**Session I: Lecture Notes on**
**"Introduction to Environmental Law and Policy"**

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## I. Introduction

Preservation and protection of environment is a major focus of all current human endeavours. Its value to human beings has for long been recognized. Traditions, folklore and mythologies have given prominence to environment and different components of environment have been even treated as different forms of the Almighty. Respect for and preservation of environment is an ancient *dharma* of India. Tending forests and hunting animals is a duty of the king to ensure ecological balance. Other civilizations may have their own methods and means to give similar and equal respect to the environment.

Man is a creature of nature that has been recognized by all civilizations. Much before we look at what law or policy governs national or international society, it is important to look at mans relationship with nature. Although man has control over natural resources what distinguishes him from lower animals is his power to discern and use his resources rationally. However, we witness the reverse. A lion shares his meals with his pride, eats only as much as his stomach can take. The fox, wolf or other scavengers also share his catch.

But man hunts with driftnets that kill fishes and turtles, hunts whales that are not his basic diet, acquires property that he does not require for his living, pollutes oceans that provide him food and sustenance. So where do we find a place for law and policy. Thomas Aquinas regarded natural law as supreme law because he believed that god is the creator and all men drew their sustenance from god's mercies. The divinity of kings is known in the ancient Indian concept of dharma too. Law has been created by man to support an ordered life, far from the life being short, nasty and brutish as viewed by Thomas Hobbes. Lockean ideas provided a representative form of government and also the need for laws along with Bentham's concept of utilitarianism of the "greatest happiness of greater number". HLA Hart spoke of the need for primacy of rules; those create that a primary obligation

and those which create secondary duties too. Dworkin too much of a liberal spoke of the underlying philosophy of law being in principles as opposed to rules. There is some truth in this as principles provide the conceptual framework for rules to exist in international society. We will see how this really is done at the international level a little later.

Customs often decide the shape of laws to come. Customary practices create social mores and mores become norms or acquire normative character. Man has always worshipped nature as seen earlier. The example provided in your note appears very apt as the Chinese believing that tiger products or its body parts are used as medicine. No measure of law will be able to change a time acquired social more. In international law custom is supposed to be a primary source of law. Laws can be abrogated rescinded, but customs cant. Their effect continues even when States are not parties or place reservations on the application of international treaties (Nicaragua Case ICJ Reports, 1986).

However, man in his quest for precision and clarity often prefers clear treaty obligations or hard written obligations, which can be authoritatively interpreted and quoted. Most national constitutions provide for a rationale or basis to regulate the environment. We shall look into this aspect now.

## II. Environmental Law and the Indian Constitution

Friends, the problem of the environmental protection and conservation is an issue, which the COI has dealt with in an adequate measure. The obligations of a State to provide its citizenry a clean and healthy environment is included in Part IV of the COI. Although the Directive Principles of State Policy are not enforceable rights, as the name suggest they are directions to the government of the day to carry out measures, which affect the social and economic life of the people. In this regard, Articles 48 A and 49 provide for the protection and the improvement of the environment and safeguarding of forest and wild life of the country. Article 49 casts an obligation upon the state to " protect monuments, places and objects of national importance". These two articles read together clearly define the role of the state in protecting the environment for the present generation as well as those coming in the future. The obligation is also clearly a pro-active one, where the state is not only to protect but also preserve and improve the wild life and the place and objects of national importance. Similarly, Article 51 (c) calls upon the State to adhere to

international laws and treaties obligations and foster respect for these. This Article assume special relevance because of the domestic legislation which were enacted in the field of water and air laws, soon after the historic United Nations Conference on Human Environment (UNCHE), held in Stockholm, in 1972.

It may also be seen that States alone cannot be beholden to keep the environment clean. It is the duty of every individual as much as that of the State to avail a right with the corresponding duty. The COI was amended (Forty-second amendment act, 1976) and a new Part IV A was added which provides for Fundamental Duties of citizens of India. One of these duties is to "to protect and improve the natural environment including forest, lakes, rivers and wild life and to have compassion for living creatures. This amendment in very clear terms provides a role for a civil society of India to become partners in good governance as well as protection of the environment of the company. While a lawyer may argue that these are hortatory duties that cannot be enforced, they still remain a strong reminder of man being at the center of the ecological order.

