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EDITOR'S INTRODUCTION

# Introduction to the JGLR special issue on environmental governance

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## 1 Introduction

Environmental law refers to that body of law at the intersection of private and public law and straddling both domestic and international law, that is primarily geared towards addressing two basic objectives; first environmental harm resulting from human actions and conservation and sustainable use (including access and benefit sharing) of natural resources. The contours of this definition is necessarily expansive because the nature and scope of environmental problems are continuously evolving and every new decade not only brings clarity about existing environmental problems but also confronts us with newer and more complex ones. Given the transboundary nature of some environmental impacts, the growth and development of international environmental law has been particularly phenomenal over the last few decades, although there is disagreement as to effectiveness of these international efforts on the ground, i.e. at a domestic level. That said, given the fact that international law requires looking beyond narrow national interests, cooperation itself is a step forward in a positive direction. The evolution of the discipline of environmental law also reflects the vast nature of the subject, which has meant that academicians have had to grapple with challenges of specialization and the necessary discontinuities that may result from pursuing such inclinations.

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Interestingly, academicians in this field have been particularly affected by identity conundrums that underlie environmental activism on one hand and on the other support the need to adopt a certain academic distance from the subject of their research. Such issues assume primary importance especially in the context of developing countries like India, where the growth of the academic discipline has been coterminous with the growth of the environmental movements. Unlike in many western countries, environmental movements in developing countries tend to be largely bottom-up movements that are embedded within resource conflicts in which livelihood and subsistence concerns assume centrality. Indeed, the outer limits and the template of environmental law as a discipline is as much determined by national exigencies as by international events and developments.

What we intend to do over the next couple of paragraphs is to capture and discuss significant trends in the development of not only the discipline but also the practice of environmental law.

## 2 Significant trends

The *first* of such a trend is what we would refer to as the exhaustion of constitutional remedies in environmental law and practice. Perhaps due to the rapid expansion of environmental problems and the accompanying lack of expansion in environmental remedies, environmental law and practice has always had a particularly strong connection with the constitutional discourse. This is especially true of countries like India, where the lack of statutory remedies, the negligible use of tort remedies coupled with an activist judiciary has led to an intense growth of environmental constitutionalism. The constitution became the arena in which environmental problems were interpreted as environmental rights. Although environmental constitutionalism continues to remain the single most influential discourse in the practice of environmental law in India, there has been a recent parallel route to exploring other statutory interventions based on e.g. the *Right to Information* (RTI) to elicit information on environmental issues.

The *second* trend that we are witnessing is the acceptance and proliferation of special environmental courts and tribunals that are not only equipped to consider legal arguments but can also access specialized knowledge on environmental issues. The establishment of various National Green Tribunals throughout India has underlined the necessity of having a dedicated judicial forum on environmental matters with a specific mandate to exclusively take op civil cases "where a substantial question relating to environment" is involved which arises out of the implementation of the exhaustively enumerated environmental laws (in contrast to the more open-ended writ jurisdiction of the High Courts). Internationally there has also been focus on the treatment of expert evidence. Thus for instance in *Pulp Mills* case, the ICJ deliberated over the issue and observed that experts' evidence should be presented not as members of the counsel but should be produced as expert witnesses and thus open for cross examination. Even more pragmatically, state administrative tribunals in Australia have adopted a practice of "concurrent expert evidence" whereby expert evidence is taken from a number of experts *at the same*

*time* and are so to speak placed together "in the hot tub", thereby allowing the experts to engage in a debate with one another, hold them accountable for their views, and to more effectively inform the courts on technical environmental cases.

