the century where mining, dam construction, installation of power plants is a common phenomenon in every state of India. Since the inception of EIA Notification in 1994, the citizens experience with their involvement and decision making has been disappointing. In many cases substandard and fraudulent EIA Reports are forwarded, in many situations public hearings are marred with violence, intimidation and irregularities. In other glaring cases it can be seen that clearance are granted to environmentally hazardous projects inspite of staunch public opposition. [29]

The EIA Notification, 2006 is on paper but its true and absolute application is a distant reality. Right to hearing has remained a mere guarantee without proper compliance by the state and people. In wake of above situation it can be concluded that local population are not given due opportunities to place their opinion with regard to developmental activities that can be hazardous to their life and livelihood. It can be said that situation can be worst for primitive groups who lack complete representation and totally dependent on natural environment. Any alteration in natural environment or their ouster from the traditional habitats brings the worst form of human rights abuse like deprivation of livelihood, shelter, dignity, occupation, property to name some.

28 P. Leelakrishnan, Environmental Laws in India 326, 328 (3rd ed., 2009).

29 *Supra* n. 27.

### 4.3. Judicial Reasoning on Affinity between Local Population and Natural Environment

The approach of equity and sustainability can be seen in the judicial decisions of higher courts to protect the natural environment since the past three decades.[30] In order to balance the developmental needs along with the conservation of natural environment, the higher judicial system has evolved the path of sustainable development. The sustainable practice of local communities in managing natural resources is in tune with this approach. In the following judicial decisions the Supreme Court of India has appreciated the importance of natural environment in the lives of the local population and also highlighted the worthiness of such people in conserving the bounty of nature.

In *Hinchlal Tiwari* v. *Kamala Devi,* [31] the Supreme Court declared that the material resources of the community like forests, ponds, mountains are nature's precious gift to mankind. They help to maintain a delicate ecological balance and provide numerous benefits to the communities. The decision stressed on their protection for a healthy environment which enables the people to enjoy quality of life that is an integral part of human existence.

In *Waman Rao* v. *Union of India,*[32] the Court highlighted the strong linkage between land and people's social status in social system in India. It observed that assured possession of land resources gives long lasting peace, freedom from fear and security to the people. The strip of land on which they till and live assures them equal justice and dignity of person by providing a near decent means of livelihood.

The strong allegiance of tribal population to their land and forest habitat was expressly upheld in the decision of *Samatha* v *State of Andhra Pradesh and*

30 Geetanjoy Sahu, Why the Underdogs Came out Ahead: An Analysis of the Supreme Court's Environmental Judgments, 1980-2010, EPW 4, 52 (2014).

31 (2001) 6 SCC 496.

32 (1981) 2 SCC 362.

*Others.*[33] The Bench observed that land is the most important natural and valuable asset of tribal community. It is an imperishable endowment for tribal rights. Tribes nurture a great sense of attachment towards their land that in turn gives them social and economic empowerment. They mainly depend on agriculture, agricultural based activities for their sustenance. Traditionally they have a strong allegiance to land and forest in their lives.

In the landmark verdict of *Fatesang Gimba Vasava* v. *State of Gujarat* [34] the Gujarat High Court secured the rights of tribal to inch their livelihood from the forest-produces. It upheld the right of adivasi to collect bamboos from forest and sell bamboo mats to make living. It ordered the state government to supply bamboo to the adiviasis at minimal rate subject to outer limit prescribed in the considered government resolution. Adivasis were granted permission to sell bamboo articles like supdas, pala and toplas to the private purchasers at such rate agreed between them. The Division Bench of Supreme Court of India in *Suresh Lohia* v. *State of Maharashtra* [35] confirmed the decision of Gujarat High Court in Fatesang's case. These two important verdicts have restored the rights of adivasis to collect bamboo from forest and make commercial product form it to for commercial purpose. Raising concern over the ousting of tribal from their traditional land to set-up development project, the Supreme Court of India laid down several guidelines to secure tribal interests in *Banwasi Sewa Ashram* v. *State of U.P.* [36] The Court permitted acquisition of land by National Thermal Power Corporation (NTPC) only after it agreed to provide rehabilitation schemes for the ousted tribal people. In course of its order, the Court observed that tribal have been generally residing in jungles and around for their livelihood purposes. They depend solely on natural resources like fruits, vegetables, fodder, timber, fuel wood for their living. The Court further discussed that alienating the tribal from their traditional habitat must only be done after

33 AIR 1951 SC 41.

34 AIR 1987 Gujarat 9.

35 Decided by the Supreme Court of India on August 23, 1996.

36 AIR 1987 SC 374.

chalking out a comprehensive rehabilitation scheme to reinstate the tribal life.

The exposition of doctrine of public trust in the Indian legal system has been one of the landmark judicial invocations towards protecting the common resources properties. It was in the leading case of *M.C. Mehta* v. *Kamal Nath* [37] wherein this doctrine was interpreted and discussed at length to protect the diversion of river Beas to support construction of a motel. The Apex Court prohibited the unnatural construction and pollution along Beas and held that the notion that public has right over certain common natural property is finding its way into the law. It was observed that public trust is a doctrine to protect certain precious natural resources that are freely available in nature. This doctrine imposes a duty on state to protect the resources for the common enjoyment and use of the public. These resources are vested in the public by law of nature and state has a duty to protect them from vested interest. Earlier public trust doctrine was applied only for protection of access to the common benefit, however, lately it is being applied even to prevent the over-exploitation of natural resources and conservation of environment in India. Now this doctrine is being used as a legal and planning tool for fulfillment of sovereign's role as trustee of resources for future generation.[38] The Supreme Court of India's compliance with public trust doctrine along with the approach of sustainable development and intergenerational equity has given substantial protection to common resources of local communities.

The Supreme Court of India and high courts have in many ways upheld the role of local population in sustainably using the natural resources and contributing towards the protection of natural environment. The above-discussed judicial pronouncements have been instrumental in recognizing the long-lasting association of the local population with natural environment including land, forest produce, rivers to name some. The

37 (1997) 1 SCC 388.

