Right to Clean Environment: - A Basic Human Right

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Degradation of environment is one of the most severe problems human beings are suffering from. Many people do not have access to clean air and drinking water and experience health problems due to the increasing pollution. Yet, the existence of international environmental law is not rightly represented in the international legal system. International environmental law turns out to be very vague.The recent development shows that "environmental law and human rights reached a status of maturity. There are two main ways one can approach the question whether a human right to a clean environment exists. At first one looks at the existing international environmental law in order to examine whether it provides human rights norms, and second, one can study international human rights law .International environmental law is probably the youngest branch of international law. This branch says that environment protection is basic human right. In India the norms for environment protection were rather created from lawyers and activists from other available resources. Human Rights in India are guaranteed as fundamental rights under Part III (Art. 12-35) of the Constitution of India.The constitution of India under article 21 gives importance to environment by giving due regard to concept of sustainable development In India, the jurisdiction of the Supreme Court widened the scope of the right to life in Art. 21 and included the right to a wholesome environment Indian courts have repeatedly recognized a human right to environment. Especially the own activism of judges has to be acknowledged. Policies, which see environment and development not contradictory but rather as complementary forces for sustainable development could be enhanced and thus improve both the environmental condition and the economic situation of the people.

Environmental degradation is one of the most severe problems human beings are suffering from. Many people do not have access to clean air and drinking water and experience health problems due to the increasing pollution. Yet, the existence of international environmental law is under represented in the international legal system. International environmental law turns out to be very vague. About 200 treaties are registered under the United Nations environmental program register, and in total there are about 900 bi-literal and multilateral treaties.[1] Many of these treaties are "soft law" and do not seem sufficient to claim a human right to a clean environment. The recent development shows that "environmental law and human rights reached a kind of maturity and omnipresence".[2] it is intended to show at the example of Indian constitutional law and the jurisdiction of Indian courts that human rights norms can indeed be a reasonable basis for claiming a right to environment.

A Human Right to a Clean Environment

There are two main ways one can approach the question whether a human right to a clean environment exists. At first one looks at the existing international environmental law in order to examine whether it provides human rights norms, and second, one can study international human rights law and look for environmental rights within it.

1. **Role of International Conventions in Protection of Environment**

Foremost among the role of International community in the protection of environment Principle 21 of Stockholm Declaration is of great importance. Principle 21 states that in accordance to UN Charter and principles of International Law the state has a sovereign right to exploit its resources and the responsibility to ensure that activities with in their jurisdiction or control do not damage to the environment of other states. Moreover international community imposes a duty towards member States to include environment protection in domestic constitution. Therefore Article 21 0fthe Indian Constitution is widely interpreted and now it includes right to have a wholesome environment. The main purpose of international environmental law is the

protection of the environment per se.[3] some of the major objectives are the protection of the flora and fauna, the preservation of ecological balance and the conservation of the diversity of species. International environmental law imposes obligations on human beings and sets standards.

International environmental law is probably the youngest branch of international law. Although the first multilateral international environmental law convention – the Convention for the Protection of Birds Useful to Agriculture – was already established in 1902, the consciousness to develop a more effective and comprehensive regime only arose in the late1960s.

However, many environmentalists suggest that the purpose of environmental law is egocentric.[4] Obligations and duties are imposed on governments, companies, individual human beings or groups in order to reach these goals. The Antarctica Treaty (1959), the World Heritage Convention (1972), the Convention on International Trade in Endangered Species (1973) and the World Charter for Nature (1982) are some examples. These treaties do not exclusively exist for the benefit of human beings, but should protect the environment from exploitation.[5] The anthropocentric approach, saying that "environmental protection is primarily justified as a means of protecting humans rather than as an end itself"[6], is taken for granted.

One has to keep in mind that environmental protection can negatively affect the short- term needs and objectives of human beings.[7] States and individuals could be in a situation of disadvantage, if they neglect their economic development in favor of environmental protection. Especially in developing countries, the struggle of parts of the population against poverty is often considered as more important than environmental protection. States have to permanently develop their economic capability in order to remain competitive in the international market system. Moreover, the approval of the Declaration on the Right to Development[8] by the UNGA could limit any right to environment for human beings.