The *third* trend is that of democratization of environmental legal approaches. This is evident both internationally and within specific areas of national environmental policy. International environmental law provides for many spaces of substantive *participation of non-state actors,* specifically civil society organizations. In that sense international environmental law has been largely an exception to the close obsession of international law to only include state as parties and subjects in this domain. Similar trends are reflected in the area of environment impact assessment (EIA). There has been a determined movement towards involving affected persons and concerned citizens within the deliberative structure of the EIA. The process is far from satisfactory and there continues to be a need for a more effective public participation model. However, none can deny the dramatic change in perception as to the efficacy of public participation in environmental policymaking. Policy makers have at least in the context of EIA come around to expressing a clear preference for public deliberation over an exclusively expertise-based assessment. At a recently held International Conference on Global Environment Issues, organized by the NGT, India's environment minister Mr. Prakash Javadekar stated that earlier the ministry which was known as "license permit quota raj" has been changed to "public participation ministry". This trend is only expected to get more deeply embedded in environmental policymaking in India as well as other countries.

The *fourth* trend that has emerged quite recently at the international level, is the greater focus on *intra-generational equity* as a constitutive principle of environmental justice. Across diverse kinds of international treaty regimes such as climate change, access and benefit sharing of biological resources and persistent organic pollutants. The focus now is to move away from old definitions of developed and developing; future and present generation to that of *greater equity within the present generation* spread across socio-ecological systems. Part of the reason for this is that principles of distribution of state responsibility like the CBDR (common but differentiated responsibility) have been seen as only effective in a limited manner. Their effectiveness is limited by the need to apply the principle within the traditional framework of state responsibility. The lack of consensus on whether the traditional framework and the divisions that defined international law-making do still continue to be precious and valid in the present context of addressing newer environmental harms like climate change; has led to greater focus on exploring the principle of *intra-generational equity* to identify and assess differential environmental impacts across communities and following from that to construe a paradigm of responsibilities that reflect equity.

The slow movement back towards anthropocentricism in international law can be referred to as the *fifth* trend. For long, academicians have underlined the linearity in the manner in which international environmental law has historically developed. Thus, international treaties during the turn of last century were determinedly *anthropocentric* in their orientation. The natural environment was looked as merely a source of natural resource and, therefore, the primary motivation was to secure the

continued supply of this resource to meet the requirements of humankind. The Convention Designed to Ensure the Protection of Various Species of Wild Animals which are Useful to Man or Inoffensive (1900) and the Convention for the Regulation of Whaling (1931) illustrate this specific outlook. This was followed by a movement towards *enlightened anthropocentricism* wherein the needs of future generation were also an important aspect that was to be accounted. However, the environment continued to be viewed as a resource although the level of protection was hiked up to not only meet the needs of current generation but also future generations of mankind. The Stockholm Declaration of 1972 is a good example of this kind of enlightened anthropocentricism. The subsequent movement has been characterized as *ecocentricism* where the interests of the ecosystem and all living beings are given equal importance. The Rio Declaration of 1992 emphasized this trend.

Currently though, anthropocentricism seems to be regaining centrality in international negotiations on environmental issues. The most prominent example of this is the new set of Sustainable Development Goals (SDGs) that have been drawn up and are set to replace the Millennium Development Goals (MDGs). For instance, poverty eradication has gained significant pre-eminence in the long list of challenges. The SDGs could possibly be seen as a continuation of the MDGs, nevertheless one would have imagined that renaming them SDGs should have meant a clearer commitment to environmental goals as well. Unlike MDGs which had an overall commitment to environmental sustainability, the SDGs feature a series of sectoral commitments on *sustainable use* of oceans, seas and marine resources, water and sanitation; biodiversity loss; amongst others. Although the number of goals have been expanded to an unwieldy seventeen in number, not only is there a lack of a clear and overall commitment to environmental issues but also there is disproportionate focus on *pollution clean-up rather than prevention and mitigation*. This also portends a clear challenge to the linearity of the script adopted in academic comments on the general trend in international environmental governance which was expected to move from anthropocentricism to ecocentricism. Moreover, this tussle between the advantages of an anthropocentric legal framework versus a more visionary ecocentric approach is played out in the realm of environmental constitutionalism on a day-to-day basis as well.

