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STATE LIABILITY FOR TRANSBOUNDARY ENVIRONMENTAL POLLUTION.

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ABSTRACT

Physically, transboundary environmental pollution originates in one nation's territory and has an impact in another nation's territory. Generally speaking, transboundary pollution is described as pollution that has an impact on several countries and is caused by emissions from those countries. The damages are dispersed over a large geographic area by the transmission mechanisms. The contaminant can spread and collect far from its source thanks to these transmission processes. A portion of these pollutants build up in international environmental sinks, which include rivers, forests, and other ecosystems. The earth's atmosphere and oceans are examples of global environmental sinks where additional contaminants build up. These pollutants demonstrate a total indifference to political or geographic boundaries, earning them the moniker of transboundary environmental contamination. Transboundary pollution occurs in a variety of settings, including the air, seas, land, and finally space. Transboundary air and water pollution, pollution of shared resources, and pollution of global commons have all been addressed by the International Community of States. The thesis seeks to explore the multifaceted aspects of the risks associated with transboundary air and water pollution.

Keywords: Environmental law, Transboundary environmental pollution.

INTRODUCTION

Physically, transboundary environmental pollution starts in one nation's territory and has an impact in another nation's territory. Generally speaking, transboundary pollution is described as pollution that has an impact on several countries and is caused by emissions from those countries. The methods of transmission distribute the harm over a wide geographic area. Pollutants can travel great distances and accumulate far from their source because to these transmission mechanisms. A portion of these contaminants build up in international

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environmental sinks, which include rivers, forests, and other ecosystems. The earth's atmosphere and seas are examples of global environmental sinks where more contaminants build up. These pollutants demonstrate a total indifference to political or geographic borders, earning them the moniker of transboundary environmental contamination.

Transboundary pollution is defined as "any intentional or unintentional pollution whose physical origin is subject to, and situated wholly or in part within the area and under the national jurisdiction of one country and which has effects in area under the national jurisdiction of another country" by the Organisation for Economic Co-operation and Development Council.³

Not only does transboundary contamination happen on a global scale, but it also happens within any governmental unit that lacks the ability to control itself, such as states, cities, and towns. Transboundary contamination frequently involves just one-way flows:

Pollution just has no reciprocity and moves from one thing to another. In actuality, interstate and unidirectional issues were at the centre of the US transboundary contamination litigation⁴

BACKGROUND

The main focus of the Law of Nations is on collective groupings of people who are often referred to as sovereign States, legally recognised as such, and who make up its normal subjects. This does not imply that the rights of each and every person of a nation state are totally disregarded. When a rule addresses the human person as such, regardless of the national borders in which he may dwell, it forms the foundation of a law that applies to all people, whether they are evaluated individually or collectively. In doing so, the law takes on an ergo omnes quality and, as Manu puts it, ceases to be the "law of nations" and becomes the "**law of mankind.**"

It is possible to argue that the human being is the object and subject of all laws, whether they political, social, economic, or religious, and that his or her right to exist in a secure and suitable environment and to live in peace is an inherent right. If we accept the idea that the well-being of mankind is the *raison d'être* of all laws, then such a situation that is important to one's own human life must be categorised or recognised as such without a shadow of a

³ Thomas Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE LAW JOURNAL 931 (1997), <https://scholarship.law.duke.edu/dlj/vol46/iss5/1>.

⁴ *Georgia v. Tennessee Copper Co.* (1906), See also *Missouri v. Illinois* (1906).

doubt. Understanding and acknowledging that the right becomes an international right when it is exercised by all of humanity—that is, when all people of all nationalities reside in any state as citizens of that state—is crucial.

SOURCES OF AIR POLLUTION

The introduction of chemicals, particulate matter (PM), or biological materials into the atmosphere that endangers people or other living things or harms the ecosystem is known as air pollution. **"Substances put into the air by activity of mankind in concentrations sufficient to cause harmful effects to health, property, crop yield, and to interfere with the enjoyment of property"** is how the World Health Organisation (WHO) defines air pollution. "Air pollution is considered a major environmental health problem deserving high priority for action," the WHO says⁵Air (Prevention and Control of Pollution) Act, 1981 provides that "air pollution means any solid, liquid, or gaseous substances present in the atmosphere in such concentration that may tend to be injurious to human beings or other living creatures or plants or property or enjoyment"⁶ Any unusual rise or reduction in the concentration of the standard atmospheric components can also be referred to as air pollution. One of the worst environmental ills in the modern world is air pollution, which is a very significant issue. Most nations did not consider air pollution to be a serious issue until the late 1950s and early 1960s.

