Effectuation of International Environmental Law at the National Level: Some Comparative Trends in South Asia[+]

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Introduction

There have been scholarly debates concerning the function of law in a society. No law can ever fulfill all the needs and meet all the challenges in a society. It must change with the changing circumstances. In this context, law serves as a societal tool to combat problems at a given time or which may arise in the future. At global level, efforts have been made to grapple with some of the 'common concerns'[1] in recent years. The perceived debilitating effect of these 'common concerns', has led to the thinking that they need global solutions. It has, in turn, led to international legal restraints upon the behavior of the states. These legal restrains especially through treaty regimes and in some cases even 'soft' instruments, seek to lay down 'threshold' for certain activities carried out by the states at the domestic level rather than their outright prohibition *per se*. In some cases, such as the ozone depleting substances, specific substances have been phased out in a step-by-step manner through a consensual negotiated approach. As such, there has been growing centralization[2] of law making in the field of environment.

The process of laying down international legal restraints upon the behavior of sovereign states on environmental problems has led to a sound body of multilateral environmental agreements (MEAs)[3]. The gradual 'greening' of international law through this predominant legal technique has, however, remained *ad hoc*,

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[+] The author's 'valedictory' presentation at Faculty of Law, Punjabi University, Patiala, revised as on 8 January 2008. Published in ***Banyan*** (Lahore, Pakistan), *Special Issue on The Environment: Policy & Practice***,** vol.5, March 2007, pp.55-64.

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[1] For instance, Alexandre Kiss has in this context observed: "In principle, the proclamation that safeguarding the global environment or one of its components is a matter of common concern for the whole of mankind would mean that it can no longer be considered as solely within the domestic jurisdiction of States, due to its global importance and consequences for all..."; see Alexandre Kiss, "The Common Concern of Mankind", *Environmental Policy and Law*, vol. 27, no.4, 1997, p.247.

[2] Such centralized legalization in the environmental field has taken various forms. In a sense, unlike the development of traditional international law, the pace of law making in the field has been relatively faster. The trend can be discernible in the growing volume of conventional law as compared to customary law. Interestingly, most of the centralized legalization has taken place outside the precincts of UN's International Law Commission (ILC). In fact, it is the UN General Assembly which has been primarily giving direction to the law making in the field.

[3] MEAs arrived at in recent years have a great diversity and most of them underscore the multidimensional nature of environmental problems. Interestingly, there is an increasing tendency among states, especially industrialized ones, to push for a global framework for more and more environmental issues. There is, however, also a lot of skepticism and even some opposition to this approach. This often makes multilateral environmental negotiations acrimonious and virtually a battlefield on such issues, reflecting political and economic interests of states, which often results in a stalemate. The subject matter of MEAs range from issues such as protection of a species (whale) or flora and fauna in general (CITES), cultural and heritage sites, regulation of trade of hazardous chemicals and wastes, air pollution to more remote issues like ozone depletion, climate change and biological diversity.

piecemeal and *sectoral* in nature. This is especially so since the process is dictated by some 'trigger events', immediate interest of powerful states, and pressure from non-state actors as well as lack of centralized law-making institution for the purpose. The quest for prescribing a *threshold* for regulating environmental issues, through state-centric institutionalized international cooperation, has been challenging in terms of crafting adequate legal responses in the midst of scientific uncertainty as well as the need to strike a balance between developmental requirements and environmental considerations.

Regional Cooperation in South Asia

Several regional organizations (such as European Union, Organization for Economic Cooperation and Development, the Nordic Council, South Pacific Regional Environment Programme, South Asia Cooperative Environment Programme and South Asian Association for Regional Cooperation) also have developed their own regional environmental programmes and action plans. The Regional Seas Programme[4] of United Nations Environment Programme (UNEP) has been one of the most prominent efforts to address (marine) environmental problems at the regional level. It has contributed in the development of more than 50 instruments that comprise 18 regional seas programmes[5] (covering 12 conventions, 2 special regional mechanisms and 4 action plans) and 32 protocols. Thus, alongside the global environmental agreements, regional processes have also contributed substantially both in the crafting of legal mechanisms as well as cooperative institutional frameworks. In fact, in such regional frameworks, arrangements are comparatively more compact since there are limited numbers of states parties, who also share geographical proximity or have some common basis for such cooperation. They apparently have more proximate interest to ensure that the arrangements work. The issue of efficacy and effectiveness of global environmental regulatory frameworks is currently a major cause of concern since large number states are not motivated enough to ensure domestic effectuation of their respective international legal obligations.