38 S. Shanthakumar, Introduction to Environmental Law, 110 (2nd ed., 2005).

Court has strongly stood against any arbitrary denial of benefits to the local communities arising from the natural environment.

## 5. Increasing Involvement of Local People in Protection of Natural Environment

By now it is sufficiently understood that any attempt to conserve nature is destined to fail if does not take into account the claims and interests of the local population. New strategies are evolving under the international conventions and domestic policies to involve the local people in the protection of nature and its diverse resources. The approach of conservation of nature is being applied in a holistic sense. It not only includes the conservation of nature strict senso but also involves methods like catering the needs of local people and attaining sustainable use of land while conserving the environment. The principle of conservation of resources, especially primary forest, includes the incentive to protect the basic needs of the local people who are completely dependent on it. [39]

Projects which work on conservation of biodiversity have started incorporating the traditional ecological knowledge of the local population towards this end. People residing in the biodiversity-rich area have a detailed knowledge about the demography, species, ecosystem, ecological relationship and historic and recent changes therein. Many case studies have shown that traditional ecological knowledge and traditional practice have been pivotal in preserving and managing the natural and man-made ecosystem and the biodiversity nurtured by them.[40] Such knowledge acts as a guide in mapping better strategies for conserving the biodiversity in particular region. The barren and ecologically less productive regions in India have stared the community-based initiatives to rejuvenate nature. Grass-root level participation of people is garnered to manage natural resources in such areas. Local population is involved as the smallest unit of rural ecosystem in the resources management programmes. Local

39 P. Pohle & A. Gerique, Sustainable And Non-Sustainable Use Of Natural Resources By Indigenous And Local Communities 1 (1st ed. 2008).

40 *Id.*

population is now seen as a means to usher development and at the same time preserve the land and water resources in the hostile climate regions of the country. This initiative of resource management by local communities is expected to secure living and livelihood of the rural population in India. [41]

Community participation for preserving the natural environment and resources has become an inevitable necessity in India. It is essential to preserve the rights of the local communities over the common resources. Breakdown of traditional common property resources makes such property open for access to all. The open access to common resources of nature for all acts in detrimental to the customs, usages, living pattern of the local communities; it also marginalizes them in extreme conditions. When local communities are extensively engaged in the protection of natural resources there are least chances of take-over of resources by the wealthy people. Community participation is also essential for environmental purposes. It helps in engaging the poor in long term restoration of environment.[42]

## 6. Conclusion and Suggestions

The association of local population with the natural environment has an ecological and legal aspect. The ecological aspect must be strengthened by utilizing the sustainable traits of local population to conserve nature and natural resources. The blame of environment degradation caused by unsustainable development and sheer poverty must not be imposed on the local communities. Instead, constitutional and legal measures must be taken to secure the living of local population and uplift them from the status of poverty. The past experience shows that when natural resources were under the management of local population, they were used equitably in such manner that future generations have sufficiently availed their benefits.

Secondly, the community rights of local population needs to be acknowledged and protected under the law in order to protect natural

41 Sawali Bihari Verma, Environmental Law 129-30 (1st ed. 2004).

42 John Farrington & Others, Participatory Watershed Development 64-65 (1st ed. 2005).

environment from vested interests and monetary augmentation. Strong initiatives must be taken by the state to incorporate the sense of trust to preserve natural resources that are freely available in nature. Public trust doctrine must be incorporated in all state actions in form of policy making and legislating to preserve the common pool of resources. State and its instrumentalities can very well be aided by the local communities in protecting the natural environment. The wholesome approach to conserve the natural environment shall be incomplete without the state and legal instruments acknowledging the role of local communities in managing environment. The close association between the local population and natural environment must be utilized as a part of sustainable development strategy. Such association is expected to tackle new and onerous environmental challenges like climate change, global warming, deforestation, marine pollution and biodiversity extinction to name some. The importance of local communities in preserving nature has to be increasingly encrypted in the domestic and international initiates to combat environmental hazards and usher sustainable development.

Lastly, the dichotomy between the laws and practice must be eradicated to ensure the proper management of natural environment. Rights and guarantees become dead letters of law when they exist on paper and are not meaningfully implemented in reality. As per the written laws of the land and principle of natural justice, the local communities must be given all right to participate and place their views on all matters that deeply affect their natural surroundings. They should be given adequate autonomy to utilize the natural resources for their livelihood and occupation. Laws must acknowledge that local communities share camaraderie with nature environment rather than hypothetically projecting them as foe of nature.

# 8

# PLANTATIONS AND LAW:
## ANALYSIS OF PLANTATIONS INDUSTRY VIS-À-VIS ENVIRONMENTAL LAWS

*Keith Varghese*

- *Introduction to Plantations and Law*
- *Plantations and Linkage to Environmental laws*
- *Plantations and Linkage to Land laws*
- *Plantations in Relation to Trade & Commerce laws*
- *Conclusion & Recommendations*

# 8

# PLANTATIONS AND LAW:
## ANALYSIS OF PLANTATIONS INDUSTRY VIS-À-VIS ENVIRONMENTAL LAWS

*Keith Varghese**

### 1. Introduction

The Oxford Advanced Learners Dictionary defines plantations as a large area of land, where crops such as coffee, sugar, rubber, etc. are grown. The legal understanding of plantations however is defined in each state in the Agricultural Income Tax Act and the Land Reforms Act mentions plantations for purposes of land revenue. For instance, the Kerala Plantations Tax Act, 1960 defines plantations as land used for growing coconut, arecanut, pepper, rubber, coffee, tea, cardamom[1]. Spices also form a part of the plantation crops and is extremely important since time immemorial. Records show that even religious texts like Bible and Ramayana refer to the importance of spices in religion, medicine and food.[2]

Commercial cultivation of plantation crops in India was introduced by the British. Some plantation crops such as tea and cardamom were native to India and were growing in the wild, for instance, the tea growing in the wild

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1 S. 2 (6) Kerala Plantations (Additional Tax) Act, 1960.