Up until then, people in urban and industrial regions typically thought of it as a local issue. Air pollution and other atmospheric concerns have only recently come to be recognized as significant regional and worldwide challenges. The main factors contributing to rising levels of dust and particle air pollution are thought to be population expansion, unplanned urbanization, rapid industry, and a startling rise in the number of cars.

HAZARDOUS AIR POLLUTANTS

Apart from the above stated air pollutants, almost three hundred chemical compounds have been shown to be sufficiently dangerous that their management as particulate matter is insufficient to safeguard human health. These pollutants include asbestos, arsenic, beryllium, lead, mercury, manganese, and nickel compounds; benzene and most of its derivatives (such

⁵ Social determinants of health, <https://www.who.int/health-topics/social-determinants-of-health> (last visited Feb 10, 2024).

⁶ air_act-1981.pdf, https://www.indiacode.nic.in/bitstream/123456789/9462/1/air_act-1981.pdf (last visited Feb 10, 2024).

as toluene, phenols, and xylenes); halogen gases; alkyl and vinyl halides; organic nitrates; ethers; chloroform and its oxidation compounds; and a variety of pesticides and other organic compounds. Special control techniques are required for these pollutants. Numerous sources, most notably the petrochemical sector, release hazardous materials into the atmosphere.

Asbestos, mercury, hydrogen sulphide, benzene, arsenic, and fluorides are a few more particular sources of certain airborne hazardous compounds.

SOURCES OF WATER POLLUTION

There are three types of water pollution: marine pollution, ground water pollution, and surface water contamination. Water contamination can originate from point, non-point, and natural sources. Point sources of pollution for surface water include the release of industrial and household waste waters into bodies of water including lakes, rivers, and reservoirs. Non-point sources include runoff, storm water, dispersed agricultural operations, and unregulated waste water discharge. Surface water contamination can also be caused by air pollution, which can lead to acid rain. Natural sources include the decomposition of organic matter in bodies of water, the seepage of salt water into groundwater, the chemical leaching from naturally occurring salt deposits, the washing away of volcanic eruption materials, etc.

The release of industrial waste and residential sewage onto land is the cause of ground water contamination. These wastes are frequently discharged into the ground and used as a source of water for agriculture. This practice pollutes the ground water since the wastes include nutrients.

On land, garbage, industrial solids, and municipal solid waste are disposed of.

The contaminants are carried to the ground water by rainwater that seeps through these dumps and into the earth. Urban and industrial regions frequently exhibit signs of ground water contamination. The use of pesticides in agriculture pollutes ground water in rural regions. Ship oil leaks, port activity, beach activities, contaminated rivers, and waste water discharge are the main causes of marine pollution.

When a high-energy organic material, like raw sewage, is dumped into a stream, it causes a number of changes downstream from the discharge point. This is because the oxidised

organic components of the sewage use oxygen more quickly downstream than they do upstream, resulting in a noticeable decrease downstream from the discharge.

