CEERA

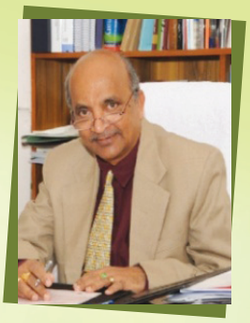
SEP 2014 VOL VI ISSUE 1

MARCH OF THE ENVIRONMENTAL LAW

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

ISSN NO. 0974-7014

From The Vice-Chancellor's Desk



Prof. (Dr.) R Venkata Rao
Professor of Law and Vice-Chancellor

'Beware of the ides of March' – that is what Shakespeare's Julius Caesar warns us.

Be aware of the heights of March, this is what CEERA's March of the Environmental Law 2014 says. The future wars will be fought for water and not for land. The popular adage goes, "Save that drop of water or be doomed to parching of everything including your throats". The current issue of the March of the Environmental Law has focused on the "current shock" of ad hocism in framing of policies, I am sure this "incessant March of the Environmental Law" continues to promote the cause of Civic Environmentalism at its best. I congratulate the "Environment" of CEERA for being the most congenial in its glorious "March".

Between Us

Prof. M. K. Ramesh
Professor of Law, NLSIU

CEERA March of the Environmental Law 2014 presents a delightful blend of the reportage about the work and happenings at the research outfit and a window to information and its analysis of the developments in the field of natural resources, environmental law and governance. Reflections on water policy, law and governance (including groundwater management) raise serious and pertinent questions about the need for and reform in policy and law making in India. Performance audit of international conservation bodies, foreseeing and displaying remarkable foresight by adding depth and dimension to the future climate negotiations, attempted in two well researched contributions, lend sharpness, focus and gravitas to the issue on hand. Information about legislative developments and precedential law, given succinctly, is bound to make one crave for more. "March of the Environmental Law", has truly arrived. No praise is too high for the brains behind sculpting it: Prof Sairam Bhat, Mr. Manjeri Subin Sunder Raj and Mr. Chiradeep Basak. May their tribe increase. Your fellow traveller in this exciting environmental law journal.

Inside This Issue

From The Co-ordinator, CEERA

Dr. Sairam Bhat
Associate Professor of Law, NLSIU

At the outset, we are indeed grateful to our patrons, viz, our Honourable Vice Chancellor, Prof (Dr.) R Venkata Rao for his perseverance and support, and Prof M K Ramesh for his premiership and guidance.

At CEERA, we are happy to bring out "March of the Environmental Law" for the year 2014. This publication is in continuation of our endeavour at the environmental law outfit at NLSIU in providing opportunity towards research and publication. The current issue carries with it short articles, legislative updates, green decisions and a book review on green matters. The article on water policy highlights critical issues in the framing and implementation of national water policies. Similarly the article on the role of CITES analyses the country specific implementation and reporting under the CITES regime. Further there are articles on the interface between environmental law and geo engineering and on the common law doctrine for the conservation of groundwater.

I thank my core team comprising of Subin and Chiradeep for coordinating and bringing out this issue.

Centre For Environmental Law Education, Research and Advocacy
Nagarbhavi, Bangalore - 560 242. Ph: 080 - 23160527
E-Mail: ceera@nls.ac.in | Website: www.nlsenlaw.org

GREEN ARTICLES

WATER POLICY AND GOVERNANCE IN INDIA: A REVIEW

Dr. Sairam Bhat, Associate Professor of Law, NLSIU

Competition among agriculture, industry and cities for limited water supplies is already constraining development efforts in India. As populations expand and economies grow, the competition for limited supplies is most likely to intensify, resulting in potential conflict situation among water users in days to come. Despite shortages of water, its misuse is widespread, so is its contamination, every where the mismanagement of water resources is evident.

Water law encompasses laws governing rivers, groundwater, tanks, irrigation, riparian rights, and water harvesting structures such as dams, and the use and accessibility to such structures as well as the quality of the water itself. If the natural habitat and biodiversity are sought to be conserved, the law has to monitor, control and regulate the use and abuse of water and air in order to maintain its purity.

While the Union has exclusive powers with regard to inter-state rivers and river valleys (List I Entry 56), States have powers on water, that is to say water supplies, irrigation and canals, drainage and embankments, water storage and waterpower subject to entry 56 of List I' (List II Entry 17). The reason behind the latter position is that there is diversity amidst states in the matters of climatic and geographic conditions, rainfall, topography, crop pattern, extent of groundwater resource and irrigation methods which require regional policy making and implementation. But discomfort arises with states' inactions and retrograde actions.[1]

At the national level, the water allocation is governed by a plethora of legislations, Rules, and Policies. One of the most important legislations, which acts as a bulwark towards water pollution, happens to be the Water (Prevention and Control of Pollution) Act, 1974. The Act itself is an outcome of the deliberations at Stockholm Conference, 1972 and the commitments of India therein. The Act, as the name suggests, seeks to prevent and control the pollution of water and also to preserve the wholesomeness of the water. The same is sought to be done by way of establishing Boards both at Central level as well as at the State level and they have been vested with appropriate powers to achieve the said goals. In addition to the provisions providing for the above mentioned, the Act also prohibits the use of stream or well for the disposal of poisonous, noxious or polluting matter. The Act also regulates and restricts the establishment of industries, operations, processes, etc. which are likely to discharge sewage or trade effluents into streams, wells, sewage, etc.

However, it has been time and again pointed out by various scholars that the water laws governing the preservation, use and allocation of water in India are not adequate to achieve the goals of preservation and judicious allocation of water; they are rather modelled on a presumption of a water surplus conditions and fail to address the concerns of water scarcity conditions.[2] Further over the past decades, renewed interest in water law and policy can be ascribed to increasing water scarcity, increasing pollution, competition among users have added to the need for a coherent policy on water use and Governance. Thus, a need was felt to formulate water policy which would better reflect the concerns of the present times. It was also realised that although water is a state subject under the Constitution of India,[3] the aspects other than water supplies, irrigation and canals, drainage and embankments, etc., like, environmental protection, water management, etc. needs common approach and guidelines. As a direct result of such a beckoning, National Water Policy, 1987 was formulated. The Policy, inter alia, focused on the optimum utilisation of the available water resources in consonance with the international agreements and domestic laws.[4] It also highlighted the importance of the improvement in the water quality and keeping it from getting polluted. However, one of the most important feature of the Policy, which is relevant for the purpose of our discussion happens to be that the Policy made a statement as to the "Water Allocation Priorities", and mentioned Drinking Water, Irrigation, Hydro-Power, Navigation and Industrial and other uses as the water allocation priorities in the descending order.[5] The Policy also referred to the "Participatory Irrigation Management", i.e. a policy objective whereby efforts was sought to be made to involve farmers in various aspects of

1 Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India*, 2nd ed., New Delhi, Oxford University Press, 2001, pp. 48-49.

2 Strategic Analysis of Water Institutions in India: Application of a New Research.

3 Entry No. 17, List II, Schedule Seventh, The Constitution of India, 1950.

4 Para 3.3, National Water Policy, 1987, Ministry of Water Resources.

5 Para 8, Ibid

management of irrigation systems. Of course it is quite difficult to directly involve farmers into the irrigation management; therefore, same is achieved generally by letting Water User's Association to take over the management of the irrigation in a particular area.[6] In fact, some state legislations have statutorily provided for the creation of Water User's Association.[7]

The National Water Policy was reviewed and updated in the year 2002. One of the most important change brought about in the policy happens to be the fact that in the water allocation priorities, 'Ecology' has been introduced as one of the priorities. The significance of this change can be understood from the fact that if allocation of water is done without paying any regard to the ecology of the water bodies, it will inevitably lead to such water bodies becoming devoid of any life whatsoever. The reason for the same lies in the fact that a minimum flow of water is required to be maintained in order to let the aquatic life present in such streams to sustain, as also for the purpose of facilitating the dilution of effluents discharged into the water.[8]

Although the National Water Policy of 2012 recognised that right to user of water for drinking, sanitation, domestic needs, and agriculture, is a pre-emptive right, yet it proposes that for uses other than this, water be treated as an economic good and be priced on economic principles. This proposal of the National Water Policy 2012, has been challenged on the grounds that making water as an economic good would lead to spiralling of water prices and, given that the policy also proposes to end all the water subsidies, it would also jeopardise the agricultural sector in the country. The Government seeks to justify this step by arguing that water is a scarce resource, and being so it is needed to be used judiciously and that providing subsidies on the water has been leading to waste and misuse of the same. On the other hand, Government argues, that pricing of water on economic principles will lead to a better conservation of water. This has been widely criticised.[9] Even one of the World Bank Papers proposed pricing system for water in India for ensuring sustainability and better allocation

The National Environment Policy of 2006[10] admits that although the rivers possess significant natural capacity to assimilate and render harmless many pollutants, the existing pollution inflows in many cases substantially exceed such natural capacities. Therefore, in the view of the authors, it would be beneficial to both the causes if all the policies are fused into a single document or are formulated at least in consonance with each other.

The National water policy has been supplemented by State Water Policies. Rajasthan & Uttar Pradesh in 1999, Karnataka in 2002 and Maharashtra 2003 have framed State Water Policy. The policies generally provides that beneficiaries and other stakeholders should be involved from the project planning stage itself and the policy also promote the use of 'incentives' to ensure that water is used 'more efficiently and productively'.

