

**REGIONAL CAPACITY DEVELOPMENT TECHNICAL ASSISTANCE:
STRENGTHENING THE CAPACITY FOR ENVIRONMENTAL AND CLIMATE CHANGE
LAWS IN ASIA AND THE PACIFIC**

Colombo, Sri Lanka, 28 May – 01 June 2018

SESSION 10 – RIGHTS IN ENVIRONMENTAL & CLIMATE CHANGE LAW



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- ❑ **Learning Objectives** – to understand the difference between substantive and procedural rights
- ❑ **Methodology** – structured, small group discussion (on role of environmental law clinics)



- **Goal 16**: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.
 - **Target 16.7**: Ensure responsive, inclusive, participatory and representative decision-making at all levels.
 - **Target 16.10**: Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements



Stockholm Declaration

- ❑ 1972 Stockholm Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972) established a basis for linking human rights & environmental protection in law.

Preamble:

Man is both creature and moulder of **his** environment...

Principle 1:

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, and **he** bears a solemn responsibility to protect and improve the environment for present and future generations.”



List of Substantive Human Rights

- Non-discrimination and equal protection of the law
- Right to life
- Prohibition of force and child labour
- Freedom of movement and residence
- Right to privacy and home life
- Right to property
- Right to freedom of religion
- Right to an adequate standard of living (food, medicine, clothing, housing, water)
- Right to identity
- Right to culture
- Minority rights
- Right to safe and healthy working conditions
- Freedom of assembly and expression/opinion
- Right to health
- Right to privacy
- Right to self-determination of peoples
- Right to a certain quality of environment (certain aspects of this right have a global consensus, such as safe drinking water, and nutritious food)



I. Right to life: General definitions

❑ **Article 3 - Universal Declaration of Human Rights**

Everyone has the right to life, liberty and security of person.

❑ **Article 6 - International Covenant on Civil and Political Rights**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

❑ **European Convention on Human Rights and Fundamental Freedoms 1950 (as amended)**

➤ **Article 2 - Right to life**

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

➤ **Article 8 - Right to respect for private and family life**

Everyone has the right to respect for his private and family life, his home and his correspondence.



Indian Constitution:

Article 21: Protection of life & personal liberty

- No person shall be deprived of his life or personal liberty except according to procedure established by law.
- Article 21 can only be claimed when a person is deprived of his “**life**” or “**personal liberty**” by the “**State**” as defined in Article 12.
- The term “life” as here used indicates something “more is meant than mere animal existence”. (*Kharak Singh v. State of Uttar Pradesh*)



Q – Does the right to life mean the right to live a healthy life, free from pollution?

This should include the right of access to fresh water, clean air, healthy sources of food, freedom from toxic chemicals etc.

i.e. The Right to Life means the right to have a clean and healthy environment

Depends on interpretation by courts: for example, India and Pakistan: right to life includes right to environment

Q - Should this right to a healthy environment be specifically stated in the Constitution?

If it is not stated, can we argue that this right is now recognised under international law?

See ***Global Pact on the Environment*** (RES. A/72/L.51), 10 May 2018;

http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/72/277



❑ **Article 21 – Indian Constitution**

No person shall be deprived of his life or personal liberty except according to procedure established by law.

❑ **Article 48A**

The State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country.

❑ **Article 51-A (g)**

It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for all living creatures.

❑ **Procedurally**, these cases are brought before the Supreme Court under Article 32, which grants citizens standing to sue directly in the Supreme Court for enforcement of **Fundamental Rights**. Persons can file a Writ Petition or address even a letter (epistolary jurisdiction) to the Chief Justice of India highlighting the question of public importance for invoking this jurisdiction (popularly called “Public Interest Litigation”)

❑ It is empowered to issue directions, orders or writs, including writs in the nature of ***habeas corpus***, ***mandamus***, prohibition, ***quo warranto*** and ***certiorari*** to enforce them.



- ❑ The Indian Supreme Court has acted on the basis of newspaper reports and its own knowledge in invoking its ‘suo moto’ (of its own motion).
- ❑ ‘Suo moto’ is special power of Indian High Courts and the Supreme Court of India to initiate a hearing by itself without anybody filing any appeal or writ petition or Public Interest Litigation
- ❑ Court enlists help of legal aid organisations and *amicus curiae*
- ❑ Appoints Commissions of Inquiry to report to the Court
- ❑ Monitors cases for years (e.g. Taj Mahal case; Ganga River case)
- ❑ Monitors the results of its orders
- ❑ Court has ordered various states to:
 - pay compensation to petitioners for failing to protect fundamental rights
 - pay costs of the petitioners (e.g. to Lawyer M.C.Mehta)
 - pay costs of Commissions of Inquiry established by the Court



R.L.E Kendra, Dehradun v State of U.P. 1985 (Doon Valley case)