IMPLICATIONS OF THE ATMOSPHERIC POLLUTANTS

It just takes extremely big particle emissions into the atmosphere to cause climate change. Along with air pollution, two factors of global atmospheric change are often taken into consideration: stratospheric ozone layer and global climate change. Large-scale industrial and technological operations carried out on one nation's territory have the potential to negatively impact not just that nation's territory but also that of another nation or the global commons. Regional environmental issues, or those affecting many countries, include international trafficking in hazardous waste and toxic chemicals, resource extraction activities that lead to a decrease in freshwater quality and quantity, border crossing air and water pollution, and nuclear accidents. These actions inflicting harm outside the realm of territorial authority and control. Global warming, species extinction, ocean pollution, deforestation, anthropogenic climate change, diminished food production, depleted fish stocks, atmospheric and climate change, acid rain, pollution of river or coastal waters, and so on are some of the issues. Global common areas and nations other than the originating state suffer harm due to transboundary dimensions. There are several activities that result in injuries that are outside the acting state's authority or geographical jurisdiction. These might involve the use of airspace, nuclear operations, industrial processes, resource conservation, and the usage of economically significant resources. A well-known example is when a state upstream pollutes a river, harming a state below. Another instance is the burning of land and forests in Indonesia, which results in haze pollution—a mixture of smoke and dust—that crosses international boundaries and impairs people's health in Singapore and other parts of Malaysia⁷. Another well-known example is the controversy surrounding Columbia's aerial application of poisonous pesticides to coca leaf crops in areas close to its border with Ecuador, which was done as part of Columbia's "war on drugs" and damaged Ecuador's environment and populace. Another example is the haze that originates in South Asia and crosses the Himalayas, resulting in an increase in pollution on the northern slopes of Everest and Central Tibet.

⁷ JERVAN, M. "THE PROHIBITION OF TRANSBOUNDARY ENVIRONMENTAL HARM: AN ANALYSIS OF THE CONTRIBUTION OF THE INTERNATIONAL COURT OF JUSTICE TO THE DEVELOPMENT OF THE NO- HARM RULE", 166 (OSLO LAW PUBLISHER, NEW YORK, 2014).

INTERNATIONAL LEGAL RESPONSE TO TRANSBOUNDARY ENVIRONMENTAL POLLUTION

Although they can create legally binding obligations for states and other members of the international community and be used in resolutions that may bind all members of the organisation as a matter of internal law, customary law rules have not played a major role in international environmental law.

Even with the abundance of bilateral, regional, and global environmental accords, customary international law continues to play a significant role in actual practice⁸. As a matter of the organization's internal law, they will create legally enforceable responsibilities for states and other members of the international community and be cited in the resolution that might legally bind all members of the organisation.

Regarding transboundary environmental contamination, international environmental law recognises the following customary principles:

- (i) It is the responsibility of the States to stop, lessen, and manage pollution and environmental damage.
- (ii) A responsibility to work together to mitigate environmental crises and dangers via notice, negotiation, consultation, and, when necessary, environmental impact assessments⁹

CONVENTIONAL INTERNATIONAL REGIME ON REGULATION OF TRANSBOUNDARY ENVIRONMENTAL POLLUTION

Unilateral, Bilateral Agreements on State Liability For Transboundary Environmental Pollution:

Numerous treaties and accords address a state's accountability for environmental damage related to certain activities or locations.

These conventions and accords are international, multilateral, and bilateral in scope. There are two main categories of important multilateral conventions: those with universal

⁸ UN Secretary- General, Gaps in international environmental law and environment related instruments: towards the global pact for the environment, 30 November 2018, A/73/419.

⁹ PAULA M. PEVATO "GOLDEN RULES OF TRANSBOUNDARY POLLUTION" INTERNATIONAL ENVIRONMENTAL LAW, VOL.2, P.77 (DARTMOUTH PUBLISHING COMPANY, ASHGATE PUBLISHING LIMITED, ENGLAND, 2003).

applicability and those with regional application. Bilateral conventions are few in comparison to the quantity of multilateral treaties. These provide forth guidelines for State culpability or serve as a foundation for the creation of such guidelines. There is a claim that there are essentially three different kinds of environmental obligations: procedural, qualitative, and quantitative eco standards¹⁰. It has been argued that there is a severe default standard of responsibility resulting from violations of international law.

The due diligence criterion is dependent on a number of circumstances. Some of the multilateral, international Conventions must be reviewed in order to ascertain the responsibility of States acknowledged in different treaties and accords. The number of the agreements that are shown below are not all of the agreements that are linked to the same. However, its greatest significance is in identifying and analysing the current international environmental law treaty practices in order to address the issue of transboundary environmental pollution.

The following makes an effort to locate the multilateral conventions on the global atmospheric problem as well as the convention pertaining to transboundary environmental contamination. It might be grouped under:

Bilateral Contracts:

Long-Range Transboundary Air Pollution Convention and Protocol of the United Nations, 1979.