In the specific case of the South Asian region and the South Asian Association for Regional Cooperation (SAARC)[6], the eight member countries have several

[4] The Regional Seas Programme (RSP) has been regarded as one of the greatest achievements of UNEP. The RSP was launched in 1974. The first of the RSP was developed in the Mediterranean with an Action Plan (1975), followed by a Convention (1976). Following success of the RSP for the Mediterranean region, RSP for other regions were developed. The Governing Council of UNEP has, in fact, consistently endorsed a regional approach to the control of marine pollution, management of marine and coastal resources and development of regional Action Plans for the purpose. From the first Action Plan adopted in the Mediterranean (1975), to the most recent one for the Caspian Sea (2003), the RSPs have multiplied to cover the marine environment of more than 150 of the world's coastal countries.

[5] The 18 RSPs cover the following areas: Antarctic, Arctic, Baltic, Black Sea, Caspian, Eastern Africa, East Asian Seas, Mediterranean, North-East Atlantic, North-East Pacific, North-West Pacific, South Pacific, Red Sea and the Gulf of Aden, ROPME Sea Area, South Asian Seas, South-East Pacific, the Western and Central Africa and the Wider Caribbean. Out of these six are UNEP-Administered Programmes, seven are Non-UNEP Administered Programmes and five are Independent Programmes; see http://www.unep.org/regionalseas/default.asp (as at 15 May 2006).

[6] The South Asian Association for Regional Cooperation (SAARC) came into being upon finalization of its Charter and attaining signatures of Heads of State or Government of Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka on 8 December 1985. The

commonalities and similarities. The member countries of SAARC are closely nit together with India sharing common boundaries with the other six countries. This gives much more justification for extending cooperation on a regional basis. For instance, floods, droughts, earthquakes, cyclones and other natural disasters frequently ravage all eight-member countries. The Himalayan range, crucial for all SAARC countries except Maldives and Sri Lanka, is beset with widespread deforestation. Three major rivers in the region: the Ganges, Indus and Bhramputra, also originate from the Himalayas. Therefore, mountain ecosystem management as well as watershed management is important areas of cooperation under SAARC auspices. Moreover, all members of SAARC except Bhutan and Nepal are littoral states of the Indian Ocean, whose fragile marine ecosystem also requires regional cooperation to protect.

Similarly, establishment of another specialized regional organization, South Asian Cooperative Environment Programme (SACEP), shows that countries of the region intended to address some of the serious environmental challenges commonly faced by them. SACEP came to be established in 1982 by the Governments of eight South Asian countries (Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka) to promote and support protection, management and enhancement of environment in the region. The SACEP Governing Council, in its meeting held in November 2003, formally re-endorsed the role of SACEP as an intergovernmental organization of the region for environmental protection and sustainable development[7]. Furthermore, the Governing Council of UNEP designated 'South Asian seas'[8] as a part of the regional seas programme of UNEP. Accordingly, SACEP has been designated as secretariat for the South Asian Seas Action Plan[9]. SACEP has taken few small initiatives[10]. However, it is yet to take off as a regional organization, to be taken seriously by its member states and to have

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Preamble to the Charter explicitly underscores the "common problems, interests and aspirations of the peoples of SOUTH ASIA and the need for joint action and enhanced cooperation within their respective political and economic systems and cultural traditions" as well as recognizes that "increased cooperation, contacts and exchanges among the countries of the region will contribute to the promotion of friendship and understanding among their peoples"; see *Charter of the South Asian Association for Regional Cooperation* (Kathmandu: SAARC) at www.saarc-sec.org

[7] The Mission of SACEP is to "promote regional co-operation in South Asia in the field of environment, both natural and human, in the context of sustainable development and on issues of economic and social development which also impinge on environment and vice versa; to support the conservation and management of the natural resources of the region and to work closely with all national, regional and international institutions, governmental and non-governmental, as well as experts and groups engaged in such co-operation and conservation efforts", *SACEP Proposed Work Programme and Budget, 2006-2007* (December 2005), paragraph 3, p.3; see www.sacep.org (as at 8 June 2006)

[8] UNEP Governing Council, at its 11th Session (1983), requested the Executive Director "to accord high priority, in the provision of assistance to the South Asia region, to projects within the framework of the South Asia Co-operative Environment Programme"; see Decision 11/7 of 24 May 1983 at www.unep.org/Documents (as at 8 June 2006).