- ❑ The case, involving a large number of lessees of limestone quarries, the Court ordered the closure of all but eight limestone quarries.
- ❑ The Court took notice of the fact that limestone quarrying and excavation of the limestone deposit affects the perennial water springs. Taking a serious view of this environmental disturbance, the Court recognized that the right to life includes the right to a wholesome environment and observed:
 - *“The consequence of this order made by us would be that the lessees of limestone quarries would be thrown out of business. This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in a healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them, to their cattle, homes and agriculture and undue affectation of air, water and environment”.*

<https://www.ecolex.org/details/court-decision/rural-litigation-and-entitlement-kendra-dehradun-and-others-petitioners-v-state-of-up-and-others-respondents-04242b1b-53ec-4139-97b1-5d996e37b2ae/>



Climate Change Litigation in Domestic Courts: Legal Issues

- ❑ For any climate change related action, **standing** is most fundamental component – the courts in USA and Australia require it. It “depends on the identity of the person [bringing the claim] and the nature of the proceedings.”
- ❑ The state of Massachusetts brought a claim against the EPA, invoking the erosion of Massachusetts’s coastal lands as an injury caused by the EPA’s failure to implement emission standards.
- ❑ The US Supreme Court observed (*Massachusetts v. EPA*, 549 U.S. at 517) the globally detrimental effects of climate change but reasoned that, to meet the injury requirement, plaintiffs who are suffering from the harmful effects of climate change must still establish injury “in a concrete and personal way.”
- ❑ In Australia, what constitutes an injury is significantly more expansive, especially under key pieces of environmental legislation. The Environment Protection and Biodiversity Conservation Act of 1999 (the EPBC Act) requires “Commonwealth involvement in assessment and approval of an activity” involving a matter of national environmental significance or of activities that will likely have a significant environmental impact “inside or outside Australian jurisdiction.”



How are substantive environmental rights distinguished from procedural environmental rights?

Procedural rights are a vehicle for delivery of substantive rights:

- Access to information in environmental matters
- Participation in environmental decision making
- Access to justice/judicial review environmental matters
- Due process/fair hearing environmental matters
- Substantive redress in court or other tribunals
- Non-interference with international petitions (where applicable)



- ❑ The UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was adopted on 25 June 1998 in Aarhus (Denmark). It entered into force on 30 October 2001.
- ❑ It provides for 3 rights :-
 - (1) **Access to environmental information** - the right of everyone to receive **environmental information** that is held by public authorities. Applicants are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession;
 - (2) **The right to participate in environmental decision-making** - Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programs relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it ("**public participation in environmental decision-making**");
 - (3) **Access to Justice** - the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general; <http://ec.europa.eu/environment/aarhus/>



- ❑ Nature has been recognised to have rights in some jurisdictions
- ❑ Ecuador was first country to recognise this. 2008 Constitution Art 71 – “Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles...” and the people have legal authority to enforce these rights on behalf of ecosystems.
- ❑ 2010 – Rights of Mother Earth – Bolivia Constitution. Humans can bring actions on behalf of Mother Earth.
- ❑ New Zealand’s Whanganui River was given legal standing as a person 15 March 2017, under a river claims settlement with the Maoris people.
- ❑ 31 March 2017 - A court in the northern Indian state of Uttarakhand cited the NZ case and ordered that the Ganges and its main tributary, the Yamuna, be accorded the status of living human entities.
- ❑ IUCN World Declaration on the Environmental Rule of Law 2016,
- ❑ Principle 2: ‘Nature has the inherent right to exist, thrive, and evolve.’



- ❑ “The values and principles of ecological law are expressed in ecocentric jurisprudence (e.g. rights of nature, ‘Mother Earth’ rights, Earth jurisprudence, eco-feminism, ecological legal theory, ‘environmental law methodology’) and are also present in constitutional and international theory (e.g. ecological human rights, ‘eco-constitutional state’, ‘Pachamama’ constitutions, ecological sustainability and integrity, ecocide campaign, commons movement, global commons theory, eco-constitutionalism, global environmental constitutionalism). While different in their approaches and emphasis, they share a common ground and can be perceived as complimentary and mutually reinforcing.”
- ❑ See new Ecological Law & Governance Association (ELGA) and their Oslo Manifesto “**From Environmental Law to Ecological Law**” - website <https://www.elga.world>
- ❑ Launched in October 2017 in Siena, Italy.



Some questions

- Can the environment be safeguarded without constitutional protection? Give examples.
- How important are substantive versus procedural rights?
- Critically examine the reasons for judicial activism in the Indian sub-continent. Does it have a sound basis in law?
- Is judicial activism necessary or desirable, in safeguarding the environment? What are the alternatives?
- Can the cases that you have studied be replicated elsewhere?
- Should all states recognize the rights of nature/Mother Earth?

