

# **STATE ACCOUNTABILITY** **FOR CLIMATE CHANGE**

## **-ENFORCING LIABILITY** **THROUGH CITIZENS' ACTION**

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# **I. STATE RESPONSIBILITY FOR CLIMATE CHANGE- IN CONTEXT**

- **BETWEEN AND AMONG STATES:**
- **GENERAL PRINCIPLES: -COMMON CONCERN; GOOD NEIGHBOURLINESS- “ NO HARM”- Trailsmelter**
- **TREATY OBLIGATIONS: Underlying Environmental Principles: Polluter Pays, Precaution, CBDR – Ecological Debt Argument**
- **UNFCCC & KYOTO PROTOCOL – Developed World : GHG EMISSION REDUCTION AND STABILIZATION – Long Gestation Period-“First Commitment period” and “ Second Commitment Period”(?)**
- **Developing World: CDM –Post-Kyoto Negotiations -Pressure to undertake obligations – “voluntary cuts”**
- **“Geographical Area of Production” and “Area of Consumption”**

## **II. CITIZENS' ACTION- ENFORCING LIABILITY : THE DEVELOPED WORLD**

- ***Basic Premise for Legal Action against the State whether a treaty has become a part of the law of the land or not :***  
***Locus Standi- (i) Statutory prescription of conferment of right in one and imposition of obligation on the State – its violation / failure of safeguard ; ( ii) party claiming relief “ directly interested” or affected.***
- ***Mere “signature” to a treaty will not do; mere policy pronouncement, expression of intent, even on the floor of the legislature, by the political leadership will not suffice, unless followed by clear legislative formulations and establishment of institutions of enforcement (- possible exception: European Declaration of Human Rights)***

- **1. U.S.A: - Non-Ratification of Kyoto Protocol**
- **– Efforts in enforcement, by invoking Statutory Provisions- attempts to get dismissal by putting forth arguments that include, “ scientific community undecided” ; “ political nature” of claim and that the accused are just a “ small part” of the problem, etc.**
- **- Federating States, either initiate action against alleged offender or themselves being made parties to defend themselves, in actions instituted in Courts**
- **Massachusetts & Ors. V. USEPA 92007) : A no. of States, along with local govts. and NGOs, challenge the decision by USEPA not to designate CO<sub>2</sub> as a pollutant under Clean Air Act– 5:4 verdict- ruled, applicants did have standing to challenge the failure of EPA (-State had a particular interest in challenging an act of the Agency, a it was likely to suffer direct harm -**

- ***proceedings underway to overturn this (-Jan.2011)***
- ***Coomer v. Murphy Oil (Oct.2009)- The U.S Ct. of Appeals for the Fifth Circuit found that the Tort-based global warming Litigation against Insurance, Oil, Coal and Chemicals presented Justiciable claims***
- ***Connecticut v.American Electric Power Co. (Dec.2010): S.C granted the petition for Certiorari, that raised climate-based Public Nuisance claims against alleged emitters of GHGs***
- ***-Invocation of Public Nuisance Law: Kivalina (-Inuit village on a Barrier island, in Alaska), suit in 2008 against Oil Companies (-Shell, Exxon Mobil & others) for monetary relief as compensation for rehabilitation of the village threatened by melting of Ice Caps- dismissed by lower Court- appealed against in Dec.2010***

- **Center for Biodiversity et al v. Locke et al (June 2009):- filing of a complaint alleging violation of the Endangered Species Act & the Administrative Procedures Act, based on the allegation that the habitat of Leatherback and Loggerhead Sea Turtles, is being destroyed by Climate Change- requiring Declaratory and Injunctive Reliefs in the form of obligating the govt. to protect the turtles and their habitat from the effects of Climate Change**
- **2. U.K: - Party to both the Treaty and the Protocol**
- **Kingsnorth Case (2008):**
  - By a majority verdict, a British Jury found five protesting Greenpeace Activists, who shut down the Kingsnorth Coal-fired Power Plant (- sealed a chimney and painted the word “ Gordon” on the Chimney, before they were forced down – the temporary shutdown and the graffiti had costed the co. \$62000 ), had a “ lawful excuse” to close the Plant to prevent greater damage from Global Warming.