[9] See *Action Plan for the Protection and Management of the Marine and Coastal Environment of the South Asian Seas Region*, formally adopted at a Meeting of Plenipotentiaries of the concerned countries (Bangladesh, India, Sri Lanka, Pakistan and Maldives) held in New Delhi, on March 24th 1995; see http://www.sacep.org/html/sas_actionplan.htm (as at 8 June 2006).

[10] Two such initiatives are: (i) Malé Declaration on Control and Prevention of Air Pollution and Its Likely Tranboundary Effects for South Asia (1998); (ii) Regional Oil and Chemical Marine Pollution Contingency Plan for South Asia (As approved by the High Level Meeting held in Colombo, Sri Lanka, 4 to 6 December 2000). There have also been MoUs on UNEP - SACEP co-operation in the field of environment (2003) and SACEP and SAARC cooperation for the protection of environment of the region (2004); see www.sacep.org (as at 8 June 2006).

effective governance structure in order to make its impact felt in the region for institutionalized environmental cooperation.

Environmental Law: Comparative Trends

In the past two decades, the countries in South Asian region have undergone significant attitudinal changes as regards need to protect the environment. The fact remains that South Asia is mired in pervasive poverty with one of the lowest per capita incomes in the world. Hence countries in the region justifiably emphasize upon their socio-economic requirements as well as developmental priorities. Notwithstanding this, countries in the region generally do not seem to be lagging behind in domestic measures for protection of environment[11]. At the regional level, SAARC commissioned two regional studies (1987 and 1988)[12] and subsequently adopted a Plan of Action on Environment (Malé, 1997) and the Declaration for a Common Environment Programme (Colombo, 1998)[13]. These trends, however, appear to be aberrations rather than institutionalized responses to common regional environmental challenges.

It is unfortunate that hardly any conscious and perceptible effort has been made in initiating regional environmental regulatory tool under the auspices of either under SAARC or SACEP. In the case of SAARC, it appears to have got bogged down in the political quagmire as well as lack of vision for common ecological heritage of the region. It seems the SAARC member countries have preferred to give priority to trade related issues (e.g. 2004 Agreement on South Asian Free Trade Area[14]) and chosen to put effective environmental cooperation on the backburner. Even specialized environmental organization of the region, SACEP, was until recently mired in the lack of interest and initiatives as well as bureaucratic inertia of the political appointees. As a result of this state of affairs, at one point it seemed almost heretical even to express the hope that SACEP has potential and could be revitalized! When the other regional organizations have been able to put into effect cooperative frameworks for addressing environmental problems, it was distasteful

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[11] For a detailed account of this see, Bharat H. Desai, "Regional Measures for Environment Protection: The SAARC Initiative", *Yearbook of International Environmental Law* (Oxford), vol.2, 1991, pp.469-471.

[12] These 2 regional studies are: (i) Regional Study on the Causes and Consequences of Natural Disasters and the Protection and Preservation of the Environment [mandated by the Third SAARC Summit, Kathmandu, 2-4 November 1987) and (ii) Regional Study on Greenhouse Effect and its Impact on the Region (mandated by the Fourth SAARC Summit, Islamabad, 29-31 December 1988); see http://www.saarc-sec.org/main.php?t=2.5 (as at 21 May 2006).

[13] The SAARC Plan of Action on Environment sought to evaluate the status of SAARC cooperation in the field of environment, identified the concerns of Member States at regional and global levels, and set out parameters and modalities for enhanced cooperation. The 1998 Common Environment Programme recalled various major international instruments and declarations on environment and noted the importance of enhanced cooperation in sharing information in the region to promote effective management of the environment for the benefit of all the Member Countries. It seems little headway has been on follow up to both these measures.

