The Indian Supreme Court and International Environmental Norms

by Gautam Sundaresh

Gautam Sundaresh is an India-qualified lawyer, currently practicing in a corporate advisory firm in Mumbai. He graduated from Jindal Global Law School in 2016.

The relationship of the Indian Supreme Court with the citizens of the country is undoubtedly an interesting one. Underlying the Court's image is an unbridled reverence by the people, and a rather prominent separation from society (one that it keenly regulates). The Court has been globally recognized for its inclination toward activism and its willingness to step in to fill gaps with respect to issues that affect the State and society alike. It has also grown progressively courageous over the years. With respect to environmental issues, the Court's activism has been markedly greater, and it has time and again played a leading role in deciding (and altering) the contours of the regulatory framework and in paving the way for a "sustainable India."[1]

In this Comment, I will analyze one such aspect of the Court's activism: its adoption and application of international environmental law principles. Many of the solutions that the Court has come up with while dealing with environmental issues have had a basis in principles that originate in international law. My objective is to critically analyze the legitimacy of, and to test whether there exists a legal basis for, such an application of these principles.

I do this by tracing the adoption and development of the jurisprudence surrounding these principles in the Indian context through an analysis of five landmark decisions of the Court. These include cases that do not necessarily pertain to environmental issues, but are helpful for understanding the situations in which the Court has resorted to international norms and principles in order to overcome the roadblocks it would face with an otherwise limited arsenal at its disposal (and necessary for giving context to how the Supreme Court has resorted to such methods while dealing with environmental issues).

The application of international principles in the Indian context has a history, as well as a distinct inception point. The Court has not reached its current level of comfort and familiarity with these principles without precedent and a sense of grounding in an analysis that it has already entered into in the past. The foundation stone (of sorts) for this integrative technique was laid in the *Gramophone* case[2] in 1984. Later cases have expanded and added nuances to both the understanding and the methodology with which such integration is carried out.

In this Comment, I discuss five judgments of the Supreme Court in chronological order, and attempt to identify both the point at which the Court chose to look beyond the domestic framework, and the methodology it adopted while doing so. After discussing the principles and rationale adopted, I critique each case individually before drawing my final conclusions based on how the jurisprudence has evolved.

I. *Gramophone Co. v. B.B. Pandey*

The 1984 *Gramophone* case dealt with the issue of whether certain goods that were simply in "innocent passage" through India to reach Nepal would be immune from regulations applicable to imports, as well as the sanctions provided for by the Indian Copyright Act.[3] In answering that question, the Supreme Court entered into a discussion of several international principles, including those contained in the Berne Convention on copyright. In order to legitimize the application of such principles, the Court relied on a common-law doctrinal understanding of the problem, weighing its options between the application of the doctrine of "incorporation" (favoring accessibility to international law principles by States without the need for formal legislation at the domestic level) vis-à-vis the doctrine of "transformation" (favoring the requirement of deliberate legislative action in order to incorporate international law principles into the domestic legal system). While categorically laying down that municipal law is to take precedence over international law in every situation,[4] the Court upheld

1. Shailendra Kumar Gupta, *Principles of International Environmental Law and Judicial Response in India*, 37 Banaras L.J. 132-45 (2008).

2. Gramophone Co. v. B.B. Pandey, A.I.R. 1984 S.C. 667.

3. Indian Copyright Act, 1957.

4. Per Shailendra Kumar Gupta, such an understanding is exclusive to the first period of adoption wherein the Court adopted a traditional dualist approach

the applicability of the doctrine of incorporation subject to the overriding authority of municipal law. It is important to note that the methodology adopted by the Court was to apply these principles of common law by resorting to Article 372 of the Indian Constitution, which provides for retaining the applicability of laws in force that existed before the enactment of the Constitution, and that have not yet been repealed.