It is imperative to spare a thought for groundwater as well which is getting depleted day by day and is being incessantly polluted. The reason for the same would again appear to be obsolete laws governing the use of groundwater. Under the Easements Act, 1882, groundwater is considered to be an easement attached with the land and therefore, it is the right of the owner of the land to use the groundwater as he wills.[11] This has led to the indiscriminate use of the groundwater and depletion of the same. In a measure to regulate the use of groundwater, the Model Groundwater (Control and Regulation) Bill, 1992 was prepared and circulated among the states by the central government. The idea was that states can take a cue from the Model Bill and frame their own on the lines of the same. Till 2010, 11 States and Union Territories enacted and implemented groundwater legislations on the lines of the Model Bill.[12] The Bill in its third provision lays down that a groundwater authority should be established. The authority shall, when it is of the opinion that, having regard to the public interest, it is imperative to control or regulate the extraction or the use of ground water in any form in any area, advice the state or the union territory government to declare such area to be notified

6 Users in Water Management, Rakesh Hooja, Page 3.

7 See The Andhra Pradesh Farmer's Management of Irrigation Systems Act, 1997; The Karnataka Irrigation and Certain Other Law (Amendment) Act, 2000.

8 Water Resources of the Indian Subcontinent, Asit K. Biswas, ýR. Rangachari, ýCecilia Tortajada, Page 315.

9 Majority of the comments on the Draft National Water Policy 2012, received by the Drafting Committee, decried the proposal of water privatisation and pricing laid down in the Draft. http://www.thehindu.com/news/national/after-outcry-centre-backs-off-on-water-pricing-privatisation/article3501953.ece?ref=relatedNews (accessed on 25th of April, 2014)

10 The dominant theme of this policy is that while conservation of environmental resources is necessary to secure livelihoods and well-being of all, the most secure basis for conservation is to ensure that people dependent on particular resources obtain better livelihoods from the fact of conservation, than from degradation of the resource."

11 Illustration (g) appended to Section 7 of the Easements Act, 1882.

12 Press Information Bureau, Government of India, Released on 4th February, 2010; http://pib.nic.in/newsite/erelease.aspx?relid=57628

under the Act.[13] Any person desirous of sinking a well within the notified area will have to apply to the groundwater authority for a permit to do so.[14] The factors which the authority need to take into consideration before granting the permit includes, among other things, the purpose or purposes for which water is to be used, the existence of other competitive users, the availability of water, quality of ground water with reference to use, etc.

Mere enactment of legislations or formulation of policies will not prove to be a panacea for the water related ills, proper enforcement and earnest compliance of these laws and policies would go a long way in curing this problem. One of the most important steps needed to be taken in this respect is to involve the stakeholders, i.e. water users in the management of water. In other words, management of water resources should be done by resorting to participatory approach. Such involvement can be made at the planning, design, development and maintenance aspects of the projects for water conservation. In order to implement this approach effectively, necessary changes in the legal and organisational structures is required. In addition to this, the National Water Policy, 2012, also emphasises on localised research for a better understanding of the conditions prevailing in a particular local area. Various states in India have already enacted legislations to facilitate Participatory water management and according to the latest estimates, approximately 63, 167 Water Users Associations have been formed and around 14.62 Million Hectares of land has been covered under participatory water management.[15]

India does not have lack of environmental related policies but it is the lack of proper implementation that has affected the right to environment. Thus, it is imperative we strive to achieve a society where ideals and reality, legislation and implementation, correlate.

, Last accessed on 25th of April, 2014.

13 Fifth Provision, The Model Groundwater ((Control and Regulation) Bill, 1992

14 Sixth Provision, Ibid.

15 Status of Participatory Irrigation Management (PIM) in India-Policy Initiatives Taken and Emerging Issues, Ministry of Water Resources, Available at: http://wrmin.nic.in/writereaddata/mainlinkFile/File421.pdf, Last accessed on 26th of April, 2014.

ROLE OF CITES AND CMS IN PROTECTING MARINE SPECIES: AN APPRAISAL

Manjeri Subin Sunder Raj
Assistant Professor of Law, NLSIU

The world was trying to cope with large scale exploitation of natural resources with the advent of industrialisation. Though a boon, industrialisation came with its set of banes and soon turned out to be the single factor that posed the highest degree of harm for the environment that we live in. Taking clue from the high monetary value for both animals and plants alike, trade, both legal and illegal, soon grew in leaps and bounds. This necessitated for urgent measures to be chalked out, lest we lose them forever and that is when we adopted CITES[1] and CMS[2].

The absence of a specific treaty article, in CITES, which mandates the development of procedures to address compliance with its provisions, makes it different from other similar agreements. The compliance system has evolved through what is known as secondary rules. Such decisions are taken during Conference of the Parties (CoP)[3]. As per that[4],

- parties are to report regularly on CITES trade and measures to implement and enforce the treaty;
- the Secretariat is to review national reports, communicate problems on implementation to parties and make recommendations;

* This article is an edited and updated version of the paper presented at the National Seminar on Law and Policy on Fisheries Conservation and Management: Issues and Challenges, held at NUALS, Cochin, on the 4th and 5th of March, 2013.

1 The birth of such an idea stemmed from the discussions in the early 1960's. World trade in animal skin was growing at a fast pace and a meet amongst several African states and the International Union for the Conservation of Nature (IUCN) tried to address the issue and come up with a solution. At the United Nations Conference on the Environment in Stockholm, Sweden, in 1972, this mandate was put on paper. Led by the United States, the mandate was signed in Washington, D.C. in 1973, and it came into effect in July 1975, when Canada, the tenth country ratified CITES.

2 This Convention, also known as the Bonn Convention, is an inter-governmental treaty was established under the aegis of the United Nations Environment Programme. It was adopted in 1979 and came into force in 1983. Conservation of wildlife and habitat is the main area of this Convention, which it aims to be done on a global scale. As of January 2013, it has 118 members. It is the only such Convention which is established solely for the conservation and management of migratory species.

3 As of 2014, 16 CoP's have been held. The 16th CoP was held between March 3 and 14, 2013 at Bangkok, Thailand.

4 Rosalind Reeve, Wildlife Trade, Sanctions and Compliance: Lessons from the CITES Regime, 82 International Affairs (Royal Institute of International Affairs 1944-) 881,(Sep. 1, 2006), at p. 881, available at http://www.jstor.org/stable/3874205, accessed on 20/08/2014

- ✤ parties are to respond with remedial action and report to the CoP; and
- ✤ the CoP is to review parties' responses and make recommendations.

In CoP2, held in San Jose, Costa Rica, in 1979, a permanent Standing Committee was established which steers the work of the treaty between CoPs. A technical Committee was established to assess species, worldwide, in CoP3, held in New Delhi, India in 1981. Due to the decline in the number of sea turtles, they were transferred to Appendix I from Appendix II[5]. For creating a new Appendix III, procedures were initiated in CoP5, held at Buenos Aires, Argentina, in 1985. This list was to include species for which a range country has asked other Parties to help control international trade[6].

At CoP10, held at Harare, Zimbabwe, in 1997, FAO Member countries raised concern on the application of the Convention to commercially-exploited aquatic species. There was a lack of consensus among countries on the role of CITES to protect and promote the sustainable use of fisheries resources. Such lack of consensus was public during the discussions that were held at COFI[7] and COFI-FT[8] meetings. The need and necessity to refine the criteria and guidelines, to list species in the Appendices of CITES, was taken into consideration and was to specifically mirror the characteristics of marine species.

At the 25th session of COFI, held in Rome from 24- 28 February, 2003[9] approval was given to a work plan for FAO in relation to commercially-exploited aquatic species. FAO's programmes in the fishing sector were reviewed and guidance was given. Appraisal of the considerable progress that was made in implementing the Code of Conduct for Responsible Fishing along with scrutiny of a large number of issues relating to world fisheries were made and recommendations were provided for. In view of the cooperation of FAO with Non-FAO regional fisheries bodies, a meeting was conducted and it was decided that regional fishery bodies' approaches to incorporate ecosystem considerations should be taken into consideration. Decisions taken at the 25th session of COFI, relating to regional fishery bodies, also, were to be reviewed.

In CoP13, held in 2004, at Bangkok, Thailand, the parties, to increase protection for several large marine species included dolphins, sharks and certain other fishes in Appendices I and II. CoP14, held in The Hague, Netherlands, in 2007 increased focus on marine species. Though there were proposals to list the spiny dogfish, porbeagle shark, European eel, red and pink corals, sawfishes, and several other marine species in the Appendices, only the European eel and sawfishes were added.

Between December 3 and 8, 2012, at the FAO Headquarters, the fourth FAO Expert Advisory Panel for the Assessment of Proposals to Amend Appendices I and II of CITES Concerning Commercially-exploited Aquatic Species was held[10]. This was in response to the agreement entered into at the 25th session of COFI, held in Rome from 24-28 February, 2003.

The latest conference, the CoP16 was held in Bangkok, Thailand between March 3 and 14, 2013[11]. The proposal to protect numerous species of turtles and sharks[12] was acceded to. The next CoP would be held in 2016 in South Africa.

The CITES Appendices currently include close to 100 commercially-exploited aquatic species of fish, molluscs and echinoderms[13]. CITES has also had significant impact with some non-fish species. Such species may be important either as targeted ones in marine harvesting activities or taken as bycatch in fisheries. For example, a number of whale species and stocks are listed on Appendix I, as are all marine turtle species[14].