But even a human right to development would not make a human right to environment impossible, since it is normal in international law to balance contradictory but equitable norms. Thus, the international community has to balance between the right to development and right to environment, then environment and development will not anymore be contradictory but complementary. This idea is often summarized under the expression "sustainable development".

The foundation for modern international environmental law was lead at the United Nations Conference on the Human Environment in Stockholm, 1972. On this conference, the Stockholm Declaration on the Human Environment[9] (Stockholm Declaration) was unanimously adopted, albeit legally not binding. Although the conference failed to proclaim an explicit human right to environment, this document shows the concern of the international community for environmental matters and, more importantly, set the agenda and framework for future discussions and initiatives.

It is worth to turn to the Stockholm Declaration a little more in detail, in order to examine whether it contains a human right to a clean environment. Especially two principles talk very explicit of such a right. Principle 1 of the Stockholm Declaration contains the "fundamental right [for man] to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being". Literally interpreted, this sentence has the quality of a human right. According to Principle 7 of the Stockholm Declaration, the states are required to take steps to prevent pollution of the environment by substances, which affect human health.

In 1992, the United Nations Conference on Environment and Development (UNCED) was held in Rio de Janeiro. Although environment was, as the title of the conference suggests, also an issue, UNCED focused rather on development related subjects (mostly North-South related topics). Indeed, the term "human rights" is only used three times in the Rio Declaration on Environment and Development (Rio Declaration).[10] According to Diane Shelton, there is no explicit link between human and environmental rights. At best, Principle 10 of the Rio Declaration can be considered as participatory right. It suggests that environmental

issues are "at best handled with participation of all concerned citizens", and further requires the states to provide "effective access to judicial and administrative proceedings"

Otherwise, the Rio Declaration rather focuses on the right to sustainable development, but with bias for development. A substantial and explicit right to a clean environment cannot be found. There is one more recent development, which could indeed lead to a right to environment in future. In 1989, a Sub-Commission of the United Nations Commission on Human Rights under the leadership of Mrs. Fatma Zohra Ksentini was assigned to study the possibility for a human right to environment.[11] In 1994, the Ksentini Report concluded that environmental rights are a part of the existing human rights.

Boyle summarizes that from now on there is a "shift from environmental law to the [human] right to a healthy and decent environment". In his words, the Ksentini Report "greened" existing Human Rights, meaning that existing human rights may already contain environmental rights. Thus, it is necessary to take a closer look at human rights treaties in order to examine whether humans can claim a right to a clean environment from its norms.

1. **International Human Rights Law Includes Right to Clean Environment**

The existing global and regional human rights treaties already contain environmental rights. Right to clean environment is a group right now it is not restricted to single citizen or person. Anderson suggests that environmental rights should be deduced from other existing human rights, because human rights already have a strong institutional structure and could lead to an effective right to a clean environment. Keeping in mind, that the Ksentini Report focused on the "interdependent, complement and indivisible"[12] relation between human rights and environmental rights, some specific human rights will now be reflected. Only two regional human right treaties contain an identifiable right to environment, namely the Art. 24 ACHPR and Art. 11 of the San Salvador Protocol to the ACHR. Art. 24 ACHPR will be taken as example.

The ACHPR is the first international human rights instrument to adopt a right to environment. Art. 24 ACHPR is a so-called "third generation human right".[13] Art. 24 ACHPR entitles a right to environment, which should be 'general', 'satisfactory' and 'favorable to development.

Although the right to environment for the African People is explicitly expressed in this article, it cannot be seen as an effective right to environment. The status of third generation rights is not definite yet. Merrills argues that Art. 24 ACHPR does not have the status of a human right due to its indeterminate character and context.[14] One can see, Art. 24 ACHPR is very indefinite. The ACHPR is generally criticized of being very vague.[15] Hence, assuming that Art. 24 ACHPR has human right status is farfetched.

Although first and second generation human rights do not express explicitly a right to environment, they have a stronger institutional basis. Thus, it is useful to have a look at some of these rights, because, they could serve as legal basis for a right to environment, when teleological interpreted in the environmental context.