Apart from Directive Principles, the COI provides for Part III that deals with Fundamental Rights. These rights are enforceable by higher courts of law and they uphold the rights of the citizen, which have guaranteed by the Constitution. Although the COI does not devote a clear article on the right to a clean and healthy environment, it has through various interpretations upheld the right to life and liberty to also include a healthy environment. There are three important articles of the constitution namely articles 14 (right to equality), article 19 (right freedom of expression) and article 21 (life and liberty) which read together provide for a very strong legal basis to enjoy right to livelihood in a humane manner. In *Olga Tellis V. Bombay Municipal Corporation* (AIR 1986 SC 180) the Supreme Court while passing directions to the municipal corporation to clean up the pavements of where the slum dwellers lived, also directed to find alternate sides for them to live. We shall see later how Indian courts have provided relief to victims of pollution while interpreting post Rio principles.

Some of the important environmental problems faced by India relate to conservation of forest, preservation of grasslands, wetlands, mangroves and the others related to sustainable use of the natural resources, which could include regulation of industry, forestry, agriculture, marine resources and movement of hazardous wastes. A broad classification of such a

regulation could be divided into pollution laws, laws relating to environmental conservation and laws relating to sustainable use of resources.

There are a number of general laws enacted by the Parliament of India and State Legislatures, which provide for detailed rules towards environmental protection and prevention of pollution and other man-made hazards. One of the oldest ones is the Indian Penal Code, 1869, which provides for environmental related offences such as nuisance, trespass, pollution ad handling of other hazardous substances. Public nuisance occurs when "a person is guilty of public nuisance who does any act, or is guilty of an illegal omission, which causes any common injury, danger, or nuisance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may occasion to use any public right." The IPC deals with a number of other environmental 'offences' such as adulteration of food, air pollution, escape of poisonous or noxious gases, dangerous explosives and dangers to human life. Likewise, a number of early acts such as the Factories Act, 1948, and the Industrial Disputes Act, provide for a number of environmentally safe and sound measures, which ensure health of persons involved in production.

Under the framework of the Constitution of India, a number of subjects are mentioned wherein environmental duties to preserve the natural resources of the country have been enumerated (Articles 48-A and 51-A). Moreover, the Constitution also provides procedures in Article 252 and 253 for adopting national legislations with respect to needs of two or more States. The Water (Prevention and Control of Pollution) Act 1974 and the Water (Prevention and Control of Pollution) Cess Act, 1977, are examples of such legislation. It may also be noted that the Union Government in pursuance of the Stockholm declaration of 1972 and acting under Article 253 adopted the Air (Prevention and Control of Pollution) Act in 1981.

The Water Pollution and Air Pollution Acts are two important legislations governing the sustainable use of air and water. The Water Pollution Act, which was adopted under Article 252 and passed by State Legislatures provides for the establishment of Central Pollution Control Boards, State Pollution Control Boards and also other mechanisms needed for prevention and control of water pollution. The institutional mechanism set up at the Central and State level provides for comprehensive plans of

action for prevention, control or abatement of pollution of streams and wells, rivers; economical methods of sewage treatment and organizing training programmes and creating educational awareness towards preventing pollution of the water bodies of the country. Deterrent penalty clauses detailing the offences for which a person can be held responsible, are also provided for. The Water Prevention Act was followed by the Water (Prevention and Control of Pollution), 1975, and the Water (Prevention and Control of Pollution) Cess Act, 1977, which dealt with certain institutional aspects of Pollution Control Boards and collection of levied cess on water consumed by industries, respectively.

The Air Pollution Act (Air Act), 1981, was adopted under Article 253 by which it is made applicable to only those States who requested its enactment. Similar to the Water Act, the Air Act too provides for constituting a Central Pollution Control Board and State Pollution Control Boards. These Boards are responsible for drawing up comprehensive plans of action for the improvement of the quality of air and the prevention, control or abatement of air pollution in the country. Provisions are also made with regard to liability for non-compliance and payment of compensation by the polluting industry. This Act stood amended by the Air (Prevention and Control of Pollution) Amendment Act, 1987, followed by the Air (Prevention and Control of Pollution) Rules in 1982. While the former made some amendments with regard to the power and authority of the Pollution Control Boards, the latter took notice of procedural rules while seeking assistance from environmental specialists.

Even as the COI is the fulcrum law guaranteeing environmental protection, there are other criminal, and civil laws of India that provide for a right to a remedy when the environment is affected. These include: public nuisance, fouling water of public spring or reservoir, polluting atmosphere, affecting general health, and mischief. These offences are punishable with fines or imprisonment ranging from 3 months or fine of Rs.500.

Environmental offences more than being crimes are also viewed in legal parlance as torts or civil offences for which remedy lies in un-liquidated damages. What this really mean this that as opposed to contracts which provide for fixed or liquidated damages, torts have unlimited amount of compensation. Under English law offences of mischief, trespass, negligence etc. are treated as torts in the landmark case of *Ryland v. Fetcher (1868)* the House of Lords had held that a person who “for his own purposes

brings on his own land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape". The rationale is a rational and prudent man knows the natural consequences of his act. In session II we shall have occasion to see how international rules of liability and compensation grew from the fundamental premise of the Rylands rule.

Besides tortious liability, we also have rules of non-fault based strict liability and absolute liability, which have emerged under domestic, and international laws. In the landmark judgment of *MC. Mehta v. Union of India (Oleum gas leak case*) the court held that the principle of absolute/ strict liability should be followed to compensate victims who have suffered injuries on account of being engaged in dangerous and hazardous. In India a number of provisions for liability have been provided under the Environment (Protection) Act 1986, the Factories (Amendment) Act 1987, the Public Liability Insurance Act 1991 (PLIA) and the Civil Procedure Code, 1908.

## III. General principles on environmental law applied by judicial decisions of Indian Courts

The study of environmental law essentially involves the interpretation and application of a number of principles of environmental law by courts. The Courts in India have applied a number of general principles of environmental law, which for the purposes our study include: principle of precaution, inter-generational equity, polluter pays principle as well as rules of absolute liability.

The Supreme Court of India in (Rural Litigation and Entitlement Kendra, Dehra Dun, vs. State of U.P., AIR 1985 SC 652, p. 656) recognized the right to a clean and healthy environment as a necessary corollary of the right to life and personal liberty guaranteed under Article 21 of the Constitution of India In *M.C. Mehta v. Union of India (*AIR 1988 SC 1037 at 1048), the Supreme Court through the Justice K.N. Singh held that the life, health and ecology are more important than loss of revenue, unemployment, etc. The High Courts of India, taking a cue from the decisions of the Supreme Court have given a wider interpretation to the right to life, that includes enjoyment of a clean and healthy environment free from pollution. In Damodar Rao v. the Special Officer Municipal Corporation of Hyderabad

(AIR 1987 A.P. 171), the Court stated "the enjoyment of life and its attainments and fulfillment by Article 21 of the Constitution embraces the protection and preservation of nature's gift without which life cannot be enjoyed. The slow poisoning of the atmosphere by environmental pollution and spoliation should also be regarded as amounting to violation of Article 21 of the Constitution"; in K.K. Hussain vs. Union of India (AIR 1990 Ker 321) the Court held that the right to sweet water and fresh air are attributes of the right to life.

The principle of intergeneration equity has been highlighted by the concept of sustainable development, wherein the Supreme Court of India has interpreted such equity in terms of a public trust. Such a trust has been vested in every State wherein it is the duty of the State to act as a guardian for the protection and preservation of natural resources. In *M.C. Mehta V. Kamal Nath* (AIR 1997 SCC, p. 413) the Supreme Court of India held that "the State is a trustee of all natural resources which are by nature meant for public use and enjoyment. The public at large is a beneficiary of the seashore, running waters, air, forests and ecologically fragile lands. The State as a trustee is under legal duty to protect natural resources. These resources meant for public use cannot be converted into private ownership". Another case the Rural Litigation and Entitlement Kendra, Dehradun vs. State of UP (Dehradun Valley litigation) the Supreme Court has ordered a number of opinions with respect to dangerous limestone quarrying activities that were going on in the Mussourie hill range of Himalayas.

With regard to the principle of polluter pays, the Supreme Court of India had an opportunity to apply this principle in M.C. Mehta V. Union of India A.I.R. 1987 SC, P. 965 (*Sri Ram gas leak case)*and the *Enviro-Legal Action V. Union of India* (AIR 1996 SC 1446). In the former case the Supreme Court laid down firm principles of strict liability and held that compensation must be correlated to the magnitude and the capacity of the enterprise. This case apart from recognizing the principle of polluter pays also evolved the rule of absolute liability when industries are engaged in hazardous and dangerous activity carrying with them a risk to the public at large. It is also important to note that the court departed from the principle of strict liability with its exception clauses as enunciated in *Ryland V. Fletcher* It held that "where an enterprise is engaged in a hazardous and inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous and inherently dangerous activity, for example,

in the escape of toxic gas, the enterprise is stirctly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability in *Ryland V. Fletcher*"

The *Sri Ram Gas Leak Case* set the trend for compensation for hazardous and dangerous activity undertaken by various enterprises. Later in the *Union Carbide Corporation V. Union of India* (AIR 1992 SC 248) the Supreme Court of India found an opportunity to further strengthen the need for absolute liability for damage resulting from escape of a poisonous methyl isocyanate. However, an opportunity was lost to put into effect the ratio of the Sri Ram gas leakage. While Chief Justice Rangnath Mishra observed that the departure from the Ryland V. Fletcher rule in the Sri Ram gas leakage was essentially an obiter, Justice Venkatachaliah (speaking for Justice K.N. Singh, N.D. Singh and himself, cast doubts on the standard of absolute liability and recognized the right of the Union Carbide to raise and urge defenses from the 'without exception', absolute liability

As regards the principle of precaution the Supreme Court of India had opportunity in *Vellore Citizens Welfare Forums case* (AIR 1996 SC 2715, P. 2720) and *A.P. Pollution Control Board v. M.V. Nayudu and Others (*1999 (1) SCALE pp. 140-159), 152., to state that it is one of an essential features of the principle of sustainable development. In the former case the Court held that the precautionary principle applied at the state level would entail: environmental measures to be undertaken by the State governments and other local bodies to anticipate, prevent and where possible mitigate environmental degradation; where activities pose a threat of ecological damage which is irreversible lack of scientific uncertainty should not be cited as a reason for continuing with an hazardous activity; and the burden of proof would be on the actor i.e. the industrialist or the developer to prove that his activity is environmentally benign.

In the *M.V. Nayudu case* the Supreme Court had an opportunity to have a detailed look at the precautionary principle governing activities, which are inherently hazardous in nature. The Court while stating that the precautionary principle had replaced the principle of 'assimilative capacity', added that the principle involves the anticipation of environmental harm and taking of measures to avoid or choose a least environmentally harmful activity, especially if the harm is irreversible in nature. The Court further

added that the legal status of the precautionary principle according to one commentator is still evolving although it is accepted as a part of customary international law, the consequences of its application in any potential situation will be influenced by the circumstances of each case**.**

## IV. Environment Protection Act, 1986

Bearing in mind the need to have a comprehensive legislation encompassing various sectors affecting the environment, the Union Government in 1986, enacted the Environment (Protection) Act (EPA).
The Environment (Protection) Act (hereinafter EPA) enacted by the Parliament on 23 May 1986 is a piece of umbrella legislation "for the protection of environment and for matters connected therewith". It entrusts the Central Government (Ministry of Environment of Forests) with the powers to "take all such measures, as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution". These measures include power of "laying down procedures for handling of hazardous substances". Further, the Central Government is empowered to lay down rules to regulate environmental pollution and to carry out the purpose of the EPA. Such rules may include rules relating to:
the procedures and safeguards for handling of hazardous substance;
(b) the prohibition and restrictions on handling of hazardous substances in different areas; and
(c) the procedure in accordance with and the safeguards in compliance with which hazardous substances shall be handled or caused to be handled.

The Act further provides that any person handling hazardous substances is bound to comply with all the prescribed procedural safeguards

The EPA provides for comprehensive definitions of a number of terms such as environment, environmental pollutant, hazardous substances etc. The Central Government is empowered to take all necessary measures for protecting and preserving the quality of the environment.

The Courts have had occasion to comment on the EPA and its role. It was held in *Indian Council for Enviro-Legal Action vs. Union of India* AIR SC 1996, p. 1446) held that Central Government had power under Sections 3 and 5 of the Environment Protection Act to levy and recover the cost of remedial measures. It was also held that the Environment Protection Act vested the Central Government with all the "powers necessary or expedient for the purpose of protecting and improving the quality of the environment."

Another issue that came up was that Sections 3 and 5 of the EPA were held to be applicable to the principle of polluter pays and the precautionary rule.

Similarly, the Central Government under the EPA is authorized to constitute authorities for the purpose of exercising its functions. The Supreme Court in *Vellore Citizens Forum v. Union of India* directed the constitution of an authority under the EPA to deal with the situation wherein tanneries and other polluting industries in Tamil Nadu. This case also emphasized the need for implementing the polluter pays and the precautionary principle. The Act also provides for standards of emission and various other procedures dealing with handling of hazardous substances. It also provides for sanctions by way of punishment and fines for persons found guilty of an offence under the Act.

The Central Government in 1996 laid down the Environment Protection Rules, which provide for detailed standards of emission or discharge of pollutants.

Section 2(E) of the EPA defines a hazardous substance to mean "to be any substance or preparation which, by reasons of its chemical or physio-chemical properties or handling is likely to cause harms to human beings, other living creatures, plants, micro-organisms, property or the environment".

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