Environment and Law: A Perspective from Developing Countries

by

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INTRODUCTION

Some fourteen years have elapsed since the United Nations convened a major intergovernmental Conference on the Human Environment at the highest policy-making level, in Stockholm, Sweden, in 1972. It was the first of the mega-conferences convened by the United Nations on critical global issues that set the pattern for the remaining seventies.

Viewed from any direction, the Stockholm Conference on the Human Environment was an important event for the world as a whole. Through the preparatory process undertaken for that Conference, as well as through the discussions during the Conference and the implementation of its recommendations later, not only has Man's understanding of the complexities associated with the development process evolved further, but also the attitude of many countries, whose interest in environmental issues could at best be described as lukewarm in the early 'seventies, has been radically altered. For example, at Stockholm the environment was viewed sectorally, and thus recommendations were categorized by sectors—air, water, soil, energy, mining, fisheries, forestry, etc. The interrelationship between the various sectors, which is a major environmental concern at present, was, however, commonly neglected.

Now it is becoming better recognized than formerly, and indeed is quite widely accepted, that environmental policies and actions have to be viewed within a broader framework of interrelationships between people, resources, environment, and development. Without such an understanding, actions taken to alleviate certain problems in one specific area, could give rise to a series of adverse impacts in other areas which had not been considered—such that the sum total of these adverse impacts could even exceed the entire benefit accruing from the action taken to rectify the original problem.

THE THIRD WORLD AND THE ENVIRONMENT

The reactions of developing countries when the Stockholm Conference was first proposed by Sweden in 1968 were mixed, with, generally speaking, any favourable reactions lukewarm at best. Interest in environmental concerns was not as high as in the Western industrialized countries, and there was a general feeling that environmental problems were less of a priority than the 'real' problem facing them: further economic development for the alleviation of poverty.

This was confirmed by the United States Agency for International Development (AID, 1974), which had canvassed its overseas Missions in Africa in 1971 in an attempt to identify the most serious environmental problems that were then confronting thirty-five third-world countries. The report, in the form of an 'Interoffice Memorandum', noted that for most of the countries concerned 'development is the absolute priority', and 'environmental considerations must not be allowed to interfere with the development process'. It concluded that there was:

> 'little evidence of awareness of environmental problems among the peoples of developing countries, or among their government administrators... Many countries are preoccupied with the development of their natural resources, and, to the extent that concern does exist for the environment, there appears to be apprehension that social and economic costs of environmental protection may very well outweigh the benefits'.

Third-world countries had some serious concerns and reservations regarding the Stockholm Conference, which were raised at various international fora (Biswas & Biswas, 1982). Among their major concerns were the following: first, there was a widespread concern that imposition of environmental regulations and safeguards would represent a new claim on the limited productive resources available to developing countries, and that this might prove detrimental to their future rate of development.

Second, there was a fear that stringent implementation of environmental regulations in developed countries could have a negative effect on export potentials and trading patterns of developing countries. For example, extensive recycling and more efficient use of raw materials in the West might tend to diminish the volume of primary commodities that were consumed by the importing countries, which might have adverse economic repercussions on developing countries that had come to rely on such exports. It was felt that some traditional export markets for agricultural products, as well as fish and meat, could even be lost to the Third World, if developed countries banned such products for environmental reasons such as high pesticide concentration or heavy-metal contamination.

Third, environmental issues could turn out to be formidable competitors for investment funds that were available in developed countries. For if such a concern did not exist, the extra funds might have been channelled towards development assistance for Third World countries.

Fourth, some countries were concerned that environmental factors could influence world trade to an ever-increasing degree—through changing the pattern of international distribution of industry, and the competitive position between countries—by altering comparative production-costs of goods manufactured. It was felt that countries enforcing less environmentally-stringent standards could have significant production cost advantages.

Fifth, developing countries might not be able to take full advantage of new opportunities that would arise from environmental control processes, but they would be expected to pay the full costs for the extra burden which such controls would impose on them.

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The preparatory process of the Stockholm Conference alleviated the expressed concerns of the developing countries sufficiently for them to take part in it. However, five years later, during the last Plenary Meeting of the United Nations Water Conference, held in Mar del Plata, Argentina, in March 1977, when the issue of the environmental considerations for large water-development projects was raised by the United States, the delegates from Brazil and Sudan attacked it so vehemently that the idea was dropped.