CMS also plays an important role in protecting marine species. Every three years, the CoP meets and decides the further course of action. Guidance as related to policy matters as

5 Plant and animal species, whose international commerce is strictly prohibited, are included in Appendix I, the 'Black List'. Appendix II, a precautionary or 'Grey List' includes those species in which, trade, if not carefully controlled, would become threatened.

6 One of the first species included in Appendix III is the giant pangolin, listed by Ghana.

7 The Committee on Fisheries (COFI), a subsidiary body of the FAO Council, was established by the FAO Conference at its Thirteenth Session in 1965. For more, see http://www.fao.org/cofi/cofi2012/en/, accessed on 20/07/2014.

8 COFI Sub-Committee on Fish Trade, established by the Committee on Fisheries (COFI) at its Sixteenth Session (1985) in accordance with Rule XXX-10 of the General Rules of the Organization and Rule VII of the COFI Rules of Procedure. For more, see, http://www.fao.org/cofi/ft/en/, accessed on 20/07/2014.

9 http://www.fao.org/fishery/nems/12095/en, accessed on 20/07/2014

10 For more see, Report of the fourth FAO Expert Advisory Panel for the Assessment of Proposals to Amend Appendices I and II of CITES Concerning Commercially-exploited Aquatic Species, Rome, 3–8 December 2012, FAO Fisheries and Aquaculture Report. No. 1032.Rome, FAO, available at http://www.fao.org/docrep/017/ap999e/ap999e00.htmFAO.2013, accessed on 22/07/2014.

11 http://biodiversity-l.iisd.org/events/cites-cop-16/, accessed on 22/07/2014

12 http://biodiversity-l.iisd.org/news/cites-secretariat-publishes-recommendations-on-listing-proposals/, accessed on 22/02/2014

13 http://www.fao.org/fishery/topic/18146/en, accessed on 22/02/2014

14 The Shrimp-Turtle Case and the Tuna-Dolphin Case discusses this aspect. For more, see http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm,and http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm, accessed on 20/07/2014

well as administrative matters is provided for by the Standing Committee. Scientific advice is offered by the Scientific Council, which too meets in between CoP meetings. Identification of research and conservation priorities also takes place.

Agreements and meetings are promoted by the Secretariat, seated at Bonn, Germany, which is provided for by the UNEP. 6 months before each CoP, the parties are supposed to submit national reports, which play a pivotal role in analysing the steps taken by them fostering the aims of the convention. Developing of agreements as well as their promotion, along with the conduct of services meetings are done by the Secretariat. It also plays a great role in the support and supervision of research activities as well as conservation programmes and projects. It is also the key factor that engages into cooperation with various governments around the world and helps in partnering with world-wide organizations to foster such conservation and thereby leading to attainment of the goals fixed.

Further to CMS, in October 2012, Brighton, UK witnessed the meeting of government officials from eight nations, which was convened in order to take a decision as regards protection of small whales, porpoises and dolphins. The meeting was held in furtherance of the Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS). Two decades ago, the ASCOBANS was held and it was a daughter agreement of CMS. A plethora of actions were mooted and agreed upon by the representatives to foster protection of marine mammals in European waters. The meeting also had the presence of the representatives of the European Commission, the International Whaling Commission (IWC), the OSPAR Commission, the sister Agreement in the Mediterranean (ACCOBAMS) and the North Atlantic Marine Mammal Commission (NAMMCO), as well as by relevant NGOs.

In the sea area that is shared by Sweden, Denmark and Germany, a conservation plan is underway for the Harbour Porpoise species. Activities are minimalized so as to protect such species and various governments, NGO's, private sector players etc are joining hands to make this a success[15]. The advent of new chemical pollutants, whose after effects are unknown, have raised concerns amongst nations, and they have given a green signal to identify priority research areas and come up with conclusive evidence and take steps to reduce pollution.

After Thoughts and Concluding Remarks

To know that there are steps which are not only taken, but also being implemented in fostering protection of marine species is heartening. However, a critical approach has to be taken, so as to ensure and examine as to whether such steps are capable of providing and reaching the aimed results.

The two kinds of reports that are to be submitted by the parties, under CITES, namely, (i) an annual trade report (ii) a biennial implementation report, helps us realise and evaluate the steps that are taken. Information on permits and certificates granted, the states with which trade occurred, and details of CITES species traded are dealt with in the former and the latter contains information on legislative, regulatory and administrative measures taken to enforce the convention.

Self-reporting by parties plays a very important role in the transfer of information as also the information that is being supplied for by various other agencies and NGO's. This however is a weak link in the enforcement of CITES. Self-reporting makes the convention only as strong as the party countries' own mechanism of enforcement, which, in certain cases, if not the most, would not be sufficient. Some sort of a higher regulatory mechanism, to probe into the actualities, rather than falling prey to the reports filed, should be devised.

Care should be exercised by the world countries to ensure that compliance with such rules is strictly adhered to, not only by member countries, but also amongst non-party countries. Stringent steps and actions, including sanctions, restrictions as well as alienation can be put into practise.

It is for the presence of these factors, that even if it can be said that it has benefited wildlife conservation and protection, CITES has left a mixed record[16]. This can also be attributed to the huge illegal market and trade practices that find a place in every market, around the world. Corruption and huge amounts of money lure people as well as nations into fuelling such illegal activities.

Steps need be taken so as to ensure that the provision of both CITES and CMS are given more prominence and that changes are made as and when required. For this, a periodic assessment of the

15 Mats Amundin from Kolmården, a Swedish Scientist, won the 4thASCOBANS Outreach and Education Award for his work in promoting the conservation of porpoises.

16 Ginette Hemley, CITES: How Useful a Tool for Wildlife Conservation, 23 Wildlife Society Bulletin 635, Changes and Challenges in the Wildlife Profession (1995), at p.635, available at http://www.jstor.org/stable/3782993, accessed on 20/07/2014

situation is warranted and called for, failing which updation of data would not be possible, which in turn would lead to inconclusiveness. Extending support to persons who are directly involved in the protection of wildlife and enacting strong, stringent and successful laws to combat the ever growing menace of poaching should be done.

Bringing forth the idea of CITES and CMS to the world, through every way comprehendible and making them aware and educated about the need and necessity, and thereby instilling in them a sense of care towards wildlife, is what is to be achieved

Effects of Pluviculture and other Emerging Geoengineering Techniques- A Brief Overview of Anthropocene and its Legal Dimension

Chiradeep Basak
Assistant Professor of Law, NLSIU

Sunshine is delicious, rain is refreshing, wind braces us up, snow is exhilarating; there is really no such thing as bad weather, only different kinds of good weather

John Rushkin

The influence of human behavior on earth's atmosphere is very noteworthy because this intervention has constituted a newfangled geological epoch for the biosphere. In order to understand and closely follow up the recent geological time period, Nobel Prize winner Paul Crutzen proposed a term, 'Anthropocene' in 2000. This is an informal geological chronological term that identifies the extent and evidence of human activities and its impact on global environment. According to Crutzen, industrial revolution was the initial point of Anthropocene.[1] In his paper for the journal *Nature* (2002), he stated that The Anthropocene could be said to have started in the late 18th century, when analyses of air trapped in polar ice showed the beginning of growing global concentrations of CO2 and CH4.[2] Many scholars agree with Crutzen, while some don't. However, there is no official initial date of Anthropocene. If we try to draw a nexus between Anthropocene and Environmental Law, we can identify how our activities have influenced global climate.

With advancement of technology, man's attempt to manipulate with environment has also advanced. O'Henry once said, '*We may achieve climate, but weather is thrust upon us'*. Drawing the inspiration from this noble thought, Hassett has rightly penned down that Man's attempts to avoid or alter the weather are as old as rain dances and as current as today's newspaper.[3]

The science of Geoengineering relates to the manipulation of the natural habitat- including the marine environment- in order to somehow abate or counteract the effects of natural and anthropogenic climate change and global warming.[4]

During Vietnam War, cloud seeding was used by US Military under the code name OPERATION POPEYE. They targeted certain areas of North Vietnam to extend the monsoon period with an objective to block supplies by creating mud in dense forests. The 54th Reconnaissance Squadron carried out the operation to 'make mud, not war'.[5] If we turn the pages of history, we will find that the rainmaking techniques were not new. American meteorologist, James Pollard Espy a.k.a *The Storm King*, in the year 1830, proposed to burn forest in order to enhance rainfall. Later he developed The Convection Theory of Storms in his work, *The Philosophy of Storms*.[6] Thereafter in 1902, the science of Pluviculture was developed by Charles Malloy Hatfied. He developed a new method of producing rain, commonly known as Hatfield's Moisture Accelerator.

In 1946, Cloud Seeding technique was invented by Vincent Schaefer. This was a path breaking invention, which changed the course of Geoengineering to a new direction. This technique has further developed and airplane based rainmakers by using chemical agents like silver iodide, carbon dioxide, urea, sodium chloride became very popular in western countries. The idea of thermodynamics and climate engineering also helped the geologist to understand hurricanes and new techniques like hurricane hacking, carbon dust absorption of solar energy are also emerging. Several international and national research organizations

1 *See* The Encyclopedia of Earth, available at www.eoearth.org/view/article/150125 [last visited on 30th August, 2014].