[14] As a precursor to SAFTA, an Agreement on SAARC Preferential Trading Arrangement (SAPTA) was signed in 1993 and four rounds of trade negotiations have been concluded. With the objective of moving towards a South Asian Economic Union (SAEU), the Agreement on South Asian Free Trade Area (SAFTA) was signed during the Twelfth Summit in Islamabad in January 2004. It entered into force in January 2006. For the text of SAFTA, see www.saarc-sec.org (as at 9 June 2006).

for SACEP to look for guidance and funding from outsiders as well as engage in merely signing of memorandums of understanding (that practically remain on paper) as a sign of achievement. In fact SACEP could have engaged available professional competence in the region to institutionalize environmental law information network[15] that serves as a backbone for effective participation for the member countries in global environmental negotiations and facilitate in framing of national policies and legislation to give effect to international environmental obligations.

In this brief paper, an effort has been made to focus upon some of the trends that indicate the interface between international environmental law and national law in the South Asian region. It presents a selective analytical overview only (as compared to findings based upon comprehensive study and actual field work), and is indicative of the picture of prevailing trends in just four selected main areas. An effort has been made to examine the churning process at work in the region that impinges upon domestic developmental priorities, trends in spreading of environmental law awareness, capacity building and preparedness of the countries in the region to grapple with larger 'battle of ideas' at work in global environmental negotiations as well as implementation, compliance with and enforcement[16] of international environmental obligations (as the countries of the region are required to do as contracting parties to multilateral environmental agreements).

(i) Proliferation of Legislations

The environmental awareness spread across the world, especially following the UN Conference on Human Environment (Stockholm, 1972)[17], has decisively brought about change in the attitude of the states, especially the developing ones, as regards use of legal tools to combat growing environmental problems. Participation of these states in various multilateral environmental regulatory forums has made decisive impact at the domestic level. Some other landmark developments such as IUCN/UNEP/WWF sponsored *World Conservation Strategy* (1980)[18], the UN

[15] In 1994, The South Asia Environment and Natural Resource Centre (SENRIC) were initiated. SENRIC assists with coordinating UNEP's early warning and assessment strategy in the South Asia region. The centre works to bring in expertise and equipment to assist in improving environmental protection in the region.

[16] There has been concerted effort in this direction at the global level in view of lack or inadequate implementation of multilateral environmental agreements in national jurisdictions of their contracting parties. In view of this state of affairs, United Nations Environment Programme (UNEP) has designed *Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements* as well as a *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* (Nairobi: UNEP, 2006). The UNEP Division on Environmental Conventions also initiated a *High-Level Meeting on Compliance with and Enforcement of Multilateral Environmental Agreements* that have had two meetings in Colombo (21-22 January 2006) and Geneva (31 May-2 June 2006). It is expected that the report of this meeting will lead to due consultations between UNEP and secretariats of various MEAs. It could also result in appropriate mandate from the UNEP Governing Council for next steps on ensuring effectiveness of MEAs and institutionalized process for effectuation of respective obligations under MEAs into national level (for the contacting parties to respective MEAs).

[17] See *Report of the United Nations Conference on the Human Environment*, Stockholm, 5-16 June 1972; UN doc. A/CONF.48/14/Rev.1

[18] IUCN, *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (Gland: IUCN, 1980). Also see IUCN, UNEP, WWF, *Caring for the Earth: A Strategy for the Earth* (Gland: October 1991)

General Assembly's resolution containing the *World Charter for Nature* (1982)[19], report of the World Commission on Environment and Development[20] as well as the revised conservation strategy - *Caring for the Earth* (1991) have, cumulatively contributed to this process. From the Stockholm Conference (1972) to the Rio Earth Summit (1992) there has been worldwide phenomenal growth in environmental legislations. A further spurt has been witnessed in the post-Rio period as well. The importance of this growing trend lies in the fact that enforcement of regulatory measures has to take place at the national level. The crystallization of emerging rules, principles, treaties and legislations for protection of environment and natural resources conservation have, in general, been recognized as constituting a body of 'environmental law'[21].

The countries in the SAARC region could not have remained immune to the global processes. Almost all the member countries of SAARC have now, generally, put into place some framework legislations to cater to the need for environmental protection. The diversity of these legislations has been dictated by the specific concern of each country. Interestingly, there has been considerable volume of *sectoral* legislations on issues such as water pollution, air pollution, forest resources, wildlife protection, environmental impact assessment, coastal zone management, hazardous wastes, genetically modified organism etc. The range of such regulatory measures has been getting diverse day by day and, in many cases, the stringency of standards is also increasing.

