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# INDEPENDENT WORK

Theme: Preservation of the Environment

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# Preservation Of The Environment

## Introduction

The protection and preservation of the environment is one of the most important issues facing humankind today. The centrality of this issue was demonstrated when the Nobel Peace Prize for 2007 was awarded to AL Gore and the Inter Governmental Panel on Climate Change for their efforts to build up and disseminate greater knowledge about man-made climate change. There is an international movement today, cutting across the north-south divide, to protect and preserve the environment. International law forms a major part of this development. Within this body of international law, dealing with protection of the environment, there exists a current of thought which argues that right to a clean or healthy or satisfactory or good environment has attained the status of a human right. The logical corollary follows that human rights mechanism can be used to prevent the degradation of the environment.

The central theme of this Paper is to answer whether there exists a human right to environment in the international arena and in India.

Shelton proposed three ways in which human rights law and environmental protection law could co-exist.

1. The first view was that since the goal of environmental protection was to improve the standard of human lives, there could be established a human right to environment which would have as its cornerstone the betterment of human lives. This view was anthropocentric. If a conflict arose between the need to protect the environment and other human rights, like the right to development or the right to livelihood, environmental protection would not get priority per se. Right to environment would just be another human right; it would not be the first among equals.

The second view was that since environmental law sought to protect nature and that humans were only a part of the natural system; human rights would have to be subservient to the main goal of protecting nature. This too recognized that a human right to environment existed.

2. The third view was that these were two different bodies of law which had certain common objectives. This view did not acknowledge the existence of a human right to environment.

The Author proposes a fourth alternative. He argues that the right to environment does not exist as a separate human right, rather it forms an integral part of other human rights. This is because a clean and healthy environment is necessary to enjoy human rights in their entirety. Here the interests of the environment would have to be balanced keeping in mind the other human rights. Where environmental degradation is absolutely necessary in order to satisfy other human rights such as a right to livelihood, then the right to environment should not be cited to block such degradation. Under such an approach, the human right to environment could be grouped under all three categories of human rights: civil and political rights; economic, social and cultural rights; and third generation rights.

The second part of the paper shows the existence of such a regime in international law. The third part shows the same with respect to India.

## Human Right To Environment In The International Arena

The human right to environment can be understood in two contexts: either as an independent right existing separately or as a part of other existing human rights. Some of the major international instruments like the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights preceded the groundswell of concern for the environment that has sprang up in the late sixties. However there does exist international instruments which talk of the human right to environment.

### Existence As An Independent Right

The link between human rights and environmental protection was made at the UN Conference on the Human Environment in Stockholm in 1972. Principle 1 of the Declaration of the UN Conference on the Human Environment stated that 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being....' Although many commentators were disappointed that the Stockholm Declaration did not expressly declare the existence of a new human right, yet this Declaration is in many ways the furthest the international community has come to recognize an independent human right to environment as it expressly declared that man was entitled to live his life in an environment of a quality that permitted a life of dignity and well being.

The UN Conference on Environment and Development in Rio de Janeiro in 1992 further elaborated on this. Principle 1 of the Rio Declaration stated that 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.' Although this principle brought to the foreground the concept of sustainable development in the battle for environmental protection, it also recognized that human beings were the *raison d'être* for sustainable development and that they were entitled to a life in harmony with nature.

Apart from these international instruments, there are regional instruments which speak of the human right to environment. Article 24 of the African Charter on Human and Peoples' Rights, which entered into force on Oct. 21, 1986, specifically grants this right: 'All peoples shall have the right to a general satisfactory environment favorable to their development.' Article 11(1) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights states 'Everyone shall have the right to live in a healthy environment and to have access to basic public services.'

There is mention of this right even in the International Court of Justice jurisprudence. Judge Weeramantri in Case concerning GabcikovoNagymaros Dam deliberated on it. The case arose from a 1977 treaty between Hungary and Czechoslovakia whereby the two countries decided to construct hydroelectric facilities on the river Danube and also to improve navigation and flood control on the same river. During the year 1989, Hungary suspended and later abandoned work on the said project because of environmental concerns raised regarding the Project. In 1991 Slovakia, as that part of the erstwhile Czechoslovakia where the Dam was supposed to be built, unilaterally implemented a variant of the Project thereby dramatically decreasing the amount of water flowing into Hungary. In 1993, the countries decided to refer the matter to the International Court. Judge Weeramantri, in a separate opinion, stated that the protection of the environment was a vital part of the contemporary human rights doctrine for it was a *sine qua non* for the enjoyment of various human rights.

The question asked at the beginning remains to be answered. Do these instruments signal the development and existence of a human right to environment? The Author seriously doubts the existence of such a right. The Rio and Stockholm Declarations have only persuasive value. They are not binding on the states and serve only as indicators of their intentions. Although the

African Human Rights Charter and the San Salvador Protocol guarantees this Human Right, this has not resulted in this right being cemented in international law as these are regional treaties. Moreover, the African Human Rights Charter is more often observed in breach than in practice. This is due to the lack of financial resources and the lack of an independent authority. The opinion rendered by Judge Weeramantri was also a separate dissenting opinion in the Case concerning Gabčíkovo-Nagymaros Dam.