## 3 Contributions

This special issue of Jindal Global Law Review includes contributions from academics, practicing advocates, activists and scholars. Although the JGLR is a decidedly academic enterprise, the exigencies of the discipline of environmental law demanded that we include as many voices from the field as from within the academia. Environmental law thus unlike that of other legal disciplines is more than just an academic enterprise. It relates to issues of social and public policy that are being actively shaped by public actors, citizens, international fora and other civil society organizations. This makes both an exciting as well as a challenging exercise to capture the diversity of opinions. Our basic objective was, therefore, to provide a

platform to those thinking on environmental issues from different regional, social and professional backgrounds.

This diversity of opinions confronts us with a significant editorial challenge. Is it possible to weave together a singular narrative which would then encompass all the different contributions? We don't think it is necessary to take such a course. Instead, in the following sections, we briefly introduce each of the contributions and identify critical points of departure and convergence between them.

We start with the article by Erin Daly and James R. May titled *Comparative Environmental Constitutionalism.* As was discussed in the earlier section, constitutionalism has been an overarching and oft used discourse in the context of environmental regulation. Daly and May highlight the pitfalls of restricting the environmental claims to established human rights and supports the expansion to include environmental harms which will enrich the nature of enforceable claims. The limitations of electing to focus exclusively on constitutional remedies to address environmental harm has triggered exhaustion within many national jurisdictions. Daly and May advocate comparative environmental constitutionalism as an emerging global discourse that can address gaps within legal regimes worldwide, thus underlining the instrumental role of environmental constitutionalism in constituting a political community. Interestingly, it is this very political community which has increasingly become disenchanted with the mere declaratory nature of constitutional jurisprudence and consequently have been forced to explore statutory remedies like the RTI to effect change on the ground.

This is followed by the Balakrishna Pisupati's article, *Access and Benefit Sharing: Issues and Experiences from India* which addresses the challenges in the domestic implementation of two different but related international treaty systems on access and benefit sharing of plant genetic resources in India. This challenge has been precipitated by the fact that both treaties propound two different systems of ownership and access. Further, there is lack of coordination between the Ministry of Agriculture and the National Biodiversity Board, the nodal executive agencies in India for the implementation of both these treaties. Pisupati's article highlights that even when there is a reasonably strong international regime, implementation on the ground may be constrained by local exigencies.

The next two articles explore the nature and contours of the concept of sustainable development in two jurisdictions: the European Union and India. The principle of sustainable development gained recognition first as a critical concept, allowing balancing of economic development with that of environmental protection. However, the lack of consensus on the specific content of a principle of sustainable development has frustrated efforts to effectuate or realize this goal in different jurisdictions. Interestingly, this ambiguity has been a boon in the concept of *sustainable development* gaining widespread support, recognition and ascendancy in international law. The decidedly anthropocentric ethical paradigm that *sustainable development* promotes is also evident from the recently launched SDGs that the UN is expected to adopt as a global goal.

Nicolas de Sadeleer in his article titled *Sustainable Development in EU Law: Still a Long Way to Go*, contends that despite international acceptability of the concept, it has encountered difficulty in establishing itself under EU Treaty law. The primary

reason behind this is that sustainable development has been subordinated to the primary goal of the European Union—establishment of the internal market. Thus although, the concept has gained wide acceptability in terms of textual references in a number of legal and policy documents of the EU, serious commitment has been lacking in identifying and developing a set of criteria that would substantively deepen the concept. Arindam Basu and Uday Shankar in their article, *Balancing of Competing Rights through Sustainable Development: Role of Indian Judiciary*, make a similar argument in the context of India by highlighting the inconsistency in the application of the concept by the judiciary. Despite the fact that the concept has gained currency through the Supreme Court's discourse, it remains an oft quoted but seldom applied concept in practice. The clear statutory recognition of the *principle of sustainable development* in the National Green Tribunal Act, 2010 and the recent attempt by the NGT (national green tribunal) to develop a standard of review for administrative decisions while applying the principle of sustainable development in *Sudiep Shrivastava vs Union of India* is a welcome development in this context.