These measures, in most of the cases, are initiated in consonance with multilateral environmental agreements or as a follow up to the decisions taken at global environmental conferences (such as 1972 Stockholm Conference, 1992 Rio Earth Summit or 2002 Johannesburg Summit). In the specific case of India, as the societal concerns for environmental problems have increased, new standards for noise pollution levels, vehicular pollution, hazardous wastes disposal, environmental impact assessment, environmental auditing and sitting of industries, coastal zone management etc. have become more complex. Article 253 of the Constitution of India has duly facilitated implementation of international environmental obligations at the national level. It seems in other countries of South Asia also, though there are variations in political situation, governance structures and legal processes, these global environmental conferences and proliferation of MEAs have made decisive impact in changing the mindsets in respective quarters.

In some cases, the concerned legislations do make a mention of it in their preamble. In the post-Rio era, sustainable development has become a buzzword. Therefore, it appears that countries in the region have started to jettison their reservations about even some of the non-legally binding instruments such as the Rio Declaration (1992)[22] and Agenda 21. In fact Agenda 21, for instance, has been

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[19] The UN General Assembly resolution 7(XXXVII), *Annex* of 28 October 1982 adopted by a vote of 111 in favor, 18 abstentions and 1 against (United States); see UN D*oc.A/RES/37/7* of 9 November 1982. Also see *Yearbook of the United Nations*, vol.36, 1982, pp.1024-1026; *ILM,* vol.23, 1983, p.455-460.

[20] See *Our Common Future* (Oxford: Oxford University Press, 1987).

[21] For a detailed study of this evolving branch of international law as well as the law-making and institution-building processes, see Bharat H. Desai, *Institutionalizing International Environmental Law* (New York, USA: Transnational Publishers, 2004).

[22] It is interesting that at the time of negotiations, states do not take such 'non-legally binding' instruments any less seriously than the so-called legally binding 'hard' instruments. Current

slowly but steadily influencing the policy-making across the board and *sustainability* is emerging as an important benchmark in decision-making in various sectors of the economies of the South Asian countries.

(ii) Governance - Institutional Growth

Alongside the proliferation of policy and legal frameworks for the protection of environment, there has been considerable growth in terms of institutional/governance structures. Since law and institutions have a symbiotic relationship, governance in environmental matters has taken shape on the basis of legal frameworks. One cannot generalize the trend in this sphere, yet some of the structures have taken shape on the predictable lines.

At governmental level, almost all the South Asian member countries[23] have now set up a nodal ministry and/or a department to look after environment protection and natural resources conservation though their nomenclatures vary from country to country.[24] Interestingly, in the case of Nepal, the environmental portfolio has come to be clubbed with population resulting in a full Ministry of Population and Environment, whereas in case of India, it has been designated as Ministry of Environment & Forests. In addition to these overarching apex structures, there have been several other specialized institutional structures whose mandate is to give effect to relevant laws and policies. Another interesting trend is noticeable in terms of birth of specialized environmental authorities for specific area/region or specific sectoral environmental issue such as aquaculture or pollution.

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thinking has focused upon implementation of such non-legally binding instruments. For instance, during 12-14 January 1999, Division of Sustainable Development [DESA] of the UN convened a Workshop on "National Implementation of the Principles contained in the Rio Declaration on Environment and Development". Similar thinking is visible on the implementation of Agenda 21 by the member states of the UN.

[23] In Pakistan, the Ministry of Environment is the main institution that deals with issues relevant to the environment. It is responsible for the coordination of its derivative institutions, such as the Pakistan Environmental Protection Council (PEPC) and the Environmental Protection Agency (EPA). In Sri Lanka, the 1978 Constitution assigns the Government broad responsibilities to "protect, preserve and improve the environment for the benefit of the community" (Article 27). In Nepal, important legislations in relation to environment protection are: Plant Protection Act, (1972); Royal Chitwan National Park Regulation, (1974); Soil and Watershed Conservation Act, (1982) King Mahendra Trust for Nature Conservation Act, (1982), Pesticide Act (1992), Forest Regulations, (1994) Buffer Zone management rules (1996), Hygiene; Consumer Protection Act, (1997), Livestock Health and Services Rules (1999), Government Managed Conservation Area Rules (2000). In Bangladesh, Ministry of Environment and Forest and the Department of Environment are responsible for conservation and improvement; and control and mitigation of pollution of environment. In Afghanistan, there has been a severe depletion of capacity at all levels due to the decades of conflicts, particularly in some of the Ministries with environmental responsibilities. The Government of Afghanistan is working to reestablish proper governance in the country with the assistance of the international community. (The data for each of these countries has been obtained from respective websites and other sources as on 7 January 2008).