The resort by the Court to provisions of the Constitution to support its reliance on the doctrine of incorporation is disputable. This can be seen by the fact that Article 372 has never again been relied on by the Court in any of its subsequent judgments applying the doctrine.[5] By reading international law into municipal rules, the Court seemed to evade the obligation of having to evolve a position of its own, simply being able to tap into ready-made principles derived from a common-law understanding. It also provided no clarity as regards the binding character of these international norms, instead putting everything forth as a given.[6]

In going through the trouble of establishing the precedence of municipal law through the principle of "comity of nations," what the Court did was betray a sense of the fact that it is not bound by international principles and that incorporation, by itself, remains optional.[7] This becomes important in light of the fact that the conventions and instruments that are relevant from an environmental perspective and discussed in later cases (i.e., the Stockholm Declaration and the Rio Declaration) are themselves nonbinding and provide immense leeway and margin of discretion to States in their implementation. It is unclear how principles from these instruments can be directly integrated into the domestic framework simply because a lacuna has presented itself, as the legislature never expressly defined the scope of such applicability.[8]

II. *Vellore Citizens Welfare Forum v. Union of India*

In 1996 came the *Vellore* decision,[9] dealing with the issue of whether there exists a constitutional and statutory right to fresh air, in relation to pollution caused by several tanneries in the state of Tamil Nadu. In this case, the Court found itself having to engage in a balancing exercise, there being a clear tussle between the question of ameliorating a visible impact on the environment, and that of ensuring the economy does not suffer due to a sudden cutback on taxes and duties paid by business owners to the state. The balancing act involved application of the principle of "sustainable development," a concept the Court claimed had risen to prominence by way of the Stockholm Declaration,[10] and thereafter solidified in the Brundtland Report[11] and Rio Declaration.[12]

The Court had no hesitation in holding that "Sustainable Development" as a balancing concept between ecology and development has been accepted as part of the customary international law, though its salient features are yet to be finalized by international law jurists."[13] It went further and read into the principle of sustainable development, finding its essential features to be the "precautionary" principle and the "polluter-pays" principle. It backed up this analysis by stating that the "'polluter-pays' principle has been held to be a sound principle by this Court in the *Bicchri* case."[14]

In laying down that these principles form a part of the law of the land, the Court made reference to rights under Article 21 of the Constitution, as well as relying on the principles underlying the Directive Principles of State Policy.[15] Apart from this, there is passing reference made to the environmental statutory framework, including the Air Act and Water Act, and the method in which these statutes were implemented and the ills they seek to combat. After these references, the Court jumped to conclude that the precautionary principle and the polluter-pays principle are part and parcel of the environmental law of the country. In this case, the Court went on to issue a directive that the authority constituted under §3(3) of the Environment (Protection) Act 1986 (EPA) be conferred authority by the government to deal with all such situations, and that the government shall implement the precautionary principle and the polluter-pays principle while making its determination.

The cascading effect of this decision and the prior one in *Gramophone*[16] is that the Court has provided for avenues to access international principles, where previously there were none. As Prof. Saptarishi Bandopadhyay rightly argues, the logic developed by the Court looks toward places that appear domestic in character, but is actually based on a completely external premise.[17] The reference to the various bodies and the mechanisms established under the Air Act and Water Act seems almost ludicrous and is completely irrelevant in trying to establish that inter-

in order to be able to justify an unprecedented resort to international principles. *See* Gupta, *supra* note 1.

5. Fifty Years of the Supreme Court of India (Sashi K. Verma & Kusum Kumar eds., 2004).
6. Saptarishi Bandopadhyay, *Because the Cart Situates the Horse: Unrecognized Movements Underlying the Indian Supreme Court's Internalization of International Environmental Law*, 5 Indian J. Int'l L. 204 (2010), *available at* http://works.bepress.com/saptarishi_bandopadhyay/2/.
7. *Id.*
8. *Id.*
9. Vellore Citizens Welfare Forum v. Union of India, A.I.R. 1996 S.C. 2715.
10. Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14 (June 16, 1972).
11. Report of the World Commission on Environment and Development, Our Common Future (1987), *available at* http://www.un-documents.net/our-common-future.pdf.
12. Rio Declaration on Environment and Development, in Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992), *available at* http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.
13. Vellore Citizens Welfare Forum v. Union of India, A.I.R. 1996 S.C. 2715 at ¶ 10.
14. Indian Council for Enviro-Legal Action v. Union of India, J.T. 1996 (2) 196.
15. *See* Articles 47, 48, and 51(A)(g) of the Constitution of India.
16. Gramophone Co. v. B.B. Pandey, A.I.R. 1984 S.C. 667.
17. *See supra* note 6.

national principles of sustainable development have been incorporated in India.[18]