Overall, as the latest decade progressed, the interest of developing countries in environmental issues gradually increased—both as the interrelationships between people, resources, environment, and development, came into sharper forcus and became clearer, and through the work of the United Nations Environment Programme (UNEP), which was established as a direct result of the Stockholm Conference. It was gradually accepted that environment and development are 'two sides of the same coin' (Tolba, 1982). Much of the credit for clarification of this concept, as well as its acceptance by developing countries, must go personally to UNEP's Executive Director, Mostafa Kamal Tolba, who made it one of his priority areas. As a result of such efforts, environmental concerns are now being integrated into development strategies of many different third-world nations, which undoubtedly is a major improvement on the state of affairs that existed widely until less then a decade ago. Examples from three countries will illustrate this point.

First, in Costa Rica, President Rodrigo Carazo Odio pledged in 1978 to establish a 'broad, aggressive and coordinated programme for conservation and rational use of renewable natural resources.' He said:

> 'Costa Rica is approaching the point of no return with regard to the management of its renewable natural resources... Travelling through the interior of the country, especially in the dry season, it is possible to contemplate how vast areas have been completely cut over and burned and [are] suffering the effects of the cancer of erosion. The most lamentable part of this picture is the obvious instability and poverty of the rural communities, the reduction in the potential for productivity of the soil, and the loss of options for uses having greater economic and social benefits.'

Second, in Nepal, the basic 1980–85 development plan clearly recognized the interrelationships between environmental and natural resources issues and development. It states: 'Problems like population pressure, limited cultivable land, and destruction of natural resources, will adversely tell on the whole development process itself.'

Third, in India, where the late Prime Minister, Mrs Indira Gandhi, said in 1980:

> 'The interest in conservation is not a sentimental one but rediscovery of the truth well-known to our ancient sages. The Indian tradition teaches us that all forms of life—human, animal, and plant—are so closely interlinked that disturbance in one gives rise to imbalance in the others.'

Similarly, the Framework Document for India's Sixth Five-Year Plan (1980–85) outlined an objective of the Plan to be the following:

> 'Bringing about harmony between the short- and long-term goals of development by promoting the protection and improvement of ecological and environmental assets.'

While it has to be accepted that the above examples of integrating environmental concerns in development strategies have not yet been unanimously implemented in all the third-world nations, there is no doubt that there has been a widespread and dramatic change in the attitudes of governments to environment-development issues.

Environmental Laws in Developing Countries

Environmental law, in the context of the present discussion, can be defined as a set of legal rules that are specifically addressed to activities which may have potential impacts on the environment, both natural and Man-made. It comprises both national and international laws on various aspects of environmental management, and encompasses 'hard' laws such as national legislations and international treaties as well as 'soft' laws such as standards and regulations (ESCAP, 1984).

Environmental law is an important tool for environmental management. Indeed, for any national government, it is essential that policies adopted and decisions taken at any level—national, subnational, or local—can be translated into codes of conduct that can not only be assimilated into its legal system but also can be enforced through it.

The importance of environmental law was clearly recognized by the Stockholm Conference. Two of the 26 Principles adopted were on this subject (UN, 1973):

> 'Principle 21
>
> States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.
>
> Principle 23
>
> Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.'

Furthermore, many of the recommendations of the Action Plan contained legal elements—especially Recommendations Numbers 32, 50, 51, 70, 72, 85, 86, and 92.

A review of environmental legislations in developing countries presents a very diverse picture. The latest analysis of such legislations in the Asian and the Pacific region (ESCAP, 1984) clearly confirms this view. The analysis pointed out that it is 'not simply a choice between common law or civil law or a mixture of both. While one system is founded on Islamic or Hindu law, with selective retention of Dutch law, a few others share traditions of British law superimposed upon Islamic foundations, modified by modern indigenous legal innovations. Others have indigenized eclectic legal systems which have integrated concepts from American, Spanish, Indian, and French, legal systems. Intricate as it is, the mosaic is much more elaborate when seen in detail with a great variety of ethnic and customary laws, particularly in the Pacific countries' (ESCAP, 1984).