2 *Ibid.*

3 Hassett, Charles M. Weather Modification and Control: International Organization Prospects, 7 Texas International Law Journal 89 (1971).

4 Leal Arcas Rafael, Yelaghotis Andrew, Geoengineering a Future for Mankind: Some Technical and Ethical Considerations, Carbon & Climate Law Review 128 (2012).

5 *See* The use of weather reconnaissance in combat operations, available at www.documents.theblackvault.com/documents/defenseissues/weatheruse.pdf [last visited on 30th August, 2014].

6 *See* The History of Cloud Seeding: From Pluviculture to Hurricane Hacking, available at www. climateviewer.com/2014/03/25/history-cloud-seeding-pluviculture-hurricane-hacking/ [last visited on 1st September, 2014].

like World Meteorological Organization, American Meteorological Society, National Research Council's National Academy of Sciences Board on Atmospheric Sciences and Climate are delving in to understand the science of weather modification but what comes next is the chief concern of all.

The human induced modification techniques have been criticized in recent history. There is an insufficient understanding of the science and comprehensive risk assessment as regards the usage of technique. United Nations Framework Convention on Climate Change (UNFCC) does encourage these techniques - REDD+ initiative is one of them. Due to this backing, it has also confronted controversy, as opponents have seen them as a way to avoid reducing fossil fuel dependence.[7] They have also received huge criticism for depending on ecologically damaging monoculture planting, and posing a risk to the rights of indigenous people and people in developing countries in order to solve an issue that is mainly of importance to developed countries.[8]

If we look into the moral and policy concerns over the use of these techniques, we have positive as well as negative dimensions. On the positive side, these techniques will enable us to buy some more time to respond to climate change and financially, it is one of the possible options while on the negative side the ethical quandaries blindfold us from our moral duties and leaves enough scope for the states to reduce their adaptation efforts.

Some other concerns that came under the radar of opponents are: approval procedures, accountability vacuum, threshold of risk assessment, permissibility over timeframe for holding these experiments. There is a scientific uncertainty that mere exploration of this method may lead to the emergence of a commercial or even expert constituency that will exert an influence over policy & ethical decisions in favor of this technique.

Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1976 (ENMOD) covers a wide range of climate phenomena and envisage the provisions with respect to this technique.

Looking into the state practices, we can find that climate modification law has developed far ahead in United States. They have licensing system to regulate weather modification techniques. The process is two staged- at first, issuance of license for individual cloud seeders and next; grant of permit to hold operations The core features of their regulations are:

1. To ensure the competence of companies carrying out the process;
2. Compensation, if any harm, so caused by modification techniques, commonly known as *proof of financial responsibility*.

The jurisprudence of cloud seeding regulations in US has developed due to active judicial intervention in several judgments like: *Slutsky* v. *City of New York*[9], where question over irreparable injury due to weather modification technique was raised. In *Samples* v. *Irving P. Krick Inc*.[10], for the first time a weather modification technique case was presented to a jury but in spite of enormous importance of this case, the federal judge did not prepare a written opinion for this case.[11] Similarly, in *Auvil Orchard Company, Inc.* v. *Weather Modification, Inc.*[12], honorable court issued a temporary injunction prohibiting cloud seeding for hail suppression causing flood. Some other significant cases on cloud seeding in United States are: *Southwest Weather, Inc.* v. *Duncan*[13], *Southwest Weather Inc.* v. *Jones*[14], In these cases from Texas, the property rights of the landowner over whose territory the cloud seeding was performed was raised. While in Nebraska, state statute was enacted in 1957 allowing the landowners to create a weather control district, and then vote on weather modification projects.[15] In *Adams* v. *California*,[16], the plaintiffs asserted two cause of actions against the cloud seeder: one on negligence and other over the hazardous nature of this technique.[17]Hence, the burden of proof lies upon the plaintiffs to portray that certain harms have been caused due to cloud seeding activity of defendants. In *Pennsylvania Natural Weather Association* v. *Blue Ridge Weather Modification Association*[18], the plaintiff had not proven that they were harmed by the cloud seeding. Therefore, the court denied plaintiff's request for an injunction.[19]Likewise, in several cases, the respective courts of law have incorporated the cardinal principles of tortious liability in order to address the issues; starting from strict liability, fault based torts to trespass, nuisance, negligence and proof of causation. Similarly in United Kingdom, the House of Commons Science and Technology Committee recommended UK Government that Geoengineering should be regarded as a 'public

7 *Supra* note 4 at 130.

8 *Ibid*.

9 97 N.Y.S.2d 238 (Sup.Ct. 1950)

10 Civil Nrs. 6212 (W.D.Okla.22 Dec 1954).

11 *See* Weather Modification Law in the USA, available at www.rbs2.com/weather.pdf [last visited on 2nd September, 2014].

12 Nr. 19268 (Superior Court, Chelan County, Washington 1956).

13 319 S.W.2d 940 (Tex. App.. 1958).

14 327 S.W.2d 417 (Tex. 1959).

15 *Supra* note 12 at p. 11.

16 Nr. 10112 (Supreme Court, Sutter County, Calif. 6 april 1964).

17 *Ibid.*

18 1968 WL 6708 (Pa. Com. Pl. 1968).

19 *Ibid.*

good' by bringing the notion of commons into picture.

However, in India, the experiments on cloud seeding started way back in 1954 in the Indo-Pak sub-continent. A ground seeding project was carried out in Lahore in July 1954 by using the dispersal of well-dried salt powder by a high pressure blower during afternoons from the top of a tall building an measuring the rainfall distribution in the windward and leeward directions and comparing it with the normal distribution.[20] The law as regards weather modification is quite silent in India. India being a signatory to the Chicago Convention permits certain activities but they are subject to prior approval. According to Civil Aviation Requirement Section 3 Air Transport Series 'F' Part I Issue I, 12th October, 2010 the application for issue of permission to undertake cloud seeding operations shall be submitted by an Indian Company holding nonscheduled operators permit to Directorate of Regulations and Information, DGCA. The cloud seeding operation is permissible, subject to certain conditions like prior clearance from ATC units, compliance with the safety and security requirements etc.

The state of Andhra Pradesh call for bids to conduct cloud seeding operations during monsoons but there is no clear yardstick under the Ministry of Environment and Forests, which guides, regulates, prohibits or even restricts certain weather modification techniques. But the concept and jurisprudence of weather modification law is yet to take off in India.

Way forward: Since, we don't have any comprehensive international agreement to address the concerns over weather modification techniques, an upgraded UNFCCC frame can be a viable and realistic option. This up gradation should not only encompass research stage but also implementation stage. The former will scrutinize the scientific factors associated with this tech while the latter will keep an eye on policy formulations. One more option can be a streamlined negotiation process under the initiation of highly interested states to regulate Geoengineering. We have seen this kind of arrangement in Antarctic Treaty and Non Proliferation Treaty Regimes. A small group of states could develop a far better mechanism by application of an effective approach to manage the weather modification techniques. In time, such initiative of few active states can bring several other states under its umbrella. These suggestions can be objectified only after outlining a pragmatic approach in an appropriate and organized forum.

After all, Annie Leibovitz was right when she said; Nature is so powerful, so strong. Capturing its essence is not easy- your work becomes a dance with light and the weather. It takes you to a place within yourself.

20 Ramanathan, Drought and Weather Modification: A Review, available at www.new1.dli.ernet.in/data/upload/insa/INSA_1/20005bae_257.odf (last visited on 2nd September, 2014).

Public Trust Doctrine and the Doctrine of Prior Appropriation in the Use and Conservation of Groundwater- An Overview

Srividya R Sastry

Research Officer, Centre for Environmental Law Education, Research and Advocacy (CEERA), NLSIU

"Groundwater is a national wealth and it belongs to the entire society. It is nectar, sustaining life on earth. Without water, the earth would be a desert"[1]

Groundwater regime in India is governed by Common Law principles according to which access to and use of groundwater is the right of the landowner. With the development of technology, the various options provide the individual owners to extract and utilise not only water available beneath their land but also water found beneath their neighbour's land as well. This has lead to questioning the appropriateness of common law principles which govern the access to and control of groundwater in the second half of the 20th century. Also, the lowering of water table at a greater rate in most regions of the country has called in question the common law principles governing ground water and how the groundwater law addresses these issues.

The Indian Judiciary has contributed immensely in protecting the environmental rights of the citizens of India by adopting and evolving environmental law principles. This in the recent past can be witnessed in relation to over exploitation of ground water in the state of Kerala. The issue relating to underground water came up for consideration in the case of *Perumatty Grama Panchayat* v. *State of Kerala*[2], in which the Kerala High Court held that the state is under a legal duty to protect the natural resources which in turn includes groundwater. This doctrine has its own weakness. The question relating to exploitation of underground water by the Coco Cola Company is the possibility of putting

1 *Perumatty Grama Panchayat* v. *State of Kerala,* 2004 (1) KLT 731, Para 12

2 2004 (1) KLT 731

limitations on the proprietor, i.e. the company, in its exercise of property right. Addressing this issue, the court dismissed the validity of common law rules governing the extraction of groundwater by a private individual from his property[3] and held that:

"The principles applied in the earlier decisions[4] cannot be applied now in the era where sophisticated methods are used for the extraction of groundwater like bore-wells, heavy duty pumps etc. Further it also held that the previous decisions are inconsistent with the emerging environmental jurisprudence under Article 21 of the Indian Constitution".[5]

Further, in the same decision the single judge made references to the reasonable use doctrine which is new to Indian Environmental Jurisprudence. According to this doctrine, a landowner has the right to make any reasonable use of groundwater as long as it relates to some beneficial activity on the overlying land even though significant interference might result to the groundwater supplies of adjacent landowners.[6] The two mindedness of the judge makes it crystal clear that the judiciary is not happy with the present common law principle of absolute right of landowners to extract underground water. Further, the adoption of the reasonable use doctrine would bring about a sustainable distribution of this resource without infringing upon the right to use the water resource by the respondent company and turning the whole district into a desert.