Professor Bandopadhyay also points out that there is nothing evidencing that these principles have fulfilled the requirements and met the threshold to even qualify as customary international law (CIL) (i.e., by way of State practice, decisions by international adjudicatory bodies, or *opinio juris*).[19] It is interesting to note that, as per authors like Prof. Philippe Sands, the principle of sustainable development met the requirements of CIL back in the year 1999 itself (based on the International Court of Justice's decision in the *Gabčíkovo-Nagymaros* case).[20] On the other hand, authors like Sashi K. Verma are of the opinion that the status of these principles is still controversial and that they cannot be said to qualify as CIL.[21]

Even a prima facie review of the case leaves one intrigued about how the Court deemed the precautionary principle and the polluter-pays principle to belong to a league different and separate from certain other principles that can also easily qualify as integral to the principle of sustainable development, so as to classify them as its "essential features." Further, the simple analogy that is drawn, between the polluter-pays principle and principles of "strict liability" arising from the tort of nuisance, seems to be another method in which the Court resorted to common-law principles to simplify its task of being able to apply what was hitherto not expressly permitted. In directing the authority to apply these principles in its ordinary course of functioning, it can be seen that the Court clearly overstepped its mandate of simply "filling the gaps."

III. *Vishaka v. State of Rajasthan*

One year after *Vellore* came the famous *Vishaka* decision,[22] dealing with the question of sexual harassment and an attempt to bring about gender equality at the workplace. However, it is the manner in which the Court looked outward in order to address a completely domestic statutory lacuna that is relevant for the purpose of this Comment. In the absence of any domestic framework dealing with issues of sexual harassment, the Court went a step further and laid down a comprehensive set of guidelines that were to be applicable until such a framework would be enacted. The international convention relied upon in this case was the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

The Court no longer had to set out a basis for applicability of the doctrine of incorporation, deriving this from an unchallenged *ratio decidendi* in *Gramophone*[23] itself. However, the Court still took the effort of supporting application of the doctrine by reasoning that it derived its legitimacy from Articles 51(c) and 253 of the Indian Constitution, read together with entry 14 of the Union List. Thus, the line of reasoning previously founded in Article 372 and based on "common-law heritage" was now lost in transition.

What is most interesting about the case, however, is that the Court placed direct reliance on provisions of the CEDAW, and to the various commitments made by the Government of India under the convention, for purposes of construing the nature and ambit of the guarantee of gender equality under the Constitution. The Court went on to state that fundamental rights are to be construed in light of such international norms in the absence of any domestic legislation to the contrary. In extension of this theory, the Court claimed to derive its mandate from Article 32 of the Constitution (i.e., in furtherance of the fulfillment of fundamental rights laid down in Part III of the Constitution). Thus, these guidelines were said to be given the authority of law as "declared by the Court" under Article 141 of the Constitution.

In its attempt to provide for the possibility of inaction on the part of the executive branch, the Court claimed that it would not ordinarily resort to international principles, but was doing so only because the situation demanded it. It went on to reaffirm the existence of these principles within Indian jurisprudence. Professor Bandopadhyay points out that by doing so, the Court has essentially applied nonexistent domestic laws simply as though there were laws that were not "in use."[24] In my opinion, it is also highly problematic for the Court to have opened up Part III of the Constitution (dealing with fundamental rights accorded to all citizens) to the possibility of deriving its color from international principles. The sanctity of Part III is such that it simply cannot afford to be subjugated to possibilities of open-ended interpretations. It seems ironic that the Court referred to Articles 51 and 253, and even List I of the Seventh Schedule of the Constitution, to support the doctrine of incorporation while completely ignoring the fact that it is Parliament that is empowered to carry out incorporation as per these provisions.