2 Muthiah S, A Planting Century: The first hundred years of The United Planters' Association of Southern India, Affiliated East-West Press Pvt. Ltd 1993.

hills of Assam[3], or cardamom in the Cardamom Hills of Kerala[4]. Commercial cultivation of Plantations crops were introduced in different states at various periods during the British rule in India.

The plantations industry has existed in and around forests since time immemorial and in this paper we shall explore the linkage between the various environmental aspects of the plantations industry. The objective of the paper is to know the environmental impacts of plantations. For this purpose we shall examine the various laws applicable to the plantations industry and examine it under the prism of Environmental laws. First we shall discuss briefly the linkage of plantations to environmental laws. Then we shall explore and establish links individually between the environmental laws like Water & Air pollution laws, Forest laws, Biodiversity Act etc. and plantations.

## 2. Plantations and Linkage to Environmental laws

Plantations have a close nexus to the Environment. Their beginnings were from the forests and these plantations like the coffee, tea estates still continue their existence in and around forests. To examine whether there exists a linkage between the various existing environmental laws and the plantations industry is a question we shall examine through the paper. For this purpose we shall establish a linkage between plantations and each and every aspect of the Environmental laws. For the purpose of plantations, irrigation is inevitable and currently plantations exist in and around human habitations. The negative impacts on the water sources will also affect the human life. Hence, we shall first look at the co-relation between plantations and Water and Air pollution laws.

### 2.1 Plantations in Relation to Water & Air Pollution Laws

Large scale plantations use huge amounts of water for irrigation purposes

3 Indian Tea Association, available at < http://www.indiatea.org/history_of_indian_tea.php >, last accessed on 28/12/2015.

4 Nair Prabhakaran, Agronomy and Economy of Black Pepper and Cardamom, Elsevier 2011, p.111.

and this affects the ground water table in the region. The Karnataka State government has banned Eucalyptus and Acacia plantations in certain regions after studies showed that depleting groundwater in such regions were affecting the lives of many.[5] Plantation crops are prone to diseases and pests. The pest Hemeleiavastarix causes Coffee Leaf Rust disease and the destruction caused by this was so severe that Southern Indian planters were forced to shift to tea.[6] The planters use toxic pesticides to minimize their losses and maximize their profits. These pesticides when used over a period of time have shown their ill-effects on humans also. For instance, Endosulfan which is a highly toxic pesticide was used extensively in plantations of Kasargod district in Kerala that led to pollution of the ground water, thereby entering human system. The ill effects were immense, leading to permanent deformities in the residents.[7] The Supreme Court taking into consideration of the aforementioned effects banned the use of Endosulfan as a pesticide. [8]

Tea Board of India to mitigate such effects implemented the Plant Protection Code in 2014 and laid guidelines regarding the residue of pesticides and chemicals in tea[9]. The Coffee Act, Spice Board Act etc. fails to provide safeguards for protection of environment. But, Coffee Research Institute -wing of the Coffee Board, in its coffee cultivation guide has provided guidelines to avoid water pollution due to discharge of effluents and methods to preserve the soil.[10] The effluents released during the

5 Ecological studies on eucalyptus, available at <aranya.gov.in/downloads/FR-6%20ECOLOGICAL-STUDIES.docx>last accessed on 28/12/2015.

6 *Supra* n. 2.

7 Dr. Prabhakaran, Report on Development of Kasargod District, Government of Kerala 2012.

8 *Democratic Youth Federation of India* v *Union of India,* Writ Petition (Civil) No. 213 of 2011 (Order of 13.05.2011).

9 Plant Protection Code, Tea Board of India 2014 available at <http://www.teaboard.gov.in/pdf/notice/plant_protection_code.pdf >, last accessed on 28/12/2015.

10 Central Coffee Research Institute, Coffee Cultivation Guide for South –West Monsoon Area Growers in India, 2008.

treatment of plantation crops like rubber should be treated before being discharged to restrict water pollution and air pollution. These discharges if not regulated and treated, will cause pollution of the groundwater. MoEF has brought out rules for the coffee[11] and rubber industry[12] under the Environment Protection Rules, 1986 so as to regulate the effluent discharge. Possible negative impacts of plantations on air and water is clear and this shows an inter connection between the plantations industry and the air and water pollution laws.

Having described some of the negative effects, it would be important to mention that ground water conservation is possible in plantations. For instance, proper watershed management on plantation lands with designated areas to concentrate the rain water in pits would certainly help in restoring the ground water. Watershed developments in the plantations like rubber will lead to high percolation of the ground water, avoiding run off rain water.[13] This arrangement in the plantations will also help to retain the soil from eroding. Watershed development is an effective tool to combat the change in climate and low rainfall thus, should be promoted for plantations. The water and air pollution due to plantations may have a negative impact on the various species of animals in the nearby forests and sanctuaries. Hence, it is necessary to examine the legal framework relating to wildlife in relation to plantations.

### 2.2 Plantations in relation to Wildlife Protection Act, 1972

Plantations are often located on the borders of protected areas like national parks, sanctuaries and biosphere reserves including wildlife corridors and habitat. Such a close proximity of plantation to wildlife may cause disturbance to the movement and welfare of wildlife. The Kasturirangan

11 G.S.R. 579(E), available at <http://www.moef.nic.in/legis/ep/579E.pdf> last accessed on 28/12/2015.

12 G.S.R. 221(E), 2011 available at <http://www.moef.nic.in/downloads/rules-and-regulations/221e.pdf> last accessed on 28/12/2015.

13 Satheesh R, Experiences of NABARD Watershed Project Implementation in Palakkad District, Integrated Rural Technology Centre, Palakkad.

Committee[14] report and Madhav Gadgil report[15] highlighted the sensitive locations of the plantations in Western Ghats and the close proximity of the plantations in Western Ghats to biodiversity and numerous species of animals.