Generally speaking it can be said that the developing countries of Asia and the Pacific have, for the most part, well-established and often highly-developed legal systems, which can, if required, assimilate new legal mechanisms and legislations for environmental management without undue turbulence. Many laws have been enacted in recent years, or are in the process of being enacted, which will protect and/or enhance environmental quality.

In some countries of that region, such as India or China, environment is specifically referred to in their constitutions. For example, the Indian Constitution, in the section on Directive Principles of State Policy, lays down the following duties for the State and the citizen:

> Article 48:
> 'The state shall endeavour to protect and improve the environment and so safeguard the forests and wildlife of the country.'
>
> Article 51-A:
> 'It shall be the duty of every citizen of India—(g) to protect and improve the natural environment including forests, lakes, rivers, and wildlife, and to have compassion for living creatures.'

Similarly, Article 11 of China's constitution states that 'the State protects the environment and natural resources, and prevents and eliminates pollution and other hazards to the public.'

The legislative foundation of the various national environmental policies of this Asian and Pacific region range from a general umbrella-type of legislation, which provides the framework within which a country's most significant environmental legislation is enacted, to an array of acts, rules, and regulations, for environmental protection—but without the benefit of an overall comprehensive law. Thus, the environmental policy of the Philippines is outlined by two Presidential Decrees (PDs): PD 1151, which recognizes the inalienable right of the people to a healthy environment, and PD 1152, an Environmental Code that deals with the environment in its totality, and whose main objective is to establish environmental management policies, even though pollution control measures are clearly one of its many aspects.

Similarly, Act 4 of 1982 in Indonesia, on Basic Provisions for the Management of the Living Environment, clearly stipulates the participation in environmental management as a right as well as an obligation of each citizen. The Act also provides the framework for evaluation and adjustment of all legislation having environmental components that were enacted earlier.

In Africa, the situation appears to be considerably different. An attempt was made in 1979 and 1980 by UNEP and ECA (Economic Commission for Africa) to ascertain and analyse the environmental legislation of 15 African countries, which were selected on the basis that their environmental problems could be considered as representatives of the problems of the other African countries. It was found that 'on the whole, environmental protection has not been made part of the fundamental laws of the countries in that only a few countries have made environmental concern a part of their constitutions' (UNEP, 1981). Generally, environmental problems are dealt with sectorally by various ministries such as Health, Agriculture, Commerce and Industry, Forestry, or Lands and Natural Resources, without the presence of any central coordinating machinery. There may, however, be an *ad hoc* interdepartmental coordinating committee, which invariably has only advisory functions (ECA, 1982).

Constraints

There are many constraints in developing countries on the effective use of environmental legislation. These constraints were summed up in 1977 by the ESCAP/UNEP Expert Group on Environmental Protection Legislation (UNEP, 1981) as follows:

> 'The quest for environmental quality in many parts of the ESCAP region was seriously impeded by a dearth of legal experts sufficiently familiar with the variety of ways in which the law could be used as a tool for environmental management. Other obstacles were a scarcity in the region of useful documentary materials on environmental law, texts, journals, and comparative legislation—and an adequate number of university-level courses in that field. As a result of those deficiencies, efforts to develop new and more effective environmental protection legislation in many countries of the region had proceeded too slowly, taken place in unfortunate isolation from one another, and been insufficiently informed. Inadequate manpower resources and research and training facilities had also hampered effective government implementation of environmental protection legislation.'

Even though the above comments were made in 1977, they are equally valid today.

Many constraints can be listed for the poor effectiveness of environmental legislation in developing countries, but only two major issues will be discussed here because of lack of space: (1) a piecemeal unsystematic approach to environmental management, and (2) lack of effective implementation of existing environmental legislation—irrespective of how good arrangements may be to deal with the overall problem concerned.