This is followed by two papers that specifically discuss judicial review and activism in the context of Sri Lanka and India respectively. Naazima Kamardeen in *The Honeymoon is Over: an Assessment of Judicial Activism in Environmental Cases in Sri Lanka* traces the development of judicial activism in Sri Lanka. Starting from the path-breaking Eppawala phosphate case which witnessed the judiciary breaking away from statutory boundaries to fashion a *sui generis* right to environmental protection drawing from international law, Kamardeen argues that there has been a progressive decline in judicial activism on environmental issues. The rise of judicial activism in the context of environmental issues, reflects the lack availability of effective statutory solutions. Judicial activism is driven by the persona and commitment of individual judges that renders it an ineffective long-term remedy for addressing environmental harm. Ultimately it cannot be relied on as a substantive remedy which provides a credible alternative to environmental laws and regulations. This also substantiates our earlier contention that there is a growing exhaustion with constitutional remedies. Navneeta Dash's paper, *Odysseys of Vedanta and Posco in Orissa* critiques the clear anthropocentric foundations of judicial interventions in both these cases. Thus in the *Third Vedanta* case, environmental rights of locally affected persons were indirectly secured by citing cultural and religious 'rights of humans' over nature. Dash's paper provides an extensive review of the EIA process and suggests a number of steps that could address the gaps in the design and enforcement of the EIA process in India.

The next article by Geetanjali Sharma and Shivam Singh titled *Regulating India's Blood-Sport: An Examination of the Indian Supreme Court's Decision in AWBI v. A. Nagraj* and it discusses an important case of judicial review wherein the Supreme Court of India has supported a clear commitment to move away from anthropocentric to ecocentric ethical paradigms. In pursuance of this, the Court categorically decried that discrimination against other living beings amounts to an extreme form of *speciesism.* However, by allowing for certain exceptions based on human necessity the Court has considerably undermined its own stand on adopting a more ecocentric approach to environmentalism. This primarily highlights that anthropocentricism continues to be deeply embedded within the judicial discourse

even in cases where there has been a formal reiteration of the Court's preference for adopting ecocentricism as an ethical paradigm.

In the last article included in this special issue, *The Development Situation and the legal challenges on Smart Grid in China*, Deng Haifeng discusses the legal and policy framework for implementation of smart grids in China. We end with this article since it reflects on and makes policy recommendations in a critical area of future potential. He recommends that separation of transmission and distribution is a necessary step in the reform of this sector. The utility and effective implementation of smart grids requires a radical shift away from traditional vertical integration to a new institutional structure wherein power generation, transmission, distribution and sale are separated and hived off. He emphasizes the decisive role of the federal government in the design, development and implementation of such networks. Similar arguments will apply also in the case of developing countries like India where the role of the state as a public risk taker is critical, in investing and supporting a new generation of energy reforms that will act as a signal and incentivize private investment in this sector. However, it should be kept in mind that efforts to promote and attract domestic investment in such sectors could also potentially violate the WTO commitments. In the recent case *India—Certain Measures Relating to Solar Cells and Solar Modules*, the US has alleged that India violated its WTO obligations by providing for targeted schemes to incentivize domestic private investment in the sector.

## 4 Conclusion

In conclusion we would like to thank the contributors to this special issue. Given the diversity of opinions and positions on gamut of environmental issues, we hope we have been able to provide a window and a vantage point to appreciate this diversity. We also hope that despite abandoning the project of developing a singular narrative that would string together the different contributions, we have been able to discuss and appreciate the connections between the contributions. Finally, we would like to thank and acknowledge the stellar efforts of our reviewers in taking out precious time to help us review and select contributions.[1]

We hope you enjoy reading this special issue and look forward to your comments.

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