- **3. Canada: - Party to Convention & the Protocol- enacted Kyoto Protocol Implementation Act, 2007- public statements by Govt. About the absence of plans to meet the obligations- Case in the S.C by Friends of the Earth and Ecojustice (2007), to compel compliance – dismissed on the ground that the govt. decision was a “political” one- in 2006, an opinion was submitted to the Compliance Committee of the Kyoto Protocol (- that has power of denying a party from using the trading mechanisms , like the CDM) that Canada was not fulfilling its obligations under the Protocol- the Committee, after the govt. proved that it, indeed, had created a national registry for GHG emissions, decided not to proceed further on the matter**
- **4. EU: - Party to the Convention and Protocol – has the obligation of cumulative reduction and stabilization- internal**

***imposition of obligation, across board, among all the member states - considered inequitous, by those States, who have a record of operating far below the level, as against those, with the Community, which have levels above the prescribed one***

- ***Greenpeace & Ors. V. the European Commission (1998) - Construction of two coal-fired Power plants on the Canary Islands, Spain, with funding from European Commission, challenged on the ground that it was not a sensible use of public resources , contribute to Climate Change, & the available alternative environment friendly technologies ought to have been supported- ECJ found the party not having the locus as not a directly concerned one or the affected***
- ***The same position maintained in a subsequent case as well ( - WWF-UK Ltd. V. Council of the European Union (1998)- concerned allocation of quotas for Cod fishing in the North Sea- scientific opinion was in favour of no fishing for several years, to allow the species to recover- European Council ignored this and went***



- ***ahead with fixing quotas- WWF approached the Court of First Instance and challenged the Council Decision- Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998, invoked to establish locus (A.6- “public concerned” to have access to information- includes, individuals , organisations and NGOs, “ affected” by decision-making- A.9: “ ...shall have access to a review procedure before a court of law, to challenge the substantive and procedural legality of any decision, act or omission”) - ruled, inadmissible as the applicant had no standing, because it was not individually concerned by the decision.***

### **III. CITIZENS' ACTION : ENFORCING LIABILITY IN DEVELOPING STATES**

- **INDIA**
- **A. LEGAL DESIGNS & THEIR LIMITATIONS ( Under Climate Law):**
- ***CDM: A facilitative mechanism for getting benefits- State obligation, confined to the extent of ensuring proper identification of projects, monitoring and utilization of funds and the employment of technology***
- ***No international Obligation for the present- pressure from the developed world-Voluntary Cuts***
- ***NATIONAL CLIMATE CHANGE ACTION PLAN:- Dependent on Budgetary Allocations and enacting enabling laws with proper and effective administrative oversight- Appears to veer away from GHG regulation to Afforestation and Carbon Sequestration activities.***

- **Energy Conservation Act :- More of a Guide line (- for ex., Building Code)- follow up of State Legislative measures and modification in the rules and regulations at the local level, required – Need to harmonise working of other laws and align them with this law (- Electricity Act)**
- **B. UNDER ENVIRONMENTAL LAWS AND CONSTITUTIONAL SCHEME:**
- **(i) Citizens’ suit – under EPA, Water and Air Acts – limitations**
- **(ii) Public Nuisance Action**
- **(iii) PIL- application of the PUBLIC TRUST DOCTRINE- that goes far beyond Mono Lake and the position in U.S ; application of unique judicial innovations of awarding damages for environmental harm and requiring recovery of costs for ecological restoration, recovery and remediation**

- ***(iv) Under the emerging New Liability Regime: Guidelines for Liability, Response Action and Compensation for Environmentally Dangerous Activities (2010) – wide definition and description of “ environmental harm” and responsible “ operator”***

## **IV. THE WAY FORWARD**

- **1. Needed: Legislative Measures, compelling action- with appropriate and effective internal grievance redressal mechanisms- clear scope for Citizens' Action for violations and for appeals before ordinary courts of law.**
- **2. Decentralised implementation- Local Self Govt. institutions and communities to be partners and participants in enforcement, monitoring and action**
- **3. Harmony in the working of laws and putting in place a mechanism for coordination**
- **4. Strengthening Argument for the "commons" – not "wise use", but, natural and environmentally benign use- Courts as allies in this endeavour ( Jan . 28th decision of S.C- and scores of earlier pronouncements: Nabipur and Omprakash Bhat etc.)**