Civil and political rights, also called first generation human rights, are "individual rights entailing freedom from arbitrary government interference or as guaranteeing participatory rights in civil society". They protect individuals from unlawful action of the government. Exemplary, the right to life and the right to a fair trial, both with fundamental rights character, will be briefly discussed.[16]

The main question in this context is whether the right to life imposes positive obligations on the state. Does the state have to provide adequate living conditions like better drinking water and air pollution controls, so that this fundamental human right is not negatively affected? The United Nations Human Rights Committee answers this question affirmatively. Churchill concludes that the right to life is theoretically applicable in terms of the environment, even though no successful case in the international courts has yet occurred.

Furthermore people have the right to a fair trial, in case the state acted harmful to the environment. But they have to prove that their own rights were affected. This is insofar important, because virtually every

action of a state, which is detrimental for the environment and affects any of the peoples' rights as side-effect, can be addressed in front of national courts (and in some cases in front of international human rights courts, like the European Court of Human Rights in Strasbourg). It widens the possibility for legal proceedings in environmental related questions.

Now, some examples for environmental rights derived from economic, social and cultural human rights, also called second generation human rights, will be given. Second generation rights are "concerned with encouraging governments to pursue politics which create conditions of life enabling individuals, or in some cases groups, to develop equally to their full potential". They impose standards on governments how to act. The most interesting rights in this context are probably the right to a healthy environment and the right to decent living conditions. Its dimensions have specifically been emphasized by the UNGA, "recognizing that all individuals are entitled to live in an environment adequate for their health and well-being".

If the rights to health and decent living conditions were fully implemented, the problems of pollution and environmental degradation would have been solved. But the right for health is very weak, because the state is only required to do the feasible with its available resources. Same is relevant for the right to decent living conditions. Although the state could be responsible for improving environmental hygiene in preventing industrial pollution, other human rights, like the right to development, will weaken this right, as shown above.

1. **C. Appraisal**

Thus so far, it has been shown that environmental law itself is quite weak and does not provide a human right to development. The Stockholm Declaration and the Rio Declaration are solely soft law documents and thus legally not binding. The Draft Principles of the Ksentini Report have not entered into force yet, regardless of the fact that their status would not be sufficient to grant a reliable human right to environment.

More appropriate is the approach to find environmental rights in existing human rights treaties. Human rights law provides some legal bases, which could be reinterpreted in favor of the environment. The best way to examine whether this has taken place is to study legal opinions, especially court verdicts. However, court verdicts in the international institutions dealing with environmental issues are rather rare. But "arguments for the protection of the environment as a substantive human right are almost certainly better addressed not in global terms, but in the context of particular societies and of their own legal systems", because most of the human rights cases take place in domestic jurisdictions. Hence, it should be examined at the example of the Indian legal system whether it is possible to reinterpret human rights in favor of the environment at the domestic level.

III. Environmental Justice in India

Environmental rights in India do not really exist in written form. They were rather created from lawyers and activists from other available resources. At first, the general provisions of the Constitution of India (COI) should be introduced before examining how the Indian Courts have decided on environmental related grievances. The following analysis will be limited on constitutional rights.

1. **Constitutional Right to Clean Environment**

Human Rights in India are guaranteed as fundamental rights under Part III (Art. 12-35) of the Constitution of India (COI). Since India has become a member of the ICCPR and ICESCR on 27 March 1979, human rights should be in accordance with international human rights law.[17]

Interesting to note is that whereas the rights guaranteed through the ICCPR are in Part III of the COI, the rights of the ICESCR are not in Part III. They are rather included in Part IV of the COI (Art. 36-51: Directive Principles of State Policy), and hence legally not directly enforceable for individuals and groups,[18] which takes them the immediate status of fundamental rights.

The Indian Supreme Court decided in 1980 that Part III and Part IV of the COI were complementing. Whereas Part IV imposes obligations on the state, Part III is the control mechanism.[19] Therefore, citizens can theoretically demand the state to fulfill its duties, as if it were their fundamental rights.[20] In **Koolwal v. Rajasthan[21]**, the Rajasthan High Court even decided in favor of environmental rights, although no injuries to the population were alleged in the particular case. This shows how serious Indian courts take environmental issues.