But in *Coco Cola Beverages* v. *Perumatty Grama Panchayat*[7] which dealt with the decision in appeal gave an opposite view and held that it has to be assumed that a person has the right to extract water from the property unless it is prohibited by a statute and extraction thereof was held not be illegal. The court further held that in the public interest the permissible restrictions can only be put on a user to ensure that by his conduct he does not bring about drought or any imbalance in the water table. Thus, the Division Bench of the Kerala High Court indirectly accepted the application of the Prior Appropriation Doctrine[8] which is a new concept in Indian Environmental Law Jurisprudence with two exceptions i.e. such use of underground water should not result in drought or any imbalance in the water table.

The two decisions given by judges in Kerala gave two opposed views regarding groundwater regulation. According to the first judge even without groundwater regulation, the present legal position was that groundwater is a public trust which in turn means that the state has the duty to protect it against excessive exploitation. Further, the judge made the link between public trust and the right to life. It was thus recognized that a system which leaves groundwater exploitation to the sole choice of landowners may lead to negative impact on the environment. In the next decision the division bench took the view that landowners' have an exclusive control over groundwater.[9] Further, by recognizing the two diverse principles on usage and conservation of underground water, i.e. Public Trust Doctrine and Prior Appropriation Doctrine, the court has initiated the process of adopting new principles on underground water regime in India. But, confirmation as to which of the principles is relevant in the present context is something which needs more clarity.

The single judge tried to base his decision on public law jurisprudence. This is done with an aim to evolve a set of norms through which exercise of property rights by private individual are kept within bounds. This venture, if successful, shall protect the interest of the public involved.

Further, the Government of Kerala expressing concern over pollution and depletion of groundwater caused due to the activities of the Coco Cola Company in Plachimada, Palakkad district of Kerala has approached the Supreme Court on this matter and a final decision on this case is awaited. The Supreme Court's view shall decide the future applicability of the common law principles in relation to groundwater and remove the confusion as to which principle is more apt in the present scenario.

Thus, from the discussions advanced, it is submitted that the judiciary has contributed in recognising people's right to groundwater. By agreeing to adopt new principles into the environmental jurisprudence of India, it has further shown its willingness to deviate from the age old principles of absolute

3 N. S. Soman, *Legal Regime of Undergroundwater resources*, 32 COCHIN UNIVERSITY L. R. ,156, 147-62 (2008)

4 *Kesava Bhatta* v. *Krishna*, AIR 1964 Mad. 334

5 *Id*. at 156

6 Illinois Groundwater Association, *Illinois Groundwater Law: The Rule Of Reasonable Use*, at 4, http://www.isws.illinois.edu/iswsdocs/wsp/IllinoisGroundwaterLaw.pdf (Last Accessed on: 06.02.2014)

7 2005(2) KLT 554

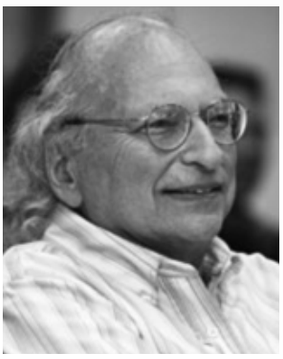
8 The prior appropriation doctrine for groundwater is based on the principle that "first in time is first in right." According to this doctrine the first appropriator of water has a right to continue to the use of was for his beneficial use without wasting the same. Under this doctrine, the ownership of land is not a consideration in assigning a right but rather the actual application of water to a beneficial use in relation to the timing of other beneficial uses.

9 Philippe Cullet, *Use and Control of Groundwater: Towards a New Framework*, 5 NALSAR ELPR 83,73-85(2011)

ownership doctrine on groundwater rights. But due to the lack of express provisions in the national or state enactments which redefines this right in terms of equitable access to and control over groundwater, judgments have been rendered less effective.

NEWS AND OPINIONS

Armin Rosencranz



The government has taken a number of actions that are seen as diluting the scope of environment related legislation in India, specifically in the instance of clearances.

Fast tracking of clearances: Clearances for projects, from mining to roads, have been fast-tracked. Over 92 projects, requiring the clearing of 1,600 hectares of forest, have been approved. Many projects related near sanctuaries and national parks have also been fast-tracked. This is pursuant to office memoranda issued by the Ministry of Environment and Forests, which demand an easing of conditions for certain specified projects, such as coal. This has also been done by extraordinary procedure of making states responsible for clearance.

Procedures Regarding Public Hearings: Procedures requiring public hearings have largely been bypassed or diluted. Existing coal mining projects can apply for a one-time capacity expansion of up to 25% without any public hearing. Further, small coal mines, producing less than 8 million tonnes annually, have been allowed to double their capacity without any hearing. Wherever possible, public hearings and taking the consent of gram sabhas has been avoided.

Review of Green Laws: Further, the government has constituted a four-member committee, under the erstwhile cabinet secretary Mr. T.S.R. Subramaniam, to review laws relating to the protection of the environment and forests, with the ostensible aim of suggesting amendments that will make these laws more effective. The committee will review the implementation of five major green laws — Environment (Protection) Act 1986, Forest (Conservation) Act 1980, Wildlife (Protection) Act 1972, Water (Prevention and Control of Pollution) Act 1974, and Air (Prevention and Control of Pollution) Act 1981. They are to recommend amendments to bring them into conformity with 'current requirements', according to the memorandum of the Ministry of Environment and Forests. Most disturbingly, this panel will take into account various Court Orders and Judicial pronouncements relating to these acts. This seems a veiled threat to negate the Supreme Court's handful of environmentally protective judgments.

Current Requirements: This raises the pertinent question of what the current requirements as identified by the Ministry are. Activists have claimed that the amendments in question are an attempt to dilute the laws related to environmental protection, for purposes of economic development. Strict procedural norms, such as those relating to public hearings, may inconvenience industrialists. The leadership in the NDA government has spoken repeatedly about how projects were being held up for 'frivolous' reasons and that they were proving to be 'roadblocks' to development. It is believed that the UPA laws, including the National Green Tribunal Act and the Forest Rights Act, have delayed, among others, the 52,000 crore POSCO project, in Odisha. While the government has denied wishing to dilute the laws, it is clear that the government considers the current usage of the environment legislation a misuse and a roadblock, and wishes to expedite the process of development, even at the cost of environmental protection and sustainable growth.

Review of the Policy of the Government : Not only is the policy of the government unlikely to benefit the environment: it is also unlikely to benefit its own objectives. Most projects are not rejected on environmental grounds. The developers continue to pollute. The NDA is not doing much more than furthering the policy of the UPA in a more transparent manner, since less than 3% of the projects were rejected even under the UPA on environmental grounds. While reform of the legislation may definitely be required, the need of the hour is not fast-tracked clearances, but rather the consolidation of clearances, an independent body for the same rather than several different, and overlapping, regulators, and greater transparency, including publishing all information related to green clearances in the public domain. Not only does this help the environment and communities, but it is also likely to increase the speed and efficiency with which environmental clearances occur.

The National Green Tribunal: Environmental lawyer Ritwick Dutta told The Hindu that many dilutions have been in the offing for a long time, but in the case of the National Green Tribunal

(NGT), it would be very difficult to recast it as an administrative or quasi-judicial body as suggested by reports. When asked, Mr. Javadekar ruled out any such change in the NGT. Mr. Dutta said that the NGT cannot be wished away, as it was an act of Parliament. "While green laws have been facing threats throughout, what is different now is the lack of concern for environment protection. While there was emphasis on transparency in the form of clearances, what about compliances? You cannot be selectively transparent."

The environment ministry wants the National Green Tribunal (NGT) to make recommendations to the government instead of issuing directions like a quasi-judicial body. The ministry seems to want only the Supreme Court to have the right to reject clearances.

Since its inception in 2010, the NGT – headed by a former SC judge – had stayed green approvals for several projects. In the Posco case, it asked the environment ministry to review green clearances after some local villages refused to consent to the project under the FRA.

The move to amend legislations was initiated by Javadekar himself. A cabinet note – prepared by his ministry – to water down the powers and jurisdiction of the tribunal would be circulated for inter-ministerial discussion soon, sources said. The ministry asked the tribunal a year ago to limit its jurisdiction, a proposal that was rejected by the NGT. On the FRA, officials say the requirement of mandatory consent from the gram sabha (a body of villagers) for initiating any project is the biggest hurdle in pushing infrastructure development in mineral-rich poor regions.

The Future of Green Clearances : The Supreme Court of India has asked the executive to establish and empower a National Regulator for Environmental

Clearances. Either this officer, or a comparable Red Tape Cutter, should oversee all clearances.