In the pre-independence period plantations in South India existed in the unexplored forests. The first planters used the elephant tracks to trek deep into these jungles and to lay down roads. Soon these same beasts started creating a nuisance for the planters because they would cause damage to life and property. Earlier the planters would shoot the animals which were causing damage to their plantations but, Wildlife Protection Act banned hunting.[16] This restriction on plantations owners has increased human animal conflict because of the losses they suffer. Usage of electric fences around plantations to keep elephants at bay is a common practice which may lead to death of the animals. Alternative measures should be taken like using alarm system to inform planters about the elephants nearby their plantations. Effective communication system by establishing proper informant network with help of forest dwellers might help in reducing the human-animal conflict since, location of elephants are known beforehand and measures can be taken accordingly. [17]

On the other hand in many plantations, humans and animals are able to co-exist peacefully. In tea estates of Assam, parts of estates are cleared so that wildlife can use it as a corridor and losses to plantations are restricted. Plantations of coffee and cardamom are done under canopy of trees and this agroforestry in the estates provide home to variety of animals.

14 Report of the High Level Working Group on Western Ghats, MoEF, 2013 available at <http://www.indiaenvironmentportal.org.in/files/file/HLWG-Report-Part-1_0.pdf >last accessed on 28/12/2015.

15 Report of the Western Ghats Ecology Expert Panel, MoEF, 2011 available at <http://www.moef.nic.in/downloads/public-information/wg-23052012.pdf> last accessed on 28/12/2015.

16 S. 9, Wildlife Protection Act, 1972.

17 Fernando Prithviraj *et al*, Review of Human-Elephant Conflict Mitigation Measures Practiced in South Asia, WWF 2008.

Plantations located in the Talakaveri sanctuary houses rare species like Malabar giant squirrel, palm civet, barking deer, etc.[18] Animals use the plantations as shelter because of the availability of food and low predators.[19] Economic value is also attached to these plantations & biodiversity as per The Economics of Ecosystems and Biodiversity report (TEEB).[20] Hence it is necessary to examine the TEEB – MoEF collaboration and their report on the impacts of loss of biodiversity in the forests of India.

The proximity of estates to forests and bio-diversity has attracted tourists. Increasing eco-tourism projects in plantations abutting protected areas is a cause of concern and needs to be monitored so that such activities are not hindering and damaging the environment. Hence it is also necessary to examine the Tourism Policies and legislations existing in various states.

### 2.2.1 Plantations and Tourism

Tourism has been permitted in some percent of plantation property and this percent varies from state to state. For instance, Kerala under amendment in 2005 to Kerala Land Reforms Act, 1963 permitted 5% of plantation land to be used for activities like tourism, cultivation of vegetables, vanilla, herbs, and cashew plantations. [21]

The permitted tourism activities in such plantation have to be regulated because of the close proximity of the plantations to wildlife and forests. Only Kerala and Karnataka have a legal framework to safeguard the environment from tourism activities in plantations. Under the Kerala Tourism (Conservation & Preservation of Areas) Act, 2005 the government may notify areas as Special Tourism zone.[22] In such zones, government lays

18 Plantations and biodiversity available at <http://ces.iisc.ernet.in/biodiversity/documents/sanpeack.htm> last accessed on 28/12/2015.

19 Carrere Ricardo and Lohmann Larry, Pulping the South: Industrial Tree Plantations and the World Paper Economy, Zed Books Ltd 1996, p. 73.

20 Mazza L *et al,* Nature and its role in transition to a green economy, TEEB2012.

21 S. 81(4), Kerala Land Reforms Act, 1963.

22 S. 3, Kerala Tourism (Conservation & Preservation of Areas) Act, 2005.

down guidelines regarding waste water disposal, preservation of eco zones, guidelines for establishing infrastructure and prohibition on polluting industries. Any construction activity in Special Tourism Zones areas have to be in accordance with such guidelines. Karnataka also recently enacted the Karnataka Tourism Trade (Facilitation & Regulation) Act, 2015 to regulate tourism in the state.

Such laws may prove as a safeguard from unregulated tourism activities which may cause a disturbance to the ecology of the wildlife surrounding plantations. Plantations attract tourism from over the world because of the surrounding forests and the biodiversity it houses, around and in them. Hence, it is necessary to examine the forest policies and laws to establish a link with plantations industry.

### 2.3 Plantations and Ecological Perspective on Forests

As of 2010 India stands at the 10th position in terms of forest area in the world[23] and the total forest cover of the country is 69.79 mha or 21.23% of geographical area of the country[24]. Historical records show that the first cultivation of coffee was undertaken by the British in the pre-independence period by exploring the forests and clearing such spots suitable to them. Huge forest lands were converted to monoculture plantation agriculture given the high revenue it generates. The government realizing the damage to environment and forests enacted the Forest Conservation Act, 1980 and put a restriction on diversion of forest land for non-forest purpose and plantations were termed as non-forest purpose. [25]

#### 2.3.1 Ambiguity on status of plantation lands as forests

In the pre-independence period obtaining forest land for plantations was an easy process. RH Elliot, a planter in his book Gold, Sport and Coffee Planting in Mysore wrote that anyone who desired a given tract of forest land for coffee planting sent an application to the government for it. An

23 Global Forest Resources Assessment, FAO 2010.

24 State of Forest Report, FSI 2013.

25 S. 2, Forest Conservation Act, 1980.

inquiry was then made and if no objection existed to the land being made over to the intending settler, a patta was awarded, free of any charge for the land.[26] But, as stated earlier the government stopped diversion of forest land for plantation purposes in 1980 and thereafter few states started expropriating plantations terming them as forests or private forests.

As per Oxford dictionary, forest has been defined as large area covered chiefly with trees and undergrowth. The Supreme Court on 12/12/1996[27], clarified that forest must be understood according to its dictionary meaning. This description covers all statutorily recognized forests, whether designated as reserved, protected or otherwise for the purpose of section 2(1) of the Forest conservation Act. The term 'forest land', occurring in Section 2, will not only include forest as understood in the dictionary sense, but also any area recorded as 'forest' in the Government record irrespective of the ownership. [28]

Political stance of each state on the status of plantations as forests is varied. The government of each state has difference of opinion relating to the status of plantations. Kerala has exempted plantations from the purview of definition of private forests[29] but, Kerala government has expropriated land by terming them as ecologically fragile under the Kerala Forest (Vesting and Management of Ecologically Fragile Lands) Act, 2003 which we shall be discussing later on. On the other hand, state of Tamil Nadu has notified huge swaths of rubber plantations as private forests under Tamil Nadu Preservation of Private Forest Act, 1949. Certain states however have realized the importance of plantations to the environment and revenue, and have stated clearly that they are not forests. For instance, Karnataka government has come out with a political statement that plantations are not deemed forests. [30]

26 *Supra* n.2, p. 28.