The dimension of this interpretation of the COI for environmental rights can be understood with the following interpretation. Art. 48A COI says: **"*The State shall Endeavour to protect and improve the environment and to safeguard the forests and wild life of the country*."** Here, the duty to protect and improve the environment is imposed on the state. Additionally, Article 51A (g)[22] of Constitution of India says: ***" It shall be the duty of every citizens of India – […] g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures*"**

How can citizens claim environmental rights? Other than many states, the right to fair and legal procedures belongs to the fundamental rights section in India. The right to a remedy as granted by Art. 32 of Constitution of India, gives "individuals the right 'to move to the Supreme Court by appropriate proceedings' for the enforcement of fundamental rights". A similar right on the state level to approach the High Courts exists under Art. 226 of Constitution of India. Art. 226 are even wider than Art. 32, because Art. 226 "may be invoked not only for the enforcement of a fundamental right but for 'any other purpose' as well"[23]. Hence, individuals can enforce in the High Courts that the State adheres to Part IV of the Constitution of India.

The High Court's involves hardly any costs, because public (or social) interest litigation has become a common feature in India. Under public interest litigation, the Courts facilitated the enforcement of environmental rights. Not only can letters and telegrams from individuals or interest groups be transferred into writ petitions, the court also acted on own initiative. To say it more clearly, the court inaugurated cases in the name of its citizens, particularly because on the one hand the awareness of environmental rights is not necessarily given, and on the other hand it is impossible for many people in India to address courts and enforce rights.

This short excurse in Indian Constitutional Law was particularly important, because it provided evidence that environmental rights can be enforced under its provisions. The unique procedural remedies[24] enable to address environmental issues as human rights abuses under the High Courts and the Supreme Court.

The question now is how Indian courts have decided on cases relating to substantial environmental rights. Some cases, dealing with the right to life (Art. 21) in terms of a clean environment, will be discussed.

1. **The Practice of Indian Courts**

In India, the jurisdiction of the Supreme Court widened the scope of the right to life in Art. 21 and included the right to a wholesome environment. One of the most explicit and most important case in this regard is **Subhash Kumar v. State of Bihar[25]**,The Supreme Court ruled that "Article 32 is designed for the enforcement of Fundamental Rights of a citizen by the Apex Court", and the "Right to live is a Fundamental Right under Art. 21 of the Constitution and it include the right of enjoyment of pollution free water and air for full enjoyment of life". The court even went that far in saying that a petition for Art. 21 in connection with Article 32 can be invoked by "social workers or journalists". In other words, any third person, doubtful that the environmental conditions at some place are sufficient to live a life in dignity, can call upon the courts.
This decision of the Supreme Court is revolutionary, because it set a precedent. In case there is an allegation that natural resources are polluted, the High Court or Supreme Court can be induced to investigate and eventually issue a writ petition. The authorities and private persons will have to act in compliance with minimum environmental standards.[26] Interesting to note is that the Supreme Court uses international "soft law", earlier discussed in order to emphasize its decision.[27] Hence, international environmental law, albeit

vague, has an influence on the interpretation of rights through Indian Courts. The Supreme Court has decided similarly in other cases related to the right to life.[28]

Art. 21 have proven to be a substantial legal basis to claim environmental rights, and its application was widened by the Indian jurisprudence during the years. For instance, the Kerala High Court decided to include the right to potable water under Art. 21.[29] Thus, some Indian judges are aware that something like a right to environment exists, albeit not explicitly, and have uniquely acknowledged this through court verdicts. Anderson summarizes that "probably more than any other jurisdiction on Earth, the Republic of India has fostered an extensive and innovative jurisprudence on environmental rights".

Conclusion

International environmental law does not really offer a basis for a human right to environment. The declarations and resolutions, either not in force or with soft law status, are not substantial in its nature. Thus, for logical reasons, it was rather reasonable to turn to international human rights law in order to find out whether its norms cover environmental questions. It was shown that international human rights laws could be theoretically reinterpreted in favor for a human right to environment. Since human rights abuse cases rather take place in national courts, it was supposed to demonstrate with the example of Indian courts, one of the extreme cases, that the theoretical protection of a right to environment with the anthropocentric human right approach is possible in practice. However India is the first country that legislated law for the protection of environment.