As of now, 99 per cent of projects manage to get environment-related clearances; 94% get forest clearance.

- Multiplicity of regulations and regulators help unscrupulous elements in industry to bag clearances.
- Multiple clearances required separately lead to delays and poor decision – making.
- Government has no system in place for independent appraisal of project clearances.
- Authorities lack the capacity to monitor compliance with clearance conditions.
- Lack of access to reliable and relevant information related to project clearances make them contentious.

Consolidate all green clearances, be thus related to environment, forests, wildlife or coastal zone, so that decisions can be taken understanding the overall impact of projects.

Instead of several regulators, set up an independent body to grant all green clearances. The body should be given enough power and resources to do proper assessment and impose fines and sanctions. It must be transparent and accountable and encourage public participation in green clearances.

All information related to green clearances should be put in the public domain. The process of public hearings must be strengthened and made more transparent.

Ms. Sakhi Shah, 3rd Year B.A. LL.B student prepared some of the materials supporting this article.

LEGISLATIVE UPDATES
International Framework

Turkmenistan passes Environmental Impact Assessment Law

The Environmental Impact Assessment [EIA] Law of Turkmenistan came into force. It is associated with the Trans-Caspian pipeline laying project (TAG), which is supposed to deliver Turkmen gas via Azerbaijan to Europe.

The Turkmen President Gurbanguly Berdimuhamedov signed the Law on Environmental Impact Assessment. The Law stipulates that international cooperation in the field of EIA should be carried out on the basis of Turkmenistan's international treaties with foreign states on cooperation in the protection and preservation of Environment and ecological safety for humans.

The Russian and Iranian sides insist on this Assessment, agreed by all five Caspian littoral states (Azerbaijan, Russia, Iran, Turkmenistan and Kazakhstan).

Environmental Impact Assessment plays a key role in taking an informed decision making. This enables to integrate matters of environment into other spheres of decision making.

New Bill to regulate California Groundwater

A package of bills aimed at regulating drought-parched California's stressed groundwater supplies has come under fire from agricultural interests. The Bill would allow the state to take control over the management and access of underground aquifers. The state has expressed deep concern over problems associated with water scarcity in the country.

On the other hand, the farmers rely heavily upon this groundwater for irrigation purpose. In addition, millions of people count on personal wells for drinking purpose. This step intends to address the issue of recession of groundwater levels.

The critics expressed concern over this bill, saying the proposed legislation, an overly imposed rigid guideline on farmers and the same would not address diverse geographic needs of water users.

LEGISLATIVE UPDATES
National Framework

Amendments to the Wild Life Protection Act, 1972 introduced

The Wild Life (Protection) Amendment Bill, 2013 was introduced in the Rajya Sabha in August 2013. The Bill has been referred to the Standing Committee on Environment and Forests. The Bill seeks to amend the parent enactment, Wild Life (Protection) Act, 1972.

Since, India is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and amendments to the Act are necessary for India to fulfil its obligations under the CITES.

The major amendments proposed by the Bill are:

- Sale, manufacture, transport or even use of animal traps if strictly prohibited. But for educational and research purposes, the same can be allowed, but only after prior approval
- The new amendment allows certain activities like grazing, movement of livestock, hunting with a permit, bona fide use of drinking and household water by local communities exploitation or removal of any wildlife including forest. However, produce from a sanctuary is not allowed without a permit from the prescribed authority;
- Provisions to regulate international trade in endangered species of wild fauna and flora as per the CITES have been inserted.
- A detailed schedule listing out flora and fauna for purposes of regulation of international trade under the international instrument, CITES has been added.
- The term of punishment and fines for commission of offences under the Act have been increased;
- The Tiger and Other Endangered Species Crime Control Bureau has been changed to the Wild life Crime Control Bureau.
- The term of punishment and fines for commission of offences under the Act have been increased.
- The Bill protects the hunting rights of Scheduled Tribes in the Andaman and Nicobar Islands.

Chiradeep Basak

GREEN DECISIONS

1. *Animal Welfare Board of India* v. *A. Nagaraja* 2014(6)SCALE468

Constitution of India- Prevention of Cruelty to Animals Act, 1960 (The PCA Act) -The Tamil Nadu Regulation of Jallikattu Act, 2009

The Honourable Supreme Court dealt with the rights of animals under the laws in states of Tamil Nadu & Maharashtra with reference to the Prevention of Cruelty to Animals Act,1960 while examining the same in context of jallikattu, bullock cart races etc.

The SC held that according to animal behavioural studies, bulls adopt a flight or fight response when they feel frightened or threatened. This instinctual response to a perceived threat is deliberately exploited by jallikattu organizers. Bulls are beaten, poked, prodded, harassed and jumped on by numerous people. They have their tails bitten and twisted, and their eyes and noses filled with irritating chemicals. Many peer-reviewed papers demonstrate a link between the actions of humans and the fear, distress and pain experienced by animals. Research has shown that rough or abusive handling of animals compromises their welfare by increasing an animal's fear of humans. Bulls - who are pushed, hit, prodded and abused in jallikattu - suffer mentally as well as physically. Such animal abuse is also in violation of Section 11(1)(a)(m) of The Prevention of Cruelty to Animals Act, 1960.

Section 3 of the PCA Act deals with duties of persons having charge of animals, which is mandatory in nature and to prevent the infliction upon such animal of unnecessary pain or suffering. The Court held that Jallikattu/Bullock-cart race, as such, is not for the well-being of the animal and the organisers are not preventing infliction of unnecessary pain or suffering, but they are inflicting pain and suffering on the bulls, which they are legally obliged to prevent. Thus, by undertaking such events, organizers are violating the Section 3 of the PCA Act.

2. *B.S. Sandhu* v. *Government of India & Ors.* (2014) 5 MLJ 503

Forest (Conservation) Act, 1980 - Punjab Land Preservation Act (PLP Act), 1900 - Punjab Land Preservation Act, 1900 - Indian Forest Act, 1927 - Forest (Conservation) Rules, 1981- Constitution of India

The Supreme Court was to address the issue of whether land notified under Section 3 of the PLP Act, 1900 and regulated by the prohibitory directions notified under Sections 4 and 5 of the aforesaid Act is 'forest land' or not. While addressing this issue, the Court held that under Section 3, the Local Government may regulate, restrict or prohibit by a general or special order the activities mentioned under it. These activities are not normally carried on in forests. Similarly, under Section 5 of the PLP Act, 1900, the local government is empowered by a special order, temporarily or permanently to regulate, restrict or prohibit the cultivating of any land or to admit, herd, pasture or retain cattle generally other than sheep and goats and these are the activities usually not carried on in the forests. Therefore, the Court opined that land which is notified Under Section 3 of the PLP Act, 1900 and regulated by orders of the local Government Under Section 4 and 5 of the PLP Act, 1900 may or may not be 'forest land' and held that the conclusions of the High Court that the entire land of village Karoran, District Ropar, which has been notified Under Section 3 of the PLP Act, 1900 and is regulated by the prohibitory directions notified Under Sections 4 and 5 thereof is 'forest land' was not at all correct in law.

The second issue was whether the land on which the Forest Hill Golf and Country Club of Col. B.S. Sandhu was situated was forest land as on 25.10.1980 irrespective of its classification or ownership. It held that the High Court's finding that all land in the village Karoran, District Ropar, was 'forest land' for the purpose of Section 2 of the Forest (Conservation) Act, 1980 has affected the legal rights of several villagers, agriculturists, farmers, shop owners, inhabitants who were carrying on their respective occupations on their land even before the enactment of the said Act on 25.10.1980. This in turn has affected the property rights of persons protected by Article 300A of the Constitution. The Court then sought to set aside the finding of the High Court that the entire land in village Karoran, District Ropar, is 'forest land' for the purpose of Section 2 of the Forest (Conservation) Act, 1980 and remanded the matter to the High Court for fresh hearing and fresh order in accordance with law.

3. *Common Cause* v. *Union of India & Ors.* 2014(7)SCALE91

Environment (Protection) Act, 1986- Forest (Conservation) Act, 1980;-Mines and Minerals (Development and Regulation) Act, 1957 - Mineral Concession Rules, 1960.

The Honourable Supreme of India was called upon to resolve the issue as to whether the lessees can be permitted to carry on with the mining activities without granting renewal from the state government.

The Court after considering the report of the CEC as well as the submissions on behalf of the parties, directed an interim measure that the 26 leases operating as second and subsequent renewals without any express orders of renewal passed by the State Government will not be allowed to operate by the State Government until express orders are passed in terms of Section 8(3) of the Mines and Minerals (Development and Regulation) Act, 1957. Further, it directed the State Governments to consider and dispose of all the applications regarding lease within a period of six months.

4. *Goa Foundation* v. *Union of India and Ors.* 2014(5)SCALE364

Mines and Minerals (Development and Regulation) Act, 1957 -Goa, Daman and Diu Mining Concessions (Abolition and Declaration as Mining Leases) Act, 1987 - Forests (Conservation) Act, 1980 -Environment (Protection) Act, 1986 -Commissions of Inquiry Act, 1952- Water (Prevention and Control of Pollution) Act, 1974 -Air (Prevention and Control of Pollution) Act, 1981 - Wild Life (Protection) Act, 1972 -Wild Life (Protection) Act, 1972 - Ancient Monuments and Archaeological Sites and Remains Act, 1958- Mineral Concession Rules, 1960 (M C Rules) - Mineral Conservation and Development Rules- Environment (Protection) Rules, 1986- Goa (Prevention of Illegal Mining, Storage and Transportation of Minerals) Rules, 2013; Constitution of India.

