Environmental Law: Regional and International Developments

Sanjay Upadhyay
Advocate Supreme Court of India and
Managing Partner
Enviro Legal Defence Firm, India
ADB & Srilanka Judges Institute Conference
March 2016
Nature of Environmental and Natural Resources Laws

- Use Oriented: 55%
- Acquisition Oriented: 33%
- Conservation Oriented: 11%
- Regeneration: 1%

Indian Example

But largely applicable to South Asian Region

Numerically there is an imbalance!

Therefore the lack of sustainability arises inherently!
Modern Environmental Laws

- Triggered by International Events- Stockholm- 1972; Rio-1992,
  - Wildlife Act, 1972, Water Act, 1974, CBD
- Triggered by Disasters- Bhopal in 1984
  - EPA, 1986; Public Liability Insurance Act, 1991
- Triggered by International Instruments
  - CBD, 1992- Biodiversity Act, 2002
  - CITES, 1976- Amendments in WLPA proposed
  - RAMSAR- Wetland Regulations 2010
- Peoples Pressure
  - Forest Rights Act; 2006; Provisions of Panchayats (Extension to Scheduled Areas) Act, 1996
- Peer Pressure from International Donors
  - ESMF, safeguards policies; equator principles!
Customary laws and practice— their relevance in modern environment protection regime?

- Traditional Water harvesting systems- Tribal Villages of Eastern India; Water millers; Gharat system; Chuan system

- Community Forest Management Strategies such as “deobani” “kankar bani” “devara kadu”; sarna; sacred forests

- Culling diseased wild animals? Akhand Shikar?

- “Jhum” “slash and burn” is it scientific? Some regulations hold it as a right of a Scheduled Tribe

- Niyamgiri Case of mining and role of traditional institutions and sacred hill- Supreme Court upheld it
New Challenges in Environmental Law

- Ecologically Sensitive Areas - Determination and Regulation?
- Flood Plains? Who Controls? Who regulates?
- River Regulation Zones?
- GLOFS & Liability
- Riparian Rights and PES
New Challenges in Environmental Law

- Waterways Development as more environment friendly transport? Environmental Implications!
- Coastal Vulnerability Indices; CRZ; ORZ? CZMPs? Tidal Influences and management!
- Cumulative Impact Assessments; River Basin Assessments
- Strategic Environment Impact Assessment
- Zero Liquid Discharge
- Enviro Legal Due Diligence or lack thereof
New Challenges in Environmental Law

- Qualifications of Authorities being challenged!
- Continuous mandamus (Forest case, Protected areas case)
- Role of Amicus Curiae?
- Judicial Overreach versus Judicial oversight – Thin line
- Judicial proactiveness required for strengthening environmental institutions
International Environmental Law Development

- Climate Justice
- Climate Liability
- Intended Nationally Determined Indices (INDCs)
- REDD+; REDD Readiness esp on benefit sharing
  - National; sub national; nested approach?
- PES and other IBMs- What are the legal implications? And where are the legal spaces for them?
Doctrines Evolved by Courts in India: Seeds of Climate Justice

- Doctrines evolved by courts on environmental justice have become part of Indian law and can be used as stepping stone to build the case on climate justice.

- **Public Trust Doctrine:**
  - M.C.Mehta v. Kamal Nath, (1996) 1 SCC 38: In a case where an attempt was made to divert flow of a river for augmenting facilities at a motel, it was held that State and its instrumentalities as trustees have a duty to protect and preserve natural resources.
  - MI Builders Pvt. Ltd. v. Radhey Shyam Sahu, AIR 1996 SC 2468: a city development authority was asked to dismantle an underground market built beneath a garden of historical importance.
Doctrines Evolved by Courts in India: Seeds of Climate Justice

- **Precautionary Principle:**
  - **Vellore Citizens Welfare Forum v. UOI, AIR 1996 SC 2718:** The principle was adopted to check pollution of underground water caused by tanneries in Tamil Nadu.
  - **Narmada Bachao Andolan v. UOI, AIR 2000 SC 375:** The Supreme Court held that the precautionary principle could not be applied to the decision for building a dam whose gains and losses were predictable and certain.

- **Polluter Pays Principle:**
  - The object of this principle is to make the polluter liable for the compensation to the victims as also for the cost of restoring of environmental degradation.
  - **Vellore Citizens Welfare Forum v. UOI, AIR 1996 SC 2718:** It was held that the precautionary principle and the polluter pays principle are part of environmental law of the country.
Doctrines Evolved by Courts in India: Seeds of Climate Justice

- **Absolute Liability Principle:**
  - *M. C. Mehta v. UOI, AIR 1987 SC 1086 (Oleum Gas Leak Case):* The principle was adopted to compensate victims of pollution caused by inherently dangerous industries.
  - *Narmada Bachao Andolan v. UOI, AIR 2000 SC 375:* The Supreme Court held that the precautionary principle could not be applied to the decision for building a dam whose gains and losses were predictable and certain.

- **Sustainable Development and Intergenerational Equity:**
  - *M.C. Mehta v. UOI, AIR 1997 SC 734 (Taj Trapezium Case):* While taking note of the disastrous effects that the emissions from the Mathura Oil Refinery had on the Taj Mahal, the Supreme Court applied the principle of sustainable development to the case, and apart from passing various directions, stepped in to execute and supervise the resultant actions.

- **HOW DOES ONE OPERATIONALISE THESE?**
Some Regional Developments

- Afghanistan - Land Management Law and Land Acquisition law being amended! The traditional system of management “jirga” system being weaved into the formal land management system.

- Pakistan: Trophy hunting! Unsustainable Fisheries! Community Wildlife management!

- Bangladesh - Climate justice and coastal concerns

- Nepal - CFUG; latest constitution

- Bhutan - GLOFs; Hydropower development and cumulative impacts

- Srilanka….
Key Environmental Law Challenges in South Asia

- Capacity-building on both substantive and procedural environmental laws:
  - Within the executive, judiciary and legal profession
  - Curriculum of environmental teachers
  - Capacity-building of institutions to train environmental lawyers
  - Capacity-building of administrative and regulatory institutions—PCBs; CZMAss, EACs,
Key Environmental Issues and Challenges in South Asia- Legal Perspective

- Role of environmental law in corporate governance:
  - Corporate social responsibility to corporate environmental responsibility
    - India– Its more as one of the Terms of Reference for prior EC
  - How can we get the concerns of the environment in the board rooms?
  - Environmental decisions need to make good business sense.
Challenges of Environmental Law practice in the Region!

- **Resources- Foreign Aid?**
- **Competence**
- **Attorney Fees Concept in Public Interest Cases**
- **Lack of expertise both at the bar and the bench**
- **NGT as a combination of Expert and Judicial Members- A unique Institutional Arrangement!**
  - Does it get reconstituted depending on the dispute?
THANK YOU

sanjay@eldfindia.com

+91–9810298530 (m)