The ECE Convention of 1991 on Transboundary Environmental Impact Assessment.

The 1992 ECE Convention and associated Protocol on the Transboundary Effects of Industrial Accidents.

The 2002 Agreement on Transboundary Haze Pollution by the Association of Southeast Asian Nations

The Stockholm Convention on Persistent Organic Pollutants was held in 2004.

The 2006 Framework Convention on the Protection of the Environment for Central Asia's Sustainable Development.

Multilateral Conventions on Global Atmospheric Problem:

¹⁰ SANJAY UPADHYAY AND VIDEH UPADHYAY, "WATER LAWS, AIR LAWS AND THE ENVIRONMENT" p.44 (LEXIS NEXIS, NEW DELHI, 2002).

- 1985 Vienna Convention.
- The 1987 Montreal Protocol: Adjustment and Amendment.
- 1992 United Nations Framework Convention on Climate Change.
- 2013 Minamata Mercury Convention

FROM AN INDIAN PERSPECTIVE, THE STATE'S LIABILITY FOR TRANSBOUNDARY ENVIRONMENTAL POLLUTION

Constitutional Aspect: State's Obligation to Protect the Environment in India:

Distribution of Legislative Power:

The Centre and the States have equal authority under Indian federalism. The Indian Constitution's Part XII outlines the legislative and administrative relationships between the federal government and the states. The schedule's seventh item has been made available for the topics that both the State and the Centre have the authority to enact laws on. There are certain topics that are not included in the list; Parliament nevertheless has the authority to enact laws on these unlisted topics.

The parliament may enact laws on the subjects included in the State list in the "national interest," notwithstanding the division of legislative authority between the federal government and the states. Parliament also has the authority to enact laws on State-related matters if approved by the respective State legislatures.

Additionally, this State obligation is included under Articles 253 and 51(c)¹¹. Article 253 aligns with the goal stated in Article 51(c), which states that Union law covers both the making and implementing of treaties. This is also stated under entry 14, list I. The phrase "notwithstanding the foregoing provisions of this chapter" gives the Parliament the authority to enact laws even on subjects that are subject to state law if doing so is required to carry out its obligations under international agreements or treaties that it has negotiated with other nations, or to enforce any decisions that have been made at any international conference, association, or other body. This authority includes items pertaining to treaties, accords, and State lists.

¹¹ Article 51(C) provides that "The State shall endeavor to foster respect for international law and treaty obligations in the dealings of organized peoples with one and another.

DIRECTIVE PRINCIPLES OF STATE POLICY

Public health enhancement is one of the State's main responsibilities, according to Article 47. The state must be able to offer a clean environment, which includes clean water and air, in order to enhance public health. The duty placed on the State by this Article is of utmost significance, and the State is required to act appropriately, as environmental protection and improvement are directly related to improved health.

The 42nd Amendment Act, 1976, contained Article 48A and placed emphasis on the State's obligation to work towards improving the environment, safeguarding the nation's forests and animals, and protecting them.

The Supreme Court stated in the Sachidanand Pandey case¹² that it cannot ignore ecological issues raised before it, claiming instead that policy decisions should be made by the appropriate body because priorities are a matter of policy. The Court must determine whether relevant factors are taken into account and irrelevant information is omitted. The Court may proceed farther in appropriate instances; but, the extent of the Court's future action will depend on the particulars of each case. The Court may always issue any appropriate orders while keeping in mind the Constitution's Article 48A and Article 51 A(g).

Additionally, the Supreme Court has held that the State is required under articles 39(e), 47, and 48-A taken together to guarantee public health, enhance environmental protection, and enhance human health¹³.

FUNDAMENTAL DUTIES

Part IV A of the Constitution, which was added by the 42nd Amendment Act of 1976, lays forth the fundamental environmental obligations of Indian citizens. Having compassion for all living things and safeguarding the natural environment, which includes woods, lakes, rivers, and wildlife, is one of a citizen's essential responsibilities. Every individual has a responsibility to preserve the environment and trees. By requiring residents to preserve and enhance the natural environment, Article 51(A)(g) expressly acknowledges the seriousness of environmental contamination. Poverty-free air, water, and land are all part of the natural environment. The aforementioned clause required "every citizen" to safeguard and enhance

¹² Sachidanand Pandey v. State of West Bengal AIR 1987 SC 1109, 1114-15.