In the present Public Interest Litigation the Honourable Supreme Court of India was called upon to address the following issues:

a. Whether the leases held by the mining lessees have expired?

Addressing this issue, the court held that, MC rules provided that the renewal application of the lessee is ought to be disposed off within a period of 6 months and if not, it is deemed to be refused. Further, it held that the MC Rules are framed under Section 13 of the MMDR Act by the Central Government and are not in contravention with the provisions of the Act. The court was of the view that the deemed mining leases have expired in 1987 under Section 5 (1) of the Abolition Act. Also, the maximum renewal period of 20 years of the deemed mining leases in Goa under Section 8 (2) of the MMDR Act read with Sub-Rules (8) and (9) of Rule 24(A) of the MC Rules has expired in 2007.

b. Whether the dump can be kept beyond the lease area?

The Honourable Court held that under the MMDR Act, a person who holds a mining lease granted under the MMDR Act and the Rules made thereunder is entitled to carry on mining operations in accordance with the terms of the lease in the leased area and may carry on all other activities connected with mining within the leased area. Area outside the leased area of the mining lease may belong to the State or may belong to any private person, but if the mining lease does not confer any right whatsoever on the holder of a mining lease to dump any mining waste outside the leased area. Further it was held that such person will have no legal right whatsoever to remove his dump, overburden, tailings or rejects and keep the same in such area outside the leased area. The court held that, even where the lessees have dumped their overburdens, tailing and rejects on lands owned by them, such lands are situated mainly in forest areas where non- forest activities, such as mining, is prohibited and can be done only with prior permission of the Central Government under Section 2 of the Forest conservation Act, 1980 and the notification issued under Sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986 requires prior environmental clearance for carrying out the activity of mining which includes even dumping of mineral waste. Thus, it held that lessees cannot dump mining waste even in such areas owned by the lessees.

c. How far from the boundaries of the National Park and Wildlife Sanctuaries should the mining activities be permitted?

The court addressing this issue, held that, until the Central Government takes into account various factors mentioned in Sub-rule (1), follows the procedure laid down in Sub-rule (3) and issues a notification under Rule 5 of the Environment Protection Rules,1986 prohibiting mining operations in a certain area, there can be no prohibition under law to carry on mining activity beyond the boundaries of National Parks or Wildlife Sanctuaries. Further it also directed the Ministry of Environment and Forests to follow the procedure and issue the notification of eco sensitive zones under Rule 5 of the Environment (Protection) Rules, 1986 within six months.

d. Was there a complete lack of control on production and transportation of mineral from the mining leases in the State of Goa?

The Honourable Supreme Court completely agreed with the CEC report that illegal mining in the State of Goa was in abundance. Further it referred to Goa (Prevention of Illegal Mining, Storage and Transportation of Minerals) Rules, 2013 which provides for establishment of check posts, barriers and weighbridges and inspection of minerals in transit. The court was of the view that these rules

if strictly enforced by the State Government would help the mining, storage and transportation of minerals in the State of Goa.

e To what extent mining has damaged the environment in Goa and what measures are to be taken to ensure inter-generational equity and sustainable development?

The court took the view that the Committee of Experts must conduct a macro EIA study and propose ceiling of the annual excavation of iron ore from the State of Goa, considering its iron ore resources and its carrying capacity and keeping in mind the principles of sustainable development and inter-generational equity and all other relevant factors. Further it came to the conclusion that a cap of 20 to 27.5 million tons per annum should be fixed for excavation of iron ore in the state of Goa as founded by Expert committee as well as ISM, Dhanbad.

f. Whether in the future the mining leases are to be auctioned or have to be granted in accordance with the policy of the state and the provisions of the MMDR Act and MC Rules?

The court opined that it is for the State Government to decide as a matter of policy the manner in which the leases of these mineral resources would be granted but it should be done in accordance with the provisions of the MMDR Act and Rules and it has to be consistent with the constitutional provisions. Further it held that the decision of the State of Goa to grant a mining lease in a particular manner or to a particular party must be capable of examination by way of judicial review by the Court.

g. Whether suspension of mining operations in the State of Goa by order dated 10.09.2012 of the Government of Goa and the suspension of the Environmental Clearances granted to the mines in the State of Goa by order dated 14.09.2012 were legal and valid?

The order made the State of Goa suspending the environmental clearances granted to the mines could not be quashed by the Court since the Court has already held that the mining leases were illegal. The order dated 10.09.2012 of the Government of Goa and the order dated 14.09.2012 of the MoEF is legal and will be applicable till decisions are taken by the State Government to grant fresh leases and decisions are taken by the MoEF to grant fresh environmental clearances for mining projects.

5. *Wilfred J.* v. *Ministry Of Environment & Forests* MANU/GT/0072/2014

Administrative Tribunals Act, 1985 - Constitution Of India -Environment Protection Act, 1986- National Green Tribunal Act, 2010 (herein after referred to as NGT Act)- Coastal Regulation Zone,2011 (CRZ Rules, 2011)

The NGT was approached to adjudicate upon the following issues:

1. Whether the NGT being a creation of a statute is vested with the powers of judicial review to examine the constitutional validity/vires or legality of a legislation (subordinate or delegated) and exercise of such jurisdiction would tantamount to enlarging its own jurisdiction by the tribunal?
2. Whether the Principal Bench of NGT has any territorial jurisdiction to entertain and decide the cases where the cause of action has arisen at Kerala and Coastal Zones?
3. Whether the Chairperson of the NGT, unlike some other statutes, is vested with the power to transfer cases to its Principal or Regional Benches from other benches?
4. Whether it is permitted to insert certain words into the CRZ Notification 2011 indirectly and effectively through the Original Application No. 74 of 2014?

Adjudicating all four issues raised before it, NGT held that within the framework of the provisions of the NGT Act and the principles discussed, NGT had the power to exercise limited power of judicial review to examine the constitutional validity/vires of subordinate or delegated legislation and held that while performing such functions it would supplement higher judiciary and not supersede them. Considering the facts and circumstances of the case, a part of the cause of action arose at New Delhi and within the area under the territorial jurisdiction of the Principal Bench of NGT. Hence, it has jurisdiction to entertain and decide the present cases. Further, it held that under Section 4(4) of the NGT Act and Rules 3 to 6 and Rule 11 of Rules of 2011, the Chairperson of NGT has the power and authority to transfer cases from one place of sitting to the other place of sitting or even to a place other than that. Finally, adjudicating on the last issue NGT held that Original Application No,.74 of 2014 cannot be dismissed on the ground that it attempts to insert certain words indirectly which cannot be directly and which is impermissible and hence directed the matter to be listed for arguments on merits.

Srividya R Sastry

RECENT ACTIVITIES: TRAINING AND CAPACITY BUILDING

1. ONE WEEK TRAINING PROGRAM FOR OFFICERS OF INDIAN FOREST SERVICE ON "INTERNATIONAL AND NATIONAL ISSUES AND MITIGATION MEASURES, 2nd to 6th December, 2013 :

Commons Cell and CEERA, NLSIU in collaboration with Ministry of Environment and Forest, successfully organized this training program for IFS officers. The one week training program enabled all the trainees to get a hold over the legal side of issues related to forest rights, wildlife protection, illegal mining etc. The main objective of this program was to expose participants to best practices and current trends in planning and management, advance the adoption of conservation planning and decision models that explicitly incorporate social considerations including social impacts, stakeholder tolerances, involvement and preferences.

The course structure was framed to introduce participants to practical methodologies with a concoction of theoretical basis. Classroom instruction was organized by the core content areas and thematic topics mentioned:

International and National dimensions of environmental law and its evolution, Climate Change, Global Commons, Biodiversity Conservation and Benefit Sharing with Local Communities, Dissemination of Timber Trade Certification and Statistics, Audio Visual presentation from a Conservator's perspective, Forest Tribal Interface, Good Governance, Holistic Approach to Forest Management through People's Participation, Integrated Approach for Sustainable and Development of Fragile Eco System, Laws Governing Environmental Protection and Forest Conservation, Policy and Legal Issues in Forestry Communication. As part of case studies, some devising sessions on Godavarman Case and Bt Brinjal, were offered. An exclusive session on certain challenging issues of illegal mining in forests presented problems and pitfalls faced by and environmental triumphs of the achievements of a group of foresters. During problem solving sessions, there was mooting by several stakeholders enabling the trainees to think from every facets of legal issues related to forest management.

The sessions were led by National Law School of India University faculty and invited resource persons and included a combination of lecture, discussion, presentations and group activities.

The concepts and techniques covered in the sessions were demonstrated and further explored during case studies and problem solving activities.

2. THREE DAY TRAINING PROGRAMME ON "LAND ACQUISITION, REHABILITATION AND RESETTLEMENT : POLICY, LAW & PRACTICE", FOR NTPC OFFICERS, 28th to 30th January, 2014

The three day Training Programme on "Land Acquisition, Rehabilitation and Resettlement: Policy, Law & Practice" from 28th to 30th January, 2014 for NTPC Officers, organised, upon a request from NTPC, by the Commons Cell and CEERA in NLSIU, had eighteen Senior level Officers, drawn from all over India, getting trained by a group of experts, in getting acquainted with the new law on Land Acquisition, Resettlement & Rehabilitation and the laws allied to the same.