Supporters of such a right cite the fact that a number of Constitutions guarantee this right. By 1998, 81 countries of the world had constitutions which either guaranteed the right to a healthy environment or which had a duty to defend it. However, just state practice is not enough to constitute a rule of international law. For it to attain the status of customary international law the rule must be a settled practice carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. In other words, the substance of customary international law is primarily in the actual practice and opiniojuris of states. In addition, the State practice must be extensive and virtually uniform, particularly with respect to States whose interests are specially affected. This lack of opiniojuris is reflected in the text of the Johannesburg Declaration of 2002. After Rio in 1992 the world had the opportunity in Johannesburg to protect the environment by declaring a human right to the environment. The fact that they did not do so shows that they either did not believe in the existence of such a right or that they did not want such a right.

Another reason why certain environmentalists are not promoting a human right to environment is because of the fluidity of the definition. Firstly, there is no consensus as to the scope of the definition. Secondly, even if the definition could be limited to terms like 'a healthy environment' or an 'ecologically balanced environment', there would still be confusion about the scope of these phrases. They might prefer to keep the problems inherent in the protection of human rights out of the field of environmental protection.

## Existence As A Part Of Other Rights

Although the existence of an independent human right to environment might not have crystallized, yet that is not to say that the protection of the environment does not figure in human rights jurisprudence. It is accepted that without a certain minimum standard of the environment, other human rights cannot be enjoyed in full. The United Nations (hereinafter UN) recognized this during their XXIII session in 1968. The General Assembly in Resolution 2398 expressed their concern about the effect the continued 'impairment of the quality of the human environment' could have on humankind's 'enjoyment of basic human rights.' The Sub-Commission on Prevention of Discrimination and Protection of Minorities asked Mrs. FatmaZohraKsentini to prepare a concise note setting forth methods by which a study could be made of the problem of the environment and its relation to human rights on 31st August, 1989. In her final Report she identified certain human rights which would be affected by the degradation of the environment; some of them being:

1. Right to life,  
Right to health,
2. Right to food,  
Right to safe and healthy working conditions,
3. Cultural rights.

The Right to life is one of the most fundamental human rights. Article 3 of the Universal Declaration of Human Rights states that “Everyone has the right to life, liberty and security of person.” It is also found in the International Covenant on Civil and Political Rights of 1966 (art. 4), the European Convention on Human Rights of 1950 and the American Convention on Human Rights (Pact of San José of 1969). It is an ergo omnes obligation under international law. It is also a jus cogens norm. The Ksentini Report quoted with approval this statement of Prof. Galicki,

“...the right to life is the one which is, most of all, connected to and dependent on proper protection of the human environment. It is because this right, like no other, may be directly and dangerously threatened by detrimental environmental measures. The right to life and the quality of life depend directly on positive or negative environmental conditions...”

The fact that environmental preservation is essential to the enjoyment of the right to life was recognized by the Hague Declaration on the Environment.

The right to health is another fundamental right which is closely connected to the conservation of the environment. Article 12 of the International Covenant on Economic, Social and Cultural Rights guarantees ‘.....the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’ The article explains that this shall include all steps taken to improve the environment. This right is directly linked to the right to water and food, to safe and healthy working conditions, and to housing.

Realization of the right to safe and healthy working conditions requires a working environment free from pollution and other hazards, where workers' health is not threatened by circumstances such as exposure to asbestos, contact with pesticides and fungicides, or inhalation of toxic substances. The relationship between the deterioration of the environment and the enjoyment of cultural rights has several dimensions, indissolubly linked to the fundamental rights to education, information, freedom of expression, assembly and association, and the right to take part in public life and in decision-making.

## Human Right To Environment In India

A similar legal regime exists in India regarding the right to environment. Although the right to a clean and healthy environment is recognized as a fundamental right, yet it exists only as a part of another fundamental right.

Although the degradation of the environment was not a very important issue at the time of the drafting of the Indian Constitution, yet the Constitution contained certain articles which were related to environmental protection. These included Article 47 (Improvement of Public Health), Article 48 (Organization of Agriculture and Animal Husbandry on Modern and Scientific lines), Article 49 (Protection of National Monuments from spoliation and disfigurement).

As the concern about the environment grew, amendments were made to the Indian Constitution. The Constitution was amended in 1976 to include environmental protection as a mandatory duty of the state. Article 48A was added to part IV of the Constitution on Directive Principles which stated ‘Protection and improvement of environment and safeguarding of forests and wild life. - The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country’. Citizens have a duty to ‘protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures’ under Article 51A (g) of the Constitution thus increasing the participation of the public in environmental protection. Apart from the constitutional mandate to protect and improve the environment there are plenty of post independence legislations on the subject the most important being, The Water (Prevention and Control of Pollution) Act, 1974 (the Water Act), The Air

(Prevention and Control of Pollution) Act, 1981 (the Air Act) and the Environment Protection Act 1986 (the Environment Act).

The Indian legal system, especially the judiciary, has been at the vanguard of the movement to protect the environment. Apart from the provisions mentioned above, there is also the environmental jurisprudence under Article 21 of the Constitution. This Article, which states 'No person shall be deprived of his life or personal liberty except according to procedure established by law', is one of the fundamental rights guaranteed by the Constitution. This right, popularly referred to as the right to life, has been interpreted as including within it the right to environment.

The Supreme Court in *Subhash Kumar v. State of Bihar* declared:

“Right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality.....of life in derogation..... of laws, a citizen..... has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life. A petition under Article 32 for the prevention of pollution is maintainable at the instance of affected persons or even by a group of social workers or journalists.”