On the first issue, let us consider the case of India, where the late Prime Minister Indira Gandhi established in 1980 a Committee for Recommending Legislative Measures and Administrative Machinery for Ensuring Environmental Protection. It analysed over 200 Central and Provincial laws which had direct or indirect bearings on the environment (Anon., 1980). As this is one of the very few comprehensive analyses of environmental legislation available for developing countries, its findings are worth quoting. The Committee's findings were the following:

i) Many of the existing laws are updated (in a limited sense) versions of earlier ones. They are primarily meant to promote development and resource utilization for specific economic benefits, without a careful analysis of the potential short- and long-term deleterious effects on the environment.

ii) Many of the existing laws relating to management of environmental resources do not clearly state the social objectives that they aim to achieve. In the absence of any explicit policy statement on the objectives to be accomplished, the administrative machineries set up to implement the legislations have on their own interpreted their duties from time to time, which have often proved to be not in conformity with the intent and purpose for which the enactment was made in the first place. Moreover, changes in national policies and circumstances have progressively rendered several of these Acts obsolete.

iii) Some of the laws in force, particularly with regard to land-use and management of environmental resources, appear at times to be accomplishing mutually defeating social objectives. Where such resources are shared by more than one State, legislation enacted in one State may have adverse environmental implications for a neighbouring one.

iv) The implementing and monitoring machineries of many of these legislations are deficient in the scientific and technical expertise, as well as in other infrastructural resources, required to assess and prevent the possibility of adverse environmental impacts.

The Committee concluded that all the above weaknesses stem from the fact that there is 'no systematic procedure for periodic reviews of the adequacy of the Acts in the light of experience gained in implementation efforts' (Anon., 1980).

This unfortunately is the case for an important developing country such as India, where environmental legislation and administrative machineries are reasonably well-established, and where availability of legal expertise is not a problem. The situation is likely to be worse in most other developing countries.

The second issue is that of implementation and enforcement measures which are necessary for environmental legislation. Laws which are not implemented in any form, or are not enforced for whatever reasons, may contribute to political expediency, satisfy bureaucratic conscience, or meet a formal international obligation; but their impact on environmental management would be minimal at best. As a general rule, legislation is not the critical factor for environmental management in developing countries, as it is often made out to be, but rather the inadequacy of implementation and enforcement of legal measures already available, and the lack of standards and controls for maintaining and/or enhancing environmental quality. To a significant extent, lack of implementation and enforcement can be attributed to the absence of law enforcement and regulatory agencies with adequate budget and expertise. It should, however, also be realized that sometimes socio-economic conditions of a country practically ensure that laws cannot be enforced. For example, in some African countries hunting laws could not be enforced because there is no adequate alternative source of meat supply to local 'protected' animals (UNEP, 1981).

Concluding Remarks

In recent years, with continued scientific and technological developments, problems and issues associated with environmental management have become even more complex than they were before. In many areas it may no longer be possible to forecast possible environmental consequences of certain actions with any degree of accuracy, or reliably to identify their cause-and-effect relationships. This is especially true for persistent discharges of small doses of toxic or hazardous substances to the environment. Because of the scientific and legal complexities involved, it is no longer possible for either the legal experts or the environmental scientists to venture out alone in the 'minefield' of environmental law, if the ensuing results are to be maximized. Accordingly, it is essential that lawyers and environmentalists now work as a team for successful environmental management.

There are signs in a few developing countries that citizens are rebelling against the protectors of the public interest. Victims of environmental disruptions have started to question the effectiveness or desirability of leaving environmental protection exclusively in the hands of government administrators whose interests and goals may no longer be necessarily in line with theirs. Various nongovernmental organizations have recently sprung up in developing countries for the provision of a new perspective on environmental problems, which may not coincide with the interest of administrative agencies. Perhaps the prospect of external scrutiny, either by courts or by vocal citizens and nongovernmental organizations, may cure the administrative and regulatory agencies of their traditional lethargy and narrowness, and may ensure that environmental laws are implemented and that the legislative processes work effectively.

Summary

Environmental law is an important tool for environmental management. A review of the environmental legislation existing in developing countries presents a very diverse picture. Generally speaking, the Asian countries have for the most part well-established and often highly-developed legal systems, which, when necessary, can assimilate new legal mechanisms and legislation for environmental management without undue turbulence. In contrast, the African countries have not on the whole made environmental protection a part of the fundamental laws that exist at present.

Poor effectiveness of environmental legislation in developing countries should be a matter of very serious concern. Such poor effectiveness is primarily due to two major problems: a piecemeal, unsystematic legal approach to environmental management, and the lack of effective implementation of existing environmental legislation—irrespective of how good it may be to deal with the overall problem.

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