[24] The national legislation in India, Pakistan and Bangladesh is sectoral and the environment is dealt with by separate legislation. However, framework environmental legislation in recent years took account of human health and safety aspect and sustainable development. The general environmental framework laws [44] tend to be enabling in nature and mainly charge a competent national authority to provide more specific guidelines and regulations in future. In Pakistan and Bangladesh, these framework laws deal with water and air pollution and regulate, to certain extent, hazardous waste. In Pakistan, the Environmental Protection Act 1997 (hereafter, 1997 Act) acts as a framework law and techniques such as penalty and sanction, and international environmental principles such as the precautionary principle and polluter pays principle have been applied to implement the law.

In addition to the institutional structures at governmental levels, there have been several other efforts on the part of the civil society having decisive impact on the environmental scene in the region.[25] Many environmental activists and NGOs have contributed substantially in sensitizing the public opinion and forced the authorities to act in matters of public interest. Often recourse to the tool of public interest environmental litigation (PIEL)[26] has come in handy for these public-spirited individuals/groups.

(iii) Judicial Approach

The SAARC region[27] holds the distinction in terms of innovative judicial approach to public interest issues in general and environmental issues in particular.[28] In countries such as Bangladesh, India, Nepal, Pakistan and Sri Lanka, access to justice has been greatly facilitated due to liberalization of the rule of *locus standi*.[29] This has enabled any public-spirited individual or a group to seek redressal of

[25] Implementation of framework laws is not promising as the pollution standards are being set by various government agencies. Moreover, the agencies are in charge of implementing it, not the aggrieved citizens. Only in limited cases, do citizens have access to justice through environmental legislation. For example, in Bangladesh, the Directorate of Environment has identified some 903 polluting companies in 1989. However, no action was taken against them.

[26] For genesis of public interest environmental litigation in India, for instance, see Bharat H. Desai, "Enforcement of Right to Environment Protection through Public Interest Litigation in India", *Indian Journal of International Law*, vol.33, 1993, pp.27-40.

[27] India, Pakistan, Bangladesh, Sri Lanka and Nepal use various constitutional rights (of different degrees) to protect the environment. The right to life, a fundamental right, has been extended to include the right to a healthy environment. The right to healthy environment has been incorporated, directly or indirectly, into the judgements of the court. In India, the state has a duty to protect and preserve the ecosystem. This is a part of the directive principles of state policy and not a fundamental right. On the other hand, the Constitution of Bangladesh or Pakistan does not provide any direct protection of the environment. In India, Pakistan and Bangladesh, the fundamental right to life has been expanded to include, inter alia, right to liberty, livelihood, healthy/clean environment or protection against degrading treatment. Two more constitutional rights, the right to equality and right to property, have been analysed to determine their application in the protection of the environment and human rights. Most litigation are brought against public authorities, which include various ministries of Central government, federal bodies (in Sri Lanka, Pakistan and India), local authorities and public owned companies (Nepal).

[28] The most common remedies that are offered by the court are directions, injunction and civil and criminal damages. The Indian judiciary has made several successful directions to set up expert committees, special committees or commissioners in several environmental litigations. Moreover, the Indian courts have made several directions on unconditional closure of tanneries and relocation, payment of compensation for reversing the damage, payment of costs required for the remedial measures necessary measures to be adopted by the relevant Ministry to broadcast information relating to environment in the media, attracting the attention of the Government where there is a necessity of legislation, setting up a committee to monitor the directions of the court. PIEL involved water pollution, urban development and environment, air pollution, conservation of forest resources and general environmental pollution. Most of these decisions dealt with human health and the environment.