27 *Godavarman Thirumalpad* v. *Union of India,* WP (Civil) 202/1995.

28 Karnataka Forest Department, available at <http://www.aranya.gov.in/Static%20Pages/ForestDefinition.aspx> last accessed on 28/12/2015.

29 S. 2(47), Kerala Land Reforms Act, 1963.

30 *Supra* n. 28.

This varied approach by state governments towards plantations have led to litigations across the nation. This shows the need for a streamlined approach by the center to solve the many problems affecting this industry.

### 2.3.2 Impacts of plantations on forest

The records are proof to the fact that in certain areas, plantations have encroached upon the forests.[31] The expanding plantations are not only affecting the forest but, also the biodiversity and the surrounding environment. The monoculture plantations when replacing forest cover will also eliminate the diverse wildlife it houses. [32]

Aside from the environmental impacts, plantations also offer ecological services as can be seen from the presence of trees in the shade loving estates of coffee and cardamom. The canopies of trees provide as food and shelter for certain species of animals. For instance various species of bats use coffee plantations with native shade trees as shelter.[33] Smaller animals use it for protection against predators as habitats. Hence, removing such plantations will cause an impact on the environment and not regulating them may also lead to environmental degradation.

### 2.3.3 Plantations and linkage to Agroforestry

Plantations with shade trees may be considered as agroforestry hence, it is important to analyze the Agroforestry Policy. India was the first nation to adopt an Agroforestry Policy in 2014 but, unfortunately it fails to address issues related to an important industry like plantations. Plantation owners might cut the trees in their land attracting various Tree Preservation Acts and Timber Transit Rules but, such acts have huge variations amongst different states. For instance Tamil Nadu Hill Areas (Preservation of Trees) Act, 1955 states that permission of appointed committee is required for

31 Kumar Pramod, Ravikumar P *et al,* Assessing the historical forest Encroachment of Kodagu region using remote sensing and GIS, National Remote Sensing Centre ISRO.

32 Emerging Prospects on Forest Biodiversity, UNEP Yearbook 2011.

33 Sankaran Mahesh *et al,* Landscape scale habitat suitability modeling of bats in the Western Ghats of India: Bats like something in their tea, Biological Conservation, Vol 191, pp. 529-536, 2015.

felling trees in own estate. On the other hand in Karnataka, permission of chairman is required for felling trees even for domestic use as fuel.[34] The aforementioned wide variations and impacts, both positive and negative, highlight the need for uniform legislation regarding plantations. The agroforestry policy was enacted to highlight the issue of climate change. This problem faced worldwide will hit the plantations and their production. Moreover because of the close linkage it has to forests and wildlife, it may also impact twofold on our environment. Hence it is necessary to understand the issues the industry faces due to climate change and the measures taken to fight it.

### 2.4 Impacts of Climate Change on Plantations

Climate Change is a world-wide problem affecting the human race at large. The rising temperatures apart from increasing the sea level will also affect the agriculture sector at large. This increase in the temperature is a major threat to the plantations industry and it has already shown its ill-effects on plantations. Loss to the industry will be in the form of reduction in the production output. The government will also be affected because revenue will be hit and it also provides employment to many directly and indirectly. Lay-offs to mitigate the losses will increase the burden on the government.

The measures taken by the industry to combat the effects of climate change may also take its toll on the environment. The increase in the temperature attracts higher number of pests and to maintain the production, planters might use more pesticides.[35] The higher usage of pesticides will affect the environment and the surrounding biodiversity. Taking into consideration the effects increasing temperature might have, research institutions successfully developed heat tolerant species of various plantations. Such crops adapt to the increase in the temperature.[36] The reaction of pests and

34 S. 3, Tamil Nadu Hill Areas (Preservation of Trees) Act, 1955.

35 Araya Flores, Effects on resilience in Indian cotton production due to climate change, Centre for Trans disciplinary Environmental Research 2007.

36 Pathak H. *et al,* Climate Change Impact, Adaptation and Mitigation in Agriculture: Methodology for Assessment and Application, Indian Agricultural Research Institute 2012.

diseases to these newly developed species of plantations can only be determined when field testing is done. The effect on the ground water level and soil also needs to be studied. Hence, field testing is inevitable but, the current legal framework is silent on the provisions of field testing of genetically modified crops, though recently certain states have allowed field testing of a few GM crops.

Different species of plantations are exported and traded, commercial utilization of the same is also done at a large scale. The international standards regarding residue of pesticides is getting stricter by the day. To reduce the usage of the pesticides and to preserve the biodiversity and environment, plantations worldwide have started sustainable agriculture and adopted various certifications regarding the same. Hence, to understand the legalities related to export of bio resources it is necessary to look at the legal framework of Biodiversity Act and furthermore look into the various certifications applicable to plantations and its connection to environmental laws.

### 2.5 Plantations and Connection to Biodiversity Act, 2002

Definition of biological resources under the Biodiversity Act, 2002 include plantation crops unless they are value added products.[37] Value added products are products which may contain portions or extracts of plants and animals in unrecognizable and physically inseparable form.[38] When plantations are used in commercial utilization like alcohol or medicine then, they become value added products. Value added products are given exemption under the Act, but the recent guidelines issued under the Biodiversity Act, 2002 charge royalty on commercial utilization of plantation commodities. [39]

37 S. 2 (c), Biodiversity Act, 2002.

38 S. 2(p), Biodiversity Act, 2002.

39 Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, MoEF 2014.

To facilitate easier export, certain spices were included in the Normally Traded Commodities (NTC) list under the notification of MoEF in 2009 and these are exempted from the Act.[40] However according to the MoEF clarification[41] of 2010 if they are used for research or industrial purposes then the Act will be applicable.