IV. *N.D. Jayal v. Union of India*

In 2004, in the *Jayal* case,[25] the Supreme Court was dealing by way of public interest litigation with issues pertaining to construction of the Tehri Dam. Various experts and designated committees came to differing opinions on the efficacy and safety of the dam in light of the history of seismic activity in the region. In the Supreme Court, Justice S. Rajendra Babu reached the conclusion that the government clearances were not to be interfered with, and also held that the fact that additional safety measures were proposed by the relevant experts did not require the Court to take cognizance of the matter. Dissenting from Justice

18. *See* Harish Salve, *Justice Between Generations: Environment and Social Justice*, *in* Supreme but Not Infallible: Essays in Honour of the Supreme Court of India 360-80 (B.N. Kirpal et al. eds., Oxford Univ. Press 2000).
19. *See supra* note 6.
20. *See* Philippe Sands, Principles of International Environmental Law 252 (2003).
21. *See supra* note 5.
22. Vishaka v. State of Rajasthan, A.I.R. 1997 S.C. 3011.
23. Gramophone Co. v. B.B. Pandey, A.I.R. 1984 S.C. 667.
24. *See supra* note 6.
25. N.D. Jayal v. Union of India (2004), 9 S.C.C. 362.

Babu's opinion that the cautionary measures proposed were irrelevant, Justice Devdatta M. Dharmadhikari came to the opinion that it was necessary to issue directions to the Respondents who represented certain government ministries and departments.

The Supreme Court in this case held the concept of sustainable development in India to be a fundamental right. It deemed this to be directly inferred from the fact that there exist both a fundamental right to "environment" and a fundamental right of "development" (as has been read into Article 21, from time to time). The Court then went on to state that the EPA itself is aimed at such sustainable development, adding that "[a]cknowledgement of this principle will breathe new life into our environmental jurisprudence and constitutional resolve . . . The object and purpose of the Act—'to provide for protection and improvement of the environment' could only be achieved ensuring the strict compliance of its directions."[26] The Court held that the abundant safety measures that were proposed, including 3-D nonlinear analysis of the dam, could not be precluded based on a plea that construction of dams is associated with a high degree of scientific certainty. The precautionary principle was resorted to based on the fact that India is a party and signatory to various international agreements and that the understanding in the environmental field has become a part of the domestic law (i.e., by way of the EPA).

Thus, although the Court seems reasonably certain of its ability to apply international principles, there have been several lapses on its part in this regard that call into question the confidence it attempts to portray. Despite having stated that these principles currently find their basis in the EPA, the Court finds it necessary to build a case for the reading of these principles into the Act, stating that they "breathe new life" into India's environmental jurisprudence,[27] and even repeatedly referencing Articles 51(g) and 21 of the Constitution.[28] The uncertainty of a solid foundation is evident when the Court, in near-desperation, states that absent the application of such principles, the EPA would become a "barren shell." Notwithstanding the fact that this is a display of the Court's commitment to the State's welfare, the Court is left wide open to attack over the abundant and evident logical fallacies in its reasoning. The Court also stands on shaky ground when it resorts to the principle of sustainable development to simply balance social and environmental considerations against what it considers to be an equally desirable requirement for infrastructural and economic development.

V. *KIADB v. Sri C. Kenchappa & Ors.*

The final judgment I discuss is the Supreme Court's 2006 decision in the *Kenchappa* case.[29] There, the Court was dealing with an appeal by the state against the decision passed by the Division Bench of the Karnataka High Court directing the Karnataka Industrial Area Development Board to leave a buffer zone outside a village when allocating land for the purpose of setting up a research and development project.

In this case, the Court simply referred to the *Vellore* judgment[30] as backing for the proposition that the principle of sustainable development has a place in the Indian legal framework. In addition, reference was again made to judgments[31] that expanded the scope of the rights under Article 21, reading into it the right to pollution-free air and water. Interestingly, the Court also supported the incorporation of the various subsidiary principles falling under the broad head of "sustainable development," by simply referencing earlier decisions in which they were discussed—this apparently now being an adequate standard. The precautionary principle was now said to have been adopted in the case of *M.C. Mehta v. Union of India*,[32] the polluter-pays principle in the *Bicchri*[33] and *Vellore*[34] cases, and the "public trust doctrine" in *A.P. Pollution Control Board II*[35] and *Kamal Nath*.[36]

Although taking such effort to base the application of the principles of sustainable development in Indian precedent, the Court nonetheless entered into a discussion of the development of the principle, from Stockholm all the way to Rio. It seems that the Court was not completely confident of the earlier analysis and reasoning that had led up to the application of these principles, going on to state that "the importance and awareness of environment and ecology is becoming so vital and important that *we, in our judgment, want the Appellant to insist on the conditions emanating from the principle of sustainable development*"[37] (emphasis added).