[29] Once the applicant is in the court with a claim in public interest, the most important question for the court is to decide whether the applicant should be allowed access to the judicial process. Unlike Indian courts, the Bangladeshi and Pakistani courts apply 'aggrieved person' test, which means a right or recognised interest that is direct and personal to the complainant. In India, the Constitution does not provide any specific test for standing to enforce fundamental rights and Indian courts apply the 'sufficient interest' test. Absence of any specific rule of standing is one of the reasons behind the development of PIL in India. On the other hand, the Constitution of Pakistan and Bangladesh does suggest a specific test to determine standing in writ petitions. Although in the 1990's, the judiciary of Bangladesh and Pakistan offered a liberal view of standing, there is no guideline for public interest cases.

grievances from the higher judiciary. However, significance of so-called judicial 'activism' and innovations associated with it largely depend upon the constitutional framework, legislative remedies available, judicial set up in a country, awareness on the part of the local communities as well as level of social awareness/activism.

For instance, in India, the birth of public interest environmental litigation has been facilitated by the human rights jurisprudence established by the High Courts as well as the Supreme Court of India through innovative interpretation of the 'fundamental rights' under the Constitution. Various tools and techniques devised by the apex court in India have firmly rested on the bedrock of 'judicial review' (Article 32), which itself is a fundamental right. As a result, invoking of the writ jurisdiction of the higher judiciary has not been confined to preventive directions, but has often extended to 'remedial justice'.

The growing volume of PIEL, especially in India, Bangladesh, Pakistan, Nepal and Sri Lanka has been strongly nurtured by the understanding that judges do not merely 'find' the law[30]. Often the judges have jettisoned apologist postures in this regard and considered so-called judicial 'activism' as a necessary and inevitable part of the judicial process. It appears that the precedents set by the Supreme Court of India in early seventies and eighties have had cascading effect in the region. It has led to remarkable judicial contribution in the development of environmental law in the region.

This trend has taken roots in several countries of the South Asian region[31], where respective higher judiciaries has periodically issued landmark directions on various issues such as mining activities, vehicular pollution, clean up of contaminated chemical sites, and clean up of rivers, setting of standards and national parks and sanctuaries. In this vibrant process, some of the emerging principles like 'polluter pays', 'precautionary approach', 'strict and absolute liability and 'public trust doctrine' have become part of the legal lexicon. They have in fact taken roots in the region as judges were prepared to receive 'light' from any source but made them applicable according to local requirements. In many a cases, landmark judicial directions have paved the way for development of legislations as well as even setting up of institutions. In the course of their deliberations and orders issued by the higher courts, there are growing references to international legal instruments

[30] Bharat H. Desai, "Environmental Law: Some Reflections", *Indian Bar Review*, vol.XXIII (3&4), 1996, pp.189-196 at p.192.

[31] The Indian courts dealt with mining and quarrying, forest conservation, water pollution, gas leak disaster, development projects and environment, hazardous wastes from industries, litigation concerning big dams, protection of livelihood, construction of bridges and environmental degradation. At the same time, the court dealt with the protection of wetlands, air pollution, air and water pollution, noise pollution, pollution from animal slaughter-houses, access to environmental information, trade and environment, relocation of labours after closure of polluting factories, groundwater management and development, management of city sewerage system.

In Bangladesh, the first public interest environmental litigation (PIEL) was based on noise pollution created through election canvassing. However, the most prominent case concerned the Flood Action Programme, a foreign aided development project, and its harmful effect on the people and the environment. There are cases on industrial and urban development, unplanned rural development, oil and exploration planning, lease of open-river, urban air pollution, and the need for the government to oppose unchecked pollution. Similarly, in Pakistan, the first PIEL concerned development projects and environment. Other PIEL addresses issues such as water pollution, urban development and environment, air pollution, conservation of forest resources and general environmental pollution. Most of these decisions dealt with human health and the environment.

(both hard and soft). It goes to show that the higher judiciary is not oblivious to the global multilateral regulatory processes in the field of environment. It is also interesting process of 'creeping' effect of international environmental law developments on national legal developments (even if through the so-called 'judge-made' law).

(iv) International Environmental Obligations

The countries of South Asian region have been actively participating in various multilateral environmental negotiations. Their negotiating stances, in general, have been formulated as a part of broader framework of Group of 77 and China (the group comprises almost 134 countries). They have in fact taken common positions on some occasions as well. For instance, the *Malé Declaration on Climate Change and Sea-Level Rise* as well as common negotiating position taken by the SAARC member countries for the UN Conference on Environment and Development (Rio, 1992)[32] and Rio+5 Summit[33] are such healthy instances. This has facilitated common understanding and concerns at the regional level and does help in enhancing bargaining position at a multilateral forum.