These exported plantations have to adhere to the international markets specification on residues and pesticides hence, plantations in India are slowly shifting to organic farming and sustainable agriculture. The positive impact it will have on the environment is enormous and it is necessary to examine these certifications applicable to the industry and analyze its effects.

### 2.6 Certifications in the Plantations industry

The recent demand in the international and domestic markets of plantations like tea, coffee has shown that consumers prefer environment friendly products and certain international markets are ready to shell out more for the same.[42] Various certification schemes for environment-friendly plantations, practicing sustainable agriculture are present, internationally and nationally. Certifications like Bird Friendly certification which is certified by Smithsonian Migratory Bird Centre and Rainforest Alliance certifications are based on the principles of Sustainable Agricultural Network. Such certifications lay down guidelines for the plantations that protects and increases the biodiversity.

There are certifications for specific plantation commodities like coffee - UTZ, and Common Code for Coffee Community. Indian certification for tea like - Trustea is also present which is modeled on international certifications like Rainforest Alliance and promotes sustainable

40 S. 40, Biodiversity Act, 2002.

41 MoEF clarification on NTC available at <http://www.moef.nic.in/downloads/public-information/br-notified.pdf>.

42 Pay Ellen, Market for Organic and Fair-Trade Coffee, Food and Agriculture Organization of the UN 2009.

agricultural.[43] Being an agroforestry based cultivation- Forest Stewardship Council Certification and VRIKSH certification by Export Promotion Council for Handicrafts Standards need to be explored in case of utilization of timber of shade trees.

Private companies like Nescafe have taken recourse to Fairtrade certification in markets like El Salvador and Ethiopia. They also have their own certification- Nespresso AAA certification modeled on sustainable agriculture. Demand for plantation crops from certified farms is on the rise. Though the major share is in the international market but, slowly the demand is rising in growing economies like India, China etc.[44] Plantation owners can take the help of governments, local NGOs, donors and also go in for group certification to share costs & profits. It is necessary to examine the evolution of laws regarding the plantation laborers to understand the current issues faced by the industry and how certifications might impact them.

### 2.6.1 Certifications a solution for labor issues in plantations

The certification like Fair-trade is a social certification program declaring that products from such farms have the requisite conditions for the laborers. According to the Fairtrade records of 2013- Indian farmers and workers received an additional 2.4 million Euros as a Fairtrade premium above what they would otherwise have received in the market.[45] The premium is collected in a common fund for the welfare of the laborers.

Such initiatives may ensure that the laborers are remunerated equally through the premium received. Certain case studies done in Coffee plantations in Kerala show the inclinations of rich farmers to shift to organic farming on the other hand small time farmers are reluctant to

43 Trustea, available at <http://www.trustea.org/> last accessed on 28/12/2015.

44 Trends in the trade of certified coffee, International Trade Centre 2011.

45 Fair trade statistics available at <http://www.fairtrade.net/single-view+M5316f2e262e.html> last accessed on 28/12/2015.

switch because of high input costs.[46] The costs may be shared by the plantations owners by going for group certifications. The government and NGOs can also contribute to the cause. Laborers employed in the plantations have been primarily from the nearby forests. Hence it is necessary to understand the positive impacts the industry is striving to achieve for the forest dwellers and its indirect effect on environment.

### 2.7 Plantations in relation to Forest Rights Act, 2006

Plantations have displaced many forest dwellers by encroaching and expanding into the nearby forests. Replacing monoculture plantations instead of forests destroy habitat and source of livelihood for the forest dwellers. If there are instances like these, then it is necessary that the rights of the affected forest dwellers are settled under the provisions of the Forest Rights Act, 2006.

#### 2.7.1 Plantations & Impact on Forest Dwellers and Environment

On the other hand, plantation industry has been striving to do its best for the forest dwellers. Plantation Boards and governments have come up with and implemented various schemes to help forest dwellers around the plantations by providing them with employment and resources to shift to commercial cultivation of plantation crops. Government of Tripura and Rubber Board has successfully implemented rubber plantation schemes in Tripura, wherein rubber plantations are maintained by Rubber Boards for certain years and then transferred to tribal populations. Moreover resources like pesticides, equipment are provided at a subsidized rate. The State government and Rubber Board share 80% of the expenditure and the forest dwellers pay the remaining 20% with the labor provided.[47] There is an indirect positive effect of these rubber schemes on the Environment also.

46 Pawel Prokop and Singh RB, Environmental Geography of South Asia, Springer 2015, pp. 235 - 240.

47 Rubber Board Schemes available at <http://rubberboard.org.in/acts/subsidy_schemes.pdf> last accessed on 28/12/2015, last accessed on 28/12/2015.

The forest dwellers practice Jhum (slash & burn) cultivation which is not eco-friendly and contributes to air pollution and climate change. Shifting from such traditional agriculture to rubber plantation is not only profitable to the government and the forest dwellers but also leaving its positive impact on the environment by reducing climate change. [48]

## 2.8 Plantations and Linkage to Land Laws

During the pre-independence period, ownership of huge tracts of land was concentrated in the hands of few individuals, families and firms. The state governments for equal distribution of land and as a measure of social welfare promulgated Land Reforms Acts and Land Ceiling Acts. Wherein a maximum threshold was set and no one was permitted from owning land more than the specified limit but, plantations were given exemptions from such provisions.For instance, in Kerala Land Reforms Act, 1963, plantations are given exemption from this Act and they could own more than the specified limit[49]. Recently states have passed legislations such as the Kerala Ecologically Fragile Lands (Vesting and Assignment) Act, 2003, Tamil Nadu Private Forests (Assumption of Management) Act, 1961 wherein states have expropriated private plantation lands. Areas adjacent to the reserved forests are expropriated under the aforementioned acts without compensation, terming them as Ecologically Fragile lands and private forests respectively.