It is true that this case does not provide anything new in terms of the rationale used by the Court in arriving at its conclusion, but simply resorts to precedent for the most part. However, what is interesting is that despite the fact that 22 years had passed since the justification provided by the Court in *Gramophone*,[38] the Court in 2006 still seemed to be as wary and uncertain of its eligibility/ability to apply the doctrine of incorporation.[39] It is clear that the Court has recognized that there have been logical leaps on its part, and is apprehensive of simply leaving the question to be decided by way of *stare decisis*.

26. *Id.* at ¶ 26.
27. *See* N.D. Jayal v. Union of India, A.I.R. 2004 S.C. 867, 878.
28. *Id.* at ¶¶ 25, 126.
29. KIADB v. Sri C. Kenchappa & Ors., A.I.R. 2006 S.C. 2038.
30. Vellore Citizens Welfare Forum v. Union of India, A.I.R. 1996 S.C. 2715.
31. Subhash Kumar v. State of Bihar, A.I.R. 1991 S.C. 420; A.P. Pollution Control Bd. II v. M.V. Nayudu (1999), 2 S.C.C. 718; Narmada Bachao Andolan v. Union of India, A.I.R. 1999 S.C. 3345.
32. M.C. Mehta v. Union of India (1991), 2 S.C.C. 137.
33. Indian Council for Enviro-Legal Action v. Union of India, J.T. (1996) 2 196.
34. *Vellore*, A.I.R. 1996 S.C. 2715.
35. *A.P. Pollution Control Bd. II* (1999), 2 S.C.C. 718.
36. M.C. Mehta v. Kamal Nath (1997), 1 S.C.C. 388.
37. KIADB v. Sri C. Kenchappa & Ors., A.I.R. 2006 S.C. 2038 at ¶ 100.
38. Gramophone Co. v. B.B. Pandey, A.I.R. 1984 S.C. 667.
39. *See* Geetanjoy Sahu, *Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence*, 4 L., Env't & Dev. J. 1, 11 (2008), *available at* http://www.lead-journal.org/content/08375.pdf.

VI. Conclusions

There are several takeaways from this analysis of how the Indian Supreme Court has conducted itself in the above-mentioned cases. It would be unfair to simply condemn the Court without giving it credit for taking up the cause of the people that the other organs of the state did not seem keen to pursue.[40] At the same time, one cannot help but notice that the Supreme Court is lacking in both grounding and accountability in the manner in which it has claimed itself to have access to these non-municipal standards.[41] As pointed out by Professor Bandopadhyay,[42] there exists a lack of coherence, and the Court is proceeding on "rhetoric and self-referential rationalization"[43] instead of ensuring any uniformity of thought. The entire process is portrayed as being predictable and obvious, while the elucidation of the steps leading up to this point is nonexistent.[44]

Surprisingly, the decisions lack direct and cogent references to the statutory framework, with the Court constantly looking to Parts III and IV of the Constitution instead. Even passing references to the statutory framework are made on the basis of an inherent presumption that they were legislated in furtherance of the international conventions being discussed, simply due to the timing of their enactment.[45] Even if the legislation can be said to be in fulfillment of India's commitments made at Stockholm, there was no formal recognition given to the principles of sustainable development either in the declaration or in any of the domestic legislation.[46] This was even mentioned in the *Kenchappa*[47] judgment.

Thus, the very basis for the Indian Supreme Court's resort to international principles seems to come into question when one enters into a determination of whether these principles were available to the Court in the first place. Notwithstanding the importance of the issues being adjudicated by the Supreme Court in these cases, it is important to ensure that resort to international principles be done in a manner that is transparent and does not leave room for overturning pro-environment decisions based on technicalities. This seems to have played on the Court's mind while adopting and simultaneously justifying the adoption of such principles in the cases discussed above. It also sheds light on the importance and urgency for these principles to find express mention and incorporation into India's domestic statutory framework.

40. *See supra* note 1.
41. *See supra* note 6.
42. *Id.*
43. *Id.*
44. *Id.*
45. *See* Sheila Jasanoff, *Managing India's Environment*, 28 Env't 12, 14 (1986).
46. *See supra* note 6.
47. KIADB v. Sri C. Kenchappa & Ors., A.I.R. 2006 S.C. 2038, ¶ 20.