The South Asian countries have been parties to many of the multilateral environmental agreements (MEAs) such as Convention on International Trade in Endangered Species (CITES)[34], Ramsar Convention on Wetlands of International Importance (Ramsar)[35], World Heritage Convention[36], Convention on Conservation of Migratory Species of the Wild Animals (CMS)[37], Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal (Basel)[38], Vienna Convention and Montreal Protocol on Protection of the Ozone Layer (Ozone)[39], UN Framework Convention on Climate Change (UNFCCC)[40], Convention on Biological Diversity (CBD)[41] and Convention on Desertification (CCD)[42]. In such cases each of the states gives effect to her respective international environmental commitment (IEC) under the regime. This has led to adoption of several legal measures in the SAARC countries to give effect to their commitments. Some of the South Asian countries already have policy or legislation in place to implement conventions such as CITES, Ramsar and World Heritage whereas in case of others (such as Montreal Protocol and CBD), processes are underway in

[32] See Joint Communiqué, SAARC Environment Ministers Conference, New Delhi, 8-9 April 1992.
[33] New Delhi Declaration of Environment Ministers on a Common SAARC Position before the UNGA Special Session on the Implementation of Agenda 21, New Delhi 2-3 April 1997.
[34] Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington), 3 March 1973; see 993 *UN Treaty Series* (UNTS), p.243.
[35] Conventions on Wetlands of International Importance (Ramsar), 2 February 1971; see *I.L.M.*, vol.22, 1982, p.698.
[36] Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris), 23 November 1972; see *I.L.M.*, vol.11, 1972, p.1358.
[37] Conventions on Conservation of Migratory Species of Wild Animals (Bonn), 23 June 1979; see *I.L.M.*, vol.19, 1979, p.15.
[38] Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel), see *ILM*, vol.28, 1989, p.657.
[39] Convention for the Protection of the Ozone Layer (Vienna), see *ILM*, vol.26, 1987,
P.1529 and Protocol on Substances that Deplete the Ozone Layer (Montreal) see *ILM*, vol.26, p.1550.
[40] United Nations Framework on Climate Change, see *ILM*, vol.31, 1992, pp.851-873.
[41] Convention on Biological Diversity, see *ILM*, vol.31, 1992, pp.822-841.
[42] United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Bonn: CCD Secretariat).

different countries. For instance, in India detailed rules on ozone depleting substances (ODS) were issued under the 1986 Environment (Protection) Act and a separate legislation – Biodiversity Act 2002 – was enacted to implement CBD. Still, it seems compliance with and enforcement of various multilateral environmental agreements remains a crucial challenge. There seem to be several considerations (such as socio-economic development, eradication of poverty, lack of resources, inadequacy of trained personnel etc.) are determining factors as regards interface between international environmental law and the national legislations in the South Asian region.

Conclusion

Thus, it seems that within the limitations of each of the SAARC member country, legal developments have kept pace with both domestic necessities as well as efforts to comply with international environmental commitments. All the countries of the region have inherent advantage due to the geographical proximity to learn as well as to cooperate in earnest with each other to combat common environmental problems and natural disasters in the region. It is also now need of the hour for these countries to come together to understand the marathon law-making and institutional proliferation taking place at the global level and work out common negotiating positions for such multilateral environmental negotiations. The South Asian region has a lot of potential waiting to be explored in the field of environment. It will require visionary approaches to grapple with the challenge of thickening web of global environmental regulatory process.

The development of environmental law and institutions within the member countries as well as at the regional level will go a long way in cementing the goals of regional cooperation. Moreover, it will facilitate arriving at a common understanding to charter appropriate developmental path to uplift people of the region from the morass of pervasive poverty in the twenty first century. In this age of globalization, there is still a long way to go for the countries of South Asia to wake up from the long slumber – that is partly a legacy of the sordid colonial past and partly a failure of the leadership - to play effective role on the global environmental regulatory chessboard. As a logical corollary, they shall have to jettison unwarranted and antiquated notions so as to equip themselves for grappling with the larger simmering 'battle of ideas' at the global level. They also shall have to attain effective institutionalized cooperation to protect the fragile common environmental heritage of the region either through existing regional groupings (such as SAARC and SACEP) or through new and innovative legal and institutional frameworks.

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