Kerala Ecologically Fragile Lands (Vesting and Assignment) Act, 2003 excludes tea, coffee, rubber, pepper, cardamom, coconut, arecanut and cashew from the purview of definition of forest[50]. The definition of Ecologically Fragile Lands (EFL) can be a forest land or any land of ecological importance[51]. Hence, essentially plantations should not be included as forests or EFL but, the state administration has acquired plantations terming them as ecologically fragile. Even the Kerala High

48 *Ibid.*

49 S. 81 Kerala Land Reforms Act, 1963.

50 S. 2(c) Kerala Ecologically Fragile Lands (Vesting and Assignment) Act, 2003.

51 *Ibid* S. 2 (b) (i).

Court in *Jaise Jacob* v. *State of Kerala*[52] , noted that EFL definition relates to forest but, Kerala Land Reforms Act, 1963 exempts plantations from purview of private forest and ruled in favor of the plantations. The litigations pending in various courts are causing losses to the plantations industry. The judiciary, noting the arbitrary decision of the government in *Dr. PV Majeed* v. *State of Kerala* [53] highlighted the losses caused to the industry because of the lack in proper administration.

Plantation companies taking advantage of the exemption provided under the Ceiling Acts have acquired huge areas of land. It has been noted that plantations in Kerala, Tamil Nadu and Assam are holding much more lands than in the records.[54] Moreover if the government is intending to acquire plantation lands, then the provisions under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 have to be followed and proper compensation and resettlement has to be done. The losses caused to the plantations industry is an issue since it brings in huge sources of revenue for the government in form of exports. Since they form a substantial portion of the exports it is necessary to look at the policies relating to trade, to examine their relevance to the plantations industry.

### 2.9 Plantations in relation to Trade & Commerce laws

Plantation is a form of Agriculture and the same is included in State List as Entry 14. However plantations bring in high revenue to the government and being a source of employment to many; directly and indirectly, it is considered an industry of public importance. Union has powers to make laws on an industry of public importance under Entry 52 of Union List. In light of the aforementioned statement, the Union has made laws like Rubber Act, Tea Act, Coffee Act etc. Rubber, tea & coffee bring huge revenue in forms of exports to the government hence the Ministry of

52 WP (C) No. 3912 of 2010.

53 WP (C) No. 35719 of 2009.

54 Rajagopal, Grownup Understanding of Land Issues, Mainstream, Volume L, No 40, September 22, 2012.

Commerce has included them in their mandate and are responsible for answering questions in parliament. Recently the government allowed for 100% FDI for tea, coffee, rubber, palm oil, olive oil via automatic rote.[55] Palm oil and olive oil is not included as plantations in the exemptions under Land Reforms Act and this is a flaw to be rectified for maximum utilization of the FDI exemption.

### 3. Safeguards for Environment

Even if at a later stage, if the government includes palm oil and decides to give them exemption from land ceiling, the government should keep the Indonesian tragedy in mind and put proper safeguards for protection of the environment. The international demand for palm oil is huge since it is used in a number of products. With the increasing demand from the west for palm oil, forest lands were illegally burned on pretext of forest fires for acquiring land for palm oil plantations in Indonesia. Such fires not only had effects on forest cover, air pollution, wildlife and impacts on biodiversity but, the country might face litigation for trans-boundary pollution.[56] Hence profits and revenue should not be a blinding factor for our government to destroy the environment for profits in trade relating to plantations.

### 4. Conclusion & Recommendations

- National Agro Forestry Policy, 2014 of India failed to highlight important points regarding plantations industry, which is an important agro forestry cultivation.
- The tourism policy of India and various states, fail to recognize the need to regulate eco-tourism in plantations and to protect the environment. Taking the example of Kerala and Karnataka, other states should enact tourism laws and eco-tourism in plantations should be regulated strictly.

55 Ministry of Commerce and Industry, available at <http://dipp.nic.in/English/policies/fdi_review_10112015.pdf > last accessed on 28/12/2015.

56 Pye Olive and Bhattacharya Jayathi, The Palm Oil Controversy in Southeast Asia: A Transnational Perspective, ISEAS Publishing 2013.

- There is a lacuna in the policy framework relating to the field testing of genetically modified crops, which is an increasing phenomenon in the plantations industry.
- GM crops are banned under organic certifications in India[57] hence, it is necessary for the government to relook into the policy regarding the same.
- Organic farming and biodiversity friendly plantations should be promoted and incentivized by the government which will be a boon to the environment and the industry.
- Certifications in the plantations industry may help to solve current issues the industry faces and will also provide a boost to the environment. The government and NGO's should economically assist the planters and spread awareness about the benefits they might receive in terms of added premium in the international market etc.

The impact on the environment by plantations industry is tremendous both in a positive and negative way. Plantations industry is a major contributor to the economy and employment and closing them down is impractical. The government by expropriating plantations is turning a blind eye to the positive aspects the industry has on the environment.

The plantations industry is already in an economic turmoil hence, the government should encourage and financially assist the planters to shift to environment friendly practices. Financial incentives by ways of tax exemptions for plantations going for certifications should be implemented. The current policies regarding plantations fail to address important issues regarding environment. The litigation in various courts is proof to the fact that a national policy regarding plantations is the need of the hour. Hence there should be national level policy for plantations, addressing concerns like status of plantations land as forests, proper safeguards to protect the

57 Organic India, available at <http://www.organicindia.com/content_page.php?id=190 &&pagetype= ORGANIC%20AND%20QUALITY%20CERTIFICATION>last accessed on 28/12/2015.

# CASE COMMENT

# THE CLIMATE HAS CHANGED AND THERE IS NOWHERE TO GO!

## AN APPRAISAL OF *IOANE TEITIOTA* v. *THE CHIEF EXECUTIVE OF MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT, NEW ZEALAND*

**[2015] NZSC 107**

*Manjeri Subin Sunder Raj**

This case probably is the first in the world that had an opportunity to deal with issues related to climate change refugees, with the decision being taken by the highest court of law in a country. While we live in a world where the effects of climate change can be perceived, in every nook and corner; felt across borders; it is quite disheartening to note that few steps have been successful in addressing the issue.