¹³ M.C Mehta v. Union of India (2002) 4 SCC 356.

the environment. It is argued that citizens should not be the only ones fulfilling this obligation.

The state and non-citizens alike ought to be obligated to safeguard and enhance the environment. Whether environmental contamination is generated by a citizen or a non-citizen¹⁴, the main consequences are the same. It is essential to handle both equally. The "principle of inter-generational equity," which states that the current generation has a responsibility to utilise nature in accordance with one's ability to repay, is reflected in Articles 48-A and 51A(g). It has been stated that Articles 48 A and 51 A (g) establish the legal framework for environmental conservation, requiring both the government and the people to preserve and enhance the environment.

FUNDAMENTAL RIGHTS

The Bill of Rights is contained in Part III of the Indian Constitution, which has a higher level of "Fundamental Rights." This phrase is unique to Part III and the Marginal Note to Article 13; it is not used anywhere else in the body of the Constitution. However, the rights protected by section III now hold the highest priority. No legislation, ordinance, custom, usage, or administrative decision has the authority to restrict or eliminate a person's basic rights since they are unalienable. However, there are various limitations on basic rights in India, therefore they are not unqualified. It is possible to use fundamental rights against the State. If someone violates these rights, there may be standard legal remedies available, but there may not be constitutional remedies.

The Supreme Court has stated that the right to life is a fundamental right guaranteed by Article 21 of the Indian Constitution, which includes the right to exercise full enjoyment of life and the right to enjoy pollution-free water and air. The court has noted that the right to life is a fundamental right under this provision. A person has the right to use Article 32 of the Constitution to remove pollutants from the air or water that might be harmful to their quality of life if anything threatens or degrades their quality of life in violation of the law.

The Supreme Court ruled in the Vellore Citizens' Welfare Forum case¹⁵ that the right to a pollution-free environment was a fundamental component of the law of land's jurisprudence,

¹⁴ Ashok Kumar Thakur v. Union of India (2008) 6 SCC 1, in this case State is all the citizens placed together and hence through Article 51 A does not expressly cast any fundamental duty on the State, the fact remains that the duty of every citizen of India is the collective duty of the State.

¹⁵ Vellore Citizen's Welfare Forum v. Union of India, AIR 1996 SC 2715.

as the Indian legal system was founded on English common law. The Honourable Supreme Court reaffirmed that article 21 protects the right to a clean and healthy environment. According to our common law doctrine, there is also a right to a clean and pollution-free environment. Article 48-A establishes a directive principle of state policy; Article 51 A(g) outlines citizens' basic obligation to conserve and maintain the environment; and Article 21 outlines people' fundamental right to a healthy environment.

CONCLUSION

“Man is made of food, and food is made of plants, and plants are made of earth, and earth is made of water, and water is made of air, and air is made of God's space. Protect the air, water, earth, and plants, and they will protect you, for those who ignore this unity of life perish.”

The only location in the cosmos where human existence can be sustained is Mother Earth. The ecosystem and natural support system of the planet are essential to human existence. The earth is made possible by an amazing and delicate complex of factors, including our planet's perfect location within a galaxy, its ideal distance from a perfect star, its protection from a larger planet nearby, its tilt for the seasons, the precise amount of a shield against solar radiation, a thin layer of breathable atmosphere, an abundance of water resources, a moderate temperature range, sunlight, soils, flora, and fauna. From space, where our astronauts witness a "piercingly beautiful" blue globe hanging in a void, to a view of Earth's remarkable landforms, mountains, canyons, plains, oceans, sea beds, rivers, lakes, wetlands, forests, jungles, archipelagos, deserts, fjords, glaciers, and ice fields, it is truly magnificent. The extraordinarily diverse living forms only serve to enhance this.

While there are legal mechanisms in place to address state liability for transboundary environmental pollution, there remain significant challenges in implementation and enforcement. Effective resolution of these issues requires enhanced international cooperation, strengthened legal frameworks, and the active involvement of both state and non-state actors in promoting environmental protection and sustainability.