

Constitution of India and Environmental Governance: Administrative and Adjudicatory Process

Dr. M.K. Ramesh

Professor of Law

National Law School of India University

Law Concerning Hazardous Waste and Substances

From the general frame to the specific one we get into, and in that 3 aspects that I did mention in the previous section, the first one of them is the law concerning hazardous waste and substances.

(Refer Slide Time: 00:36)

I. BACKGROUND

- *RACE TO THE BOTTOM & Trans-boundary Movement of Hazardous Substances*
- *1984: Bhoposhima- MIC release and the resultant worst environmental disaster ever in the world*
- *1986: The Khian Sea Incident: Liberian Ship loaded with more than 14,000 tons of ash from waste incinerators in Philadelphia- journeyed from Port to Port, starting from New Jersey, Dominican Republic, Honduras, Panama, Bermuda, Guinea Bissau and the Dutch Antilles, only to be turned away, for well over a year and half- finally dumped a part of it in Haiti as "topsoil fertilizer"- unloaded the rest of the cargo in Senegal, Morocco, Yugoslavia, Sri Lanka and Singapore- ship's name, changed to Felicia and then to Pelicano!*
- *1987: Italian Consignment Incident: A group of Italian companies, sent around 8000 drums of toxic substances to Nigeria, with the label*



There is a little bit of a background to this and the background comes from certain international developments. It is described as the race to the bottom. What is race to the bottom? Race to the bottom is a phenomenon which can be described in this way. In the western industrialized developed countries, after industrialization, in a wide variety of industrial processes and practices and developmental activities, there has been a huge generation of hazardous substances, substances, which are very injurious to life, limb, health and sanitation.

The disposal of it, since both in terms of value and in fact it is huge, it would involve a lot of investment has to be made in developing technology and in disposal. That would actually add up

to the cost of production by the business houses and the laws in these western developed countries started becoming more stringent.

They made it very clear that if you are generating certain kinds of wastes, which have real health hazards, you have only 2 choices. One choice is to remain in business, one choice is that you need out to find waste and means of disposing it off by yourself without exposing others. That means you dispose it off within your premises. You as a generator, you have the responsibility of its safe disposal or you cannot continue with this. Old outdated technology and industrial processes come up with the new state-of-the-art technology to have cleaner technology and mechanisms.

So, that these are no longer produced and you carry on with your business activity. So, business as usual is not possible and should we indulge in it, we will close your industry and penