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"Environmental Constitutionalism: A Way out to Deal with the Emerging Threats to the Environment"

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Abstract

Despite plethora of laws and international treaties on different aspects of the environment, quality of the environment is reducing with every passing year the world over. There has been general loss of biodiversity with more species endangered and speed of extinction of species has become alarming. Wildlife habitat has shrunk including increase in human-wildlife conflicts and wildlife trade. Our air and water quality has degraded. There is huge problem of solid waste disposal including problems posed by hazardous and electronic waste the world over.

This paper proposes to unfold the meaning of environmental constitutionalism. In addition, it also analyzes how it can prove as a game changer in handling the emerging challenges of the environmental problems.

Keywords: International Treaties, Environment, Environmental Constitutionalism.

I. Introduction:

In fulfilment of international environmental jurisprudence developed by way of International Conventions and Declarations, whether persuasive or mandatory in nature, there is a gradual trend towards expressing environmental care in Constitutions. This is substantiated by the fact that more than three fourth countries now have constitution that contain environment either as a part of fundamental rights or directive policy for the states to govern. Some constitutions also provide power to federal governments to incorporate international principles as part of their ruling jurisprudence by virtue of the constitutional features. In addition, most of the countries of the world have developed environment specific legislation in coherence with their constitutional mandate. However, these constitutional and legislative measures are not evolving at pace with the environmental problems.

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There is a requirement to figure out cause, why environmental framework is not keeping pace with the challenges. In spite of number of conventions and treaties at global level and constitutional status to the environmental care and specific laws on environment at domestic level, environmental problems are burgeoning at alarming state nationally and globally. Reason being the world at large ignores the way environmental problems have emerged and there is mutually incompatible understandings of the world because of lack of an established knowledge base and commitment.

In the initial stage of development, environmental concerns did not attract any attention in developed countries because they have given priority to economic development. In developing countries, most of the time provincial/state governments are focusing on the developmental needs without paying much importance to environmental consequences while planning for development. Most of the laws in developing countries were based on command and control regime with week enforcement and cumbersome process to prosecute wrongdoers.

Most of the international treaties envisaged transfer of technology and financial support and aid to developing countries to peruse path of development incorporating environmental considerations but this has not happened. Moreover, countries like USA and Japan and other big developed countries have even reduced their contributions to voluntary aid to developing countries. With the breakup of the erstwhile USSR and the consequent device of socialist economy and development have almost disappeared and their place has been occupied by capitalist model of development represented by multinational corporations and big corporates.

This transition has again opened up a new era of exploitation of natural resources and degradation of biodiversity. Resultantly, governments world over have slowly withdrawn itself from core sectors of development like power, infrastructure, mining, industries and tourism etc. and private sector started playing their role which is welfare oriented but driven by economic considerations. The current model of development manages to control land, resources, and long-term lease, which often leads to overexploitation, degradation of resources and myopic strategy and planning process and undermining the aspiration of indigenous community. Therefore, how we frame an environmental problem globally decide the shape, intensity and effectiveness of the solution.

Here, Michel Callons' terminology 'hot situations' leading to hot law can be referred to. As environmental problems are hot in nature, so we requires hot legal frame to handle it. Now the question is -what are the essential attributes to make any legal frame a hot legal frame. A legal frame, which is not static but dynamic and anticipatory in nature, may be termed as a hot legal frame. Here one concern is there to consider, whether hot legal frame in the form of legal reform will be sufficient or something else is required to ensure healthy and pollution free environment. Instead of legal frame to address environmental problem we need a hot legal regime to make environmental constitutionalism a working model of environmental protection. Where each stakeholders are supposed to perform their functions actively; in place of static legislation, we

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need environmental legislation with constitutional features, the executive needs to be proactive while dealing with environmental problems and instead of regular tribunal a specialized judicial tribunal to decide environmental matters with scientific understanding and approach is required for environmental matters.

In order to perform bigger role, big power and authority will be required by different institutions. In addition, this is a well-established fact that absolute power brings absolute corruptions. So here again, the core principle of constitutionalism will operate, there should be proper mechanism in place to ensure check and balance at each stage and through administrative oversight mechanism.

How to incorporate or constitute regime of environmental constitutionalism? There cannot be a straitjacket formula rather it is a sincere search for best practices to ensure protection of environment. This requires rigorous description and discussion of the existing or newly evolve practices on regular intervals to make it relevant and appropriate.

There is a necessity to keep an eye on the emerging environmental challenges and continuous effort to develop scientific understanding through advance research. Here scientific community should take the responsibility to make common people aware about the new development and emerging challenges.

In addition, most important thing is that while we are working to figure out solution to address any particular environmental challenges. We should initiate the conversation including all the stakeholders about different frames and all possible alternatives in exhaustive manner instead of working under pressure to find a quick solution to a pressing problem.

Government should initiate enactment of actionable and appropriate environmental legislation with constitutional features to determine the role of laws and to divide the power among different stakeholders in such a way so that all can contribute equally in furtherance of achieving environmental policy objective[3].

II. Environmental Constitutionalism: Meaning

Environmental constitutionalism defined May & Daly is a somewhat topical phenomenon at hanging within the pivotal interconnection of other laws namely, "constitutional law, international law, human rights and environmental law." [4]

The United Nations Environment Governing Council Decision 27/9 also recognized the role played by environmental constitutionalism in enhancing the intrinsic worth of environmental law and their compliance. The Decision 27/9 is the first inter-governmentally negotiated instrument to establish the term environmental rule of law in relation to environmental constitutionalism.

[3] Elizabeth Fisher, "Towards Environmental Constitutionalism, A Different Vision of Resource Management Act 1991", Paper given at the RMLA Conference, Dunedin, New Zealand (2014)
[4] James R. May and Erin Daly, "Global Environmental constitutionalism" 2 *Intergenerational Justice Review* 71-72 (2016)

Environmental rule of law is central to the concept of sustainable development and the success of environmental constitutionalism. This is for obvious reasons that environmental rule of law arms texture of environmental law on the principles of constitutionalism.

In order to understand the concept of environmental constitutionalism, it is necessary to explore the term environmental rule of law. The environmental rule of law was coined by a German Scholar Bosselmann[5] who introduced the concept of an ecological Rechtsstaat[6] as counter measure to anthropocentrism that pervades legal, economic, social, political and ethical systems. He argued that human endeavor for development has little respect for ecological limits. He therefore stressed for wholesale ecological reorientation of constitutional, political, ethical, legal on the lines of ecological rehtsstaat.

On the other hand, another environmental jurist, Jasanoff takes a rather unconventional approach to the topic of environmental constitutionalism by arguing for broad-based and more deliberate involvements of experts in environmental decision-making.[7] She argued that conflict and scientific certainty in various environmental projects or negative externalities cannot be solved simply by normative approach of law but it would require deliberate involvement of experts of multiple skills to actually understand the dynamics of environmental problems at hand.

Involvement of experts can best be seen in the functioning of Inter-governmental Panel on Climate Change (IPCC) for their inclusive approach to rely on published data and findings. The IPCC does not itself conduct any research of its own for publishing its various reports. However, Jasanoff cautions against too much reliance on experts. “Their reports should be tested in a democratic process to validate the scientific certainty of findings and data.”[8]

It is already stated that existing framework of environmental law lacks constitutionalism and mostly relies on static laws like contract law, tort law etc. The existing legal frames cannot address the dynamic nature or hot nature of environmental problems. Therefore urgency demands evolving of new legal frames to address multitude of environmental problems by integration of constitutional features into it.

III. Inception of features of Environmental Constitutionalism by incorporation of Environmental Impact Assessment (EIA) as a New Legal Frame

EIA is one such tools to predict the effect of a proposed activity/ project on the environment. Though it has its origin is NEPA in USA but its initial development occurred in Canada, Australia and New Zealand. In 1989, the World Bank adopted EIA for major development projects, in which a borrower country had to undertake an EIA under the World Bank supervision.

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[5] Klaus Bosselmann, “ The Rule of Law Grounded in the Earth: Ecological Integrity as a Groundnorm” Planetary Boundary Initiative Symposium, 3 (2013).

[6] Rechtsstaat means Rule of Law.

[7] S Jasanoff, “A world of Experts: Science and Global Environmental constitutionalism” 40(4) *Boston College Environmental Affairs Law Review* 439-452 (2013)

[8] *Ibid*

The objective of EIA is to integrate the environmental concerns in the development activities in its initial stage and further integrate environmental concerns and mitigation measures to project development. The EIA is an elaborate exercise to appraise the impact of a project or activity on the environment. It has different stages involved in the appraisal of a project.

The stages involved in EIA are screening, scoping and consideration of alternatives; baseline data collection; impact prediction; assessment of alternatives, delineation of mitigation measures and environmental impact statement; public Hearing or consultation; Decision making and monitoring the clearing condition.

Environmental Impact Assessment was part of the National Environmental Policy Act 1969 of USA. Over 60 nations copied this instrument and at least four international treaties of UN were directly inspired by EIA including World Bank. IA involves a technical evaluation intended to contribute to more objective decision-making. EIA is an activity that is done to find out the impact that would be made before a proposed development takes place is given permission to establish.

At the end of the project, an audit evaluates the accuracy of the EIA by comparing actual to predicted impacts. The objective is to make future EIAs more valid and effective. Two primary consideration are:

- Scientific- to examine the accuracy of predictions and explain errors.
- Management- To access the success of mitigation in reducing impacts.

After an EIA, the precautionary and polluter pays principles may be applied to decide whether to reject, modify or require strict liability or insurance coverage to a project based on predicted terms.

EIA is thus a new legal frame and it is loaded with technical functions. For carrying out an EIA, new public institution have been created or existing ones are strengthened in most countries.

IV. International environmental law principles and its contribution in development of environmental constitutionalism

This is to reiterate that environmental laws and their compliance have not been able to improve the quality of the environment. This alerted the attention of environmental law academicians the world over to think about the alternative ways to address the problems. This in turn led to addressing the problems through constitutional process ultimately leading to the emergence of environmental constitutionalism. Different contours of this emerging and nascent concept have been discussed in the preceding pages. Now let us turn to the international environmental law principles.

The principles of international environmental law have been developed partly by constitutional and higher courts the world over and later by international events under the auspices of the UN, most of such concepts and principles have been developed by common law countries. However,

few continental countries have also contributed to development of innovative norms found useful in growth of environmental constitutionalism. It is worthwhile to examine few accepted environmental law principles.

Historically No Harm principle has its origin in the ruling in Trail smelter case[9] (United States v Canada). The tribunal ruled[10]

The ICJ later confirmed the customary nature of the principle in 1949 in the Corfu channel case (UK v Albania).[11]

The above principle remained dormant for many decades until it was explicitly recognized in 1972, with the adoption of the Stockholm Declaration. Principle 21 of the Stockholm Declaration specifically linked the 'Sovereign Right' of a state to exploit its own resources to the responsibility not to cause environmental damage to other states or jurisdictions.[12]Recognition of no harm principle thus entered the domain of environmental jurisprudence globally.

Prevention Principle was introduced in 1972 in Principle 21 of the Stockholm Declaration.[13]

This principle has found expression in a number of international law principles. Article 193 of UNCLOS also incorporates this principle. Preamble to UNFCCC and Article 3 of CBD refer to the prevention principle in its expanded version introduced in the Stockholm Declaration and subsequently taken up by Principle 2 of Rio Declaration. The ICJ has subsequently confirmed twice the customary nature of the prevention principle in Nagyamaros project case[14]

The existence of general duty of cooperation, notification and consultation are well established in the international law. Likewise prior informed consent and EIA are widely present in international law practice globally.

Polluter pays principle is formally a part of Principle 16 of the Rio Declaration, which stressed necessity of promoting internationalization of costs and use of economic instruments.[15]

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[9] Trail Smelter Arbitration, RIAA, Vol.III, pp.1905-82 (Trail Smelter), p.1965.

[10]"No state has the right to use and permit the use of its territory in such a manner as to cause injury by fames in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."

[11] Corfu Channel Case (UK v Albania) [1949] ICJ

[12] Commission on Sustainable development, Report of the expert group meeting on identification of principles of international law for sustainable development, Geneva, Switzerland, 26-28 September 1995 (Report-Principles), para 516.

[13]"State have…..the sovereign right to exploit their own resources …… and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. The contents of the principle 21 was both a reflection of general international law (re-affirming the no harm principle).

[14]"In the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and the limitations inherent in the very mechanism of reparation of this type of damage."

[15]"National authorities should endeavor to promote the internalization of environmental costs and use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with

Principle of common but differentiated responsibility (CBDR) aims to distribute the efforts required to manage environmental problems of global scale like climate change, ozone layer protection or protection of bio-diversity. This principle finds mention under Principle 7 of the Rio Declaration. Precautionary approach envisages taking of steps to avoid harm in view of scientific uncertainty about the actual harm from a project or activity. The first treaty, which explicitly referred to the concept of precaution, is Vienna Convention for the Protection of the Ozone Layer of 1985, and further developed by its Montreal Protocol of 1987. The principle of precaution can be seen in the preamble of CBD and UNFCCC. Indian Supreme Court has frequently used the principle of precaution in many cases.[16]

The adoption by the UN General Assembly of the World Charter of Nature in 1982 referred to precaution. Later on, this concept was enshrined in Principle 15 of the Rio Declaration on Environment and Development.