### 1. Background of the Case:

Mr. Ioane Teitiota and his wife, originally from Kiribati, moved to New Zealand in 2007. They subsequently had three children, who were born in New Zealand. However the children were not entitled to New Zealand citizenship under the Citizenship Act 1977[1]. Though their visas expired in October 2010, they continued to stay in New Zealand. To avoid

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deportation, Mr. Teitiota applied for refugee status under the Immigration Act 2009[2]. This legislation incorporates into New Zealand domestic law, the 1951 Convention Relating to the Status of Refugees.

The claim put forward by the applicant before the Refugee and Protection Officer was that he was entitled to be recognized as a refugee "on the basis of changes to his environment in Kiribati caused by sea-level-rise associated with climate change."[3] The same was declined and this decision was upheld by the Immigration and Protection Tribunal[4].

Mr. Teitiota subsequently sought leave from the High Court to appeal the Tribunal's decision on questions of law under section 245 of the Immigration Act 2009[5]. His application for leave to appeal to the High Court was declined by the High Court[6]. He then approached the Court of Appeal. This was also declined[7]. The applicant then approached the Supreme Court of New Zealand seeking relief.

## 2. Issue in Question:

The main issue revolved on the point whether the applicant can be treated

1 Under S. 6 of the Citizenship Act 1977, an individual will only be a New Zealand citizen by birth if under S. 6(1)(a) the person was born in New Zealand on or after 1 January 1949 and before 1 January 2006; or if under S. 6(1)(b) the person was born in New Zealand on or after 1 January 2006 and at least one of the person's parents was a New Zealand citizen or entitled in terms of the Act to reside in New Zealand indefinitely. Neither section applies in this case as The Citizenship Amendment Act 2005 changed S. 6(1) of the Citizenship Act and made it mandatory that at the time of the person's birth, at least one of the person's parents was—(i) a New Zealand citizen; or (ii) entitled in terms of the Immigration Act 2009 to be in New Zealand indefinitely, or entitled to reside indefinitely in the Cook Islands, Niue, or Tokelau.

2 Part 5 of the same deals with Refugee and protection status determinations.

3 AF (Kiribati) [2013] NZIPT 800413, para 2.

4 *Ibid.*

5 S. 245- Appeal to High Court on point of law by leave.

6 [2013] NZHC 3125.

7 [2014] NZCA 173.

as a 'refugee' under the Refugee Convention and be granted asylum. Being the first of its kind, where climate change was argued to be the reason for seeking refugee status, the court had to delve into the law as it stood and come up with a reasoned decision. The Supreme Court was asked to look into six points of law that were put forth by the appellant which he argued, if allowed, would make it possible for him to appeal the original decision of the Immigration and Protection Tribunal.

## 3. The Court's Take:

The Supreme Court of New Zealand had to decide whether the appellant can be allowed to appeal against the original decision taken by the Immigration and Protection Tribunal; wherein the said appellant, not being classified as a climate refugee and thereby not been treated as a refugee under the Refugee Convention, was asked to leave the country as his visa had expired and he and his family were staying illegally. The appellant was also not able to bring himself and his family under the New Zealand's protected person jurisdiction on the basis that his homeland was suffering the effects of climate change.

The Court while looking into the reasons why the application was rejected in the first place, by the Immigration and Protection Tribunal, and the subsequent dismissal by higher courts rejecting the appellant's application to appeal against the decision of the Immigration and Protection Tribunal noticed that the six points of law that had been raised by the aggrieved party did not deserve to be looked into. The same six points were used before the High Court[8] and the Court of Appeal[9], albeit some reformulation in the second instance.

The Supreme Court had to look into the issue as regards a court's jurisdiction to grant leave in terms of the Immigration Act and the Supreme Court Act of 2003. Relying on the decision given in *Guo* v. *Minister of Immigration* [10], the Supreme Court opined that there is nothing in S. 245 of

8 *Supra* n. 6.

9 *Supra* n. 7.

the Immigration Act which specifically restricted the jurisdiction of the Supreme Court in respect of a decision of the Court of Appeal under the same section. Thereby it was held[11] that S. 245 did not fall within the purview of S. 7 (a) of the Supreme Court Act[12].

Moving forward on the assumption that the court had jurisdiction to entertain the application the Court proceeded to answer the question as to whether leave to appeal should be granted.

The Supreme Court had to look into the issue that was raised by the appellant as to 'whether New Zealand's refugee law extends protection to a person who faces environmental displacement and the operation of a number of International Conventions, most importantly relating to the care of his three children under the age of six born in New Zealand'.

The Court also having to consider as to whether "an environmental refugee" can be treated as a refugee under the Refugee Convention, came to a decision that while the island of Kiribati does indeed face serious challenges owing to climate change, the appellant does not face 'serious harm' if he goes back to the country. The Court also noted the fact that there was nothing on record which showed that the government of Kiribati was doing nothing to address the issue and was failing to take steps in protecting its citizens from the effects of climate change. Placing reliance on these observations, the court opined that there would indeed be no miscarriage of justice in case the leave to appeal is not granted and rejected the plea.

10 [2015] NZSC 76.

11 *Id.* at para 18.

12 S. 7 - Appeals against decisions of Court of Appeal in civil proceedings:The Supreme Court can hear and determine an appeal by a party to a civil proceeding in the Court of Appeal against any decision made in the proceeding, unless—

(a) an enactment other than this Act makes provision to the effect that there is no right of appeal against the decision; or

(b) the decision is a refusal to give leave or special leave to appeal to the Court of Appeal.

## 4. Critical Take on the Decision:

While it can seem to be a harsh decision from various points, the fact is that the law present does not, in any way, allow recognition of refugee status owing to climate change. It is however heart-whelming to note that the court, understanding the need for a change, reiterated the fact that the said decision does not, in any sense, mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction. The Court was also quick to admit that this decision should not be taken as ruling out that possibility in an appropriate case .[13]

13 [2015] NZSC 107, at para. 13.

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# FORM IV

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**I, Dr. R Venkata Rao, on behalf of National Law School of India University, Bangalore, hereby declare that the particulars given above are true to the best of my knowledge and belief.**

**For National Law School of India University**
**Sd/-**
**Prof. (Dr.) R Venkata Rao**