Spread over twelve sessions, it covered enquiries into basic concepts (-like, eminent, domain, sovereignty, Public Trust, Public Purpose and equity); Comparisons (- between the old law with the new one): Connections (- with Forest-related laws, Coal-bearing Areas Law, PESA etc.) and the Preparations and planning required for R&R Activities to give effect to the new law. There were sessions on case studies, case laws and solving problems. The sessions were designed in such a manner that each one had more than one panellist to analyse the policy, law and its application and

engage in interactions with the participants. While the first day focused on concepts and the law in a comparative context, the second day featured attempts in drawing connections and alignments with related laws, case laws and case studies. The third and the final day presented the challenges ahead along with the preparations and planning that are required to implement the new law.

3. TRAINING PROGRAMME OF 2012 BATCH IAS PROBATIONERS OF KARNATAKA CADRE, 19th to 22nd MAY, 2014

The Training Programme was spread over four days

and had fourteen focussed theme based technical sessions. The sessions were on a wide array of topics that included, to name a few, Cyber Crimes, Intellectual Property Law Regime in India, Right to Information, Constitutionalism and Ethics, Civil Procedure Code, Principles of Natural Justice, Labour Legislation, Environmental Governance, Consumer Protection, State liability, Gender Justice. Apart from classroom exercises, there was a visit to the library and various Research Centres of NLSIU to give the participants a first-hand knowledge and insight of the work engaged in. The visit also tried to ensure that the officers were made familiar with resources available which can be of use to them in their future course of work.

4. BRAINSTORMING WORKSHOP ON CLIMATE CHANGE – LEGAL FORCE UNDER THE UNFCCC, 29th May, 2014

The Brainstorming Session tried to view the possible position that India can take in the Climate Change Negotiations at the threshold level. The program was organized at Habitat Centre (New Delhi) on 29th May, 2014 and had participants drawn from legal academia, MoE&F, MEA and the NGT.

The three options that are open to India are as follows:

1. Continuation of the Kyoto Protocol arrangement, for another period of time (Kyoto II commitment);

2. Moving ahead with a new agreement that would bind the leaders of the developing world, including India, for understanding obligations (voluntary or otherwise);

3. A brand new arrangement, that would have both voluntary and binding commitments, etc. while the first two options appear to have remote scope for mustering support from all, the third one enable the parties think afresh charter a new course of action.

The aforementioned options were deliberated upon and the law school was required to do a SWOT analysis of all the three options and advise the MoE&F

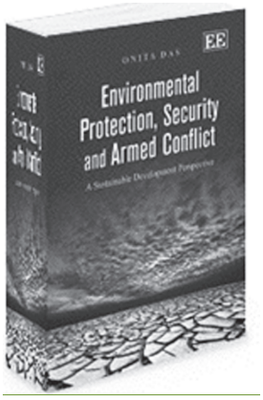
5. TWO DAY TRAINING SESSION FOR INDIAN FOREST OFFICERS, AT INDIRA GANDHI NATIONAL FOREST ACADEMY, DEHRADUN, 16th & 17th JUNE, 2014

A Two Day Training programme on Environmental Governance and related aspects was organised by CEERA and Commons Cell, NLSIU for 80 IFoS Trainees who were at the fag end of their training programme. The programme concentrated more on practical aspects of environment lawyering and the participants were divided into 8 groups of ten members each and had to role play an allotted case study. To provide them a picture of the related law, lectures were delivered beforehand on topics related to the subject. After the case presentations made, clarifications and a brief review of the same was done. A prize was also distributed for the best team

6. 6th JULY to 2nd AUGUST, 2014 : SUMMER SCHOOL INTERNATIONAL COURSE ON 'LEGAL LANDSCAPE OF RIGHTS IN INDIA

The Commons Cell and CEERA, NLSIU organised a Four Week Summer School International Course on "Legal Landscape of Rights in India" from 6th July to 2nd August, 2014 in collaboration with the Nordic Centre in India (NCI). 14 students from several leading Universities of Nordic Countries took part in the Summer School. They had engaging and stimulating lectures, discussions and practical exposure to several dimensions of Human Rights discourse within Indian Legal framework. Apart from classroom exercises there were also field visits to Karnataka Human Rights Commission, Sanitation for All- Visit to Consortium for DEWATS Dissemination (CDD), Centre for Child Law- NLSIU Campus Centre, NLSIU Legal Services Clinic in association with LSC Team, ISKCON, Eco Trip to JP Park and a visit to the neighbouring Institute of Social and Economic Change. The students were supposed to present a paper on an allotted topic and also were supposed to write a paper, based on which they were graded.

BOOK REVIEW



Environmental Protection, Security and Armed Conflict: A Sustainable Development Perspective -Onita Das, Edward Elgar Publishing (2013)

Threats to the environment are a growing concern for societies, states and the international community as a whole. These environmental issues more often than not result in violent or armed conflict which invariably causes irreparable damage to the environment; this concept encompasses the heart of the subject adopted by the author. The most striking aspect about the book is however, the author's efforts at linking sustainable development issues with the paradigms of security. This is done by interpreting the causes and consequences of environmental degradation in areas which has been affected by security and armed conflict. She has examined five case-studies relating to Somalia, Darfur, Sudan, Sierra Leone, the Gulf war and the Kosovo conflict, thus making use of tools of economic sciences, international law and sociology to further explore the concept of environment protection through sustainable development. Another novel feature about the book is its dynamic interest in the armed and security conflict. One does not, at first glance, draw a linkage between the effects of armed security conflict and environmental degradation, which is indeed a major concern arising from the endless disagreement between states and countries.

The author analyses the threats to ecosystems which are addressed with reference to an aspect of human conduct i.e., war and armed conflict, being a challenging topic because of the cyclical relationship between environmental insecurity and human insecurity. As the United Nations Environment Programme (UNEP) recently reported, not only have violent conflicts been fuelled by natural resource exploitation and related environment stresses but the environment itself continues to be a silent victim of armed conflicts worldwide. The author has made use of tools of economic sciences, international law, political sciences, sociology and contemporary history to reveal and explain particular aspects of an investigative, critical inquiry approach.

Sustainable development, a still evolving concept in international law, has been steadily gaining ground over the last few decades, it generally refers to development or the process of improving quality of life of the present generation without compromising that of the future generations. Hence, sustainable development is a concept being integrated within both realms of international law and international relations and the author finds it only practical to apply this concept in relation to the protection of environment relevant to security and armed conflict.

The book covers three stages of armed conflict;

Pre-conflict; how to prevent an environment-induced armed conflict.

During armed conflict; the issue of environmental protection in actual battle.

Post-conflict; how and who will fix or repair the war-damaged environment.

Within the body of the study, the author leads immaculately from the general data, relating to environmental protection and sustainable development as mentioned earlier, to personal projections about the implications of environmental threats to regional and global security environment. These conclusions give a practical outlook on the theoretical concepts given initially. In addition the scope of the book encompasses the international community as a whole and in some circumstances for the benefit of the reader focuses on particular institutions and agencies that are most relevant, for example the United Nations, United Nations Security Council and more importantly United Nations Environment Programme.

NLSIU Journal on Environmental Law Policy and Development [JELPD]

ISSN (O) 2348-7046

CALL FOR PAPERS ISSUE 2 2015

The Journal on Environmental Law, Policy and Development welcomes contributions from the law fraternity, as it plans to release its 2nd Issue in January 2015.

JELPD is a peer-reviewed, interdisciplinary journal, jointly published by the Commons Cell and the Centre for Environmental Law Education, Research and Advocacy (CEERA), a research wing on Human Rights and Environment, at the National Law School of India University, Bangalore, on its website www.nlsenlaw.org. JELPD aims to be a forum that involves, promotes and engages students, scholars and anyone interested in environmental law, to express and share their ideas and opinions. The Journal also plans to feature guest articles by eminent scholars as well as articles by students, thereby providing an interface for the two communities to interact.Submissions, under the following categories, are welcome.

Articles (Long Articles- between 8000-10,000 words including footnotes and Short Articles- between 5000-6000 words including footnotes)

Book Reviews (1000-2000 words including footnotes)

Case Commentaries (1000-3000 words including footnotes)

SUBMISSION GUIDELINES:

1. Submissions are to be made only in electronic form. They are to be sent to commonscell@nls.ac.inand ceera@nls.ac.in.
2. Details about the author, including qualifications and institutional affiliations, if any, are to be detailed in the covering letter.
3. Only original work need be sent. It is presumed that, once the work has been sent, that it is the original work of the author so named and that it has not been published anywhere else.
4. All work need be sent in MS Word format- (.doc or .docx)
5. The author should maintain a uniform mode of citation throughout the whole work.

Scope and relevance: The work must be on contemporary legal issues on environment. The language used must be formal and clear, adhering to the submissions guidelines of the journal.

REVIEW PROCESS

The submissions received would be reviewed and the Editor(s) would determine whether the subject matter fits within the scope of the Journal and also would assess the quality of the manuscript. The decision on publication will be solely the discretion of the Chief Editor and it takes a minimum of 1–2 weeks after the deadline.

JELPD

Last date for Submission :November 15, 2014

For details about the Environmental Law Portal, kindly visit:www.nlsenlaw.org