Development of environment law principles at international summits and their further refinement including application in domestic cases have created huge impulse for their assimilation in various treaties, convention texts and the Stockholm Declaration 1972 and their further adoption by binding and non-binding instruments following the Earth Summit 1992. The constitutional courts are adopting the *ejusdem generis rule* in the interpretation of the limited sections of the Indian constitution, which contains non-justiciable environmental rights thus having the way for their enforcement in the true spirit of Directive Principles of State Policy. Presence of Article 21 relating to rights to life and personal liberty led Indian's constitutional court to give creative interpretation thus bringing a wholesome right to the environment within the ambit of Article 21. This led to constitutionalization of environmental protection.

EIA is a good example as it creates an overarching duty for decision makers to engage in certain administrative, technical and democratic processes.[17] The EPA is an umbrella legislation therefore it provides the framework to the central government in order to make the coordination different state and central authorities using different act like water act etc. It can also empower the center to issue notification on different

First Indian EIA notification was issued under the provisions of EPA 1986 and EPR 1986 in 1994. Under this notification, scrutinize a list of 29 industries in the beginning and later 34 industries considered to have adverse impact on environment were part of the said notification.

EIA notification 2006 decentralized the decision making to State Environmental Impact Assessment Authority (SEIAA). Different categories of the projects were shown in the

due regard to the public interest and without distorting the international trade and investment." Indian Supreme Court through its many landmark cases has extensively relied on the polluter pay principle.

[16] Vellore citizen welfare forum v UoI, AIR (1996) SC 2715, 2721
Shrimp Culture Case (S. Jagannath v UoI) AIR [1997] SC 811 1846, 850
A P Pollution Control Board v Prof M V Nayadu AIR (1999) SC 812, 819

[17] See note at 10

notification like category A and category B (B1 & B2) projects. It envisaged four phases: screening (only for category B projects), scoping, public consultation and appraisal.

State Pollution Control Boards (SPCB) conducts public consultation or public hearing. The project proponent normally arranges preparation of Environmental Management Plan (EMP) by a specialized agency, which on preparation is handed over to SPCB. The EMP contains details of activity under the projects and maps possible impact on the different aspects of environment like air, water, people, soil etc. Government officials of revenue, forest department and village and panchayat functionaries and chairperson and member secretary of SPCB attend the public hearing. During the meeting, people raise their demands for compensating intangible benefits from the land (including forestland) which is proposed to be diverted for non-forestry purposes. Indigenous knowledge is often tapped to understand the possible impact of a project. Project proponent undertakes revision of the EMP based on the summary of recommendations of the public hearing. Project proponent also assures to undertake entry point activities for the welfare of the people of the area.[18]

The Ministry of Environment, Forest and Climate Change 2020 seeks to make the process more transparent and expedient through implementation of online system, delegation, rationalization, standardization of the process.

Indian initiative with Environment Impact Assessment is a good sign and leading Indian Environmental jurisprudence towards the path of Environmental Constitutionalism. As this piece of legislation incorporated practical and scientific approach to address the environmental problem. However, over the period of time amendment is required.

V. Conclusion:

Following the end of World War II and liberation of many countries from the British colonial government, all nations vigorously pursued the path of economic reconstruction and development. This involved maximizing means of production, greater use of natural resources including fossil fuel and minerals. As obvious negative externalities not only reduced the outcome of developmental initiatives but it also created huge environmental problems. Initially people and government were immune and remained unaffected from exploding environmental hazards though some countries had taken localized remedial actions with limited results.

Adverse effects of developmental planning and execution without environmental foresight led to degradation of the environment leading to soil erosion, floods and change in weather patterns. To address the emerging challenges international institutions and United Nations perceived the problem, initiated era of international summits and conferences, and thus began dialogue and discussion among world leaders to formulate new principles and approaches to address the issues.

[18] First author conducted public hearing for proposals submitted to SPCB in 2007- 2008 where he was member secreaty of the SPCB. Project proponents were GeoEnpro Petroleum Limited and Geopetrol situated in Arunachal Pradesh.

These international efforts awakened the world and in response to it inculcated environmental concerns into their legal system through either statutes or judicial pronouncement. However, the environmental concerns are becoming complicated day by day.

A way out is thus to make environment as part of the national constitutions particularly including it in their preamble and fundamental right. This will then be a mandatory obligation of the governments to enforce it through their laws, policies and programs. This will also make it justiciable and people can get a direct relief though judicial recourse. It will remove the necessity for the apex courts to invoke their writ jurisdictions by relaxing locus standi and laches. There does not appear to be any better course to bring about any other structural change in constitutions except incorporating environment as an essential part of the constitutions. This will also buttress efforts of many UN Conventions directly dealing with climate change mitigation though measures like introducing new policies and programs.