Indian courts have repeatedly recognized a human right to environment. Especially the own activism of judges has to be acknowledged. In India, the jurisdiction of the Supreme Court widened the scope of the right to life in Art. 21 and included the right to a wholesome environment. A possible right to environment, together with public interest litigation, cannot prevent that many people are heavily affected through environmental degradation without any possible remedy. The Indian courts can never handle all the existing environmental delinquencies. The reality is rather sobering.

Further, as discussed in the general part, the right to development can limit the right to environment. This is also happening in India. The right to development limits the application of the right to environment. Although there is "no judicially recognized right to development" so far, some decisions of Indian courts imply a balancing between these two aspects. Indian Court is always trying to give importance to the concept of ***sustainable development.***

Nevertheless, the Indian example on the one hand proves that a right to environment fits in human right norms, and on the other hand gives hope that other jurisprudences acknowledge it in the same extent. In that case, pressure could be exerted on the legislative powers to create an explicit right to environment. Policies, which see environment and development not contradictory but rather as complementary forces for sustainable development could be enhanced and thus improve both the environmental condition and the economic situation of the people.

[1] Schreurs and Economy (1997), pp. 1-2.
[2] Anderson (1996), p. 1.
[3] Kiss and Shelton (1991), p. 190.
[4] Boyle (1996), p. 6.
[5] Ibid
[6] Sands (1995), p. 221.
[7]Shelton (2001), p. 191
[8] UNGA Res. 41/128 (1986).
[9] Stockholm Declaration on the Human Environment (16 June 1972), UN Doc. A/Conf.48/14/Rev.1 (UNPub.73.II.A.14.) (1973). [Also in 11 ILM 1416 (1972)].
[10] UN Doc. A/CONF.151/26/Rev.1 (93.I.8) (1993).
[11] UN Doc. E/CN.4/Sub.2/1989/C23 (1989).
[12] ibid, p. 3
[13] Sieghart (1990), p. 376
[14] Merrills (1996), p. 9

[15] Churchill (1996), p. 13
[16] In global human rights treaties, Art.6(1) ICCPR and Art. 14(1) ICCPR are the legal bases, respectively.
[17] Agarwal (1992), p. 479.
[18] ibid, pp. 479-81
[19] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1506. Art. 51A and Art. 48A were introduced in the COI 1976, pursuant to the Stockholm Declaration..
[20] Du Bois (1996), p. 2. He takes reference to Subhash Kumar v. State of Bihar AIR 1991 SC 420.
[21] AIR 1988 Raj 2, 3, para 2. The High Court of Rajasthan decided that "Art. 51A gives a right to the citizen to move the Court for the enforcement of the duty cast on State instrumentalities, agencies, departments, local bodies and statutory authorities […]." See also Anderson (1996b), p. 217, who takes special reference to this case
[22]Art. 51(A) is the only article belonging to Part IV (A) of the COI ("Fundamental Duties" [of every citizen]).
[23] Divan and Rosencranz (2001), p. 129
[24] Art. 14(1) ICCPR 1966.
[25] AIR 1991 SC 420, 424, para 7.
[26] M.C. Mehta v. Union of India (1987) 4 SCC 463, 478, para 14, (also known as the "Shiram Gas Leak Case"), the Supreme Court pointed out that there has to be a minimum environmental standard for industries (in this case atannery). Yet, there is no definition of "minimal environmental standard", which leads to the assumption that environmental standards in India are rather low, as the reality suggests. This case is a good example for suing the state for not having acted against private polluters
[27] M.C. Mehta v. Union of India (1987) 4 SCC 463, 467, para 4.
[28] Virender Gaur v. State of Haryana, 1992 (2) SCC 577, 581, para. 7: "Environmental, ecological, air, water, pollution etc. should be regarded as amounting to violation of Article 21. […] it would be impossible to live with human dignity without a humane and healthy environment". T. Damodar Rao v. The Special Officer, Municipal Cooperation of Hyderabad, AIR 1987 AP 171, 181, para 24: "The slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should also be regarded as amounting violation of Art. 21 of the Constitution".
[29] Attakoya Thangal v. Union of India 1990 (1) KLT 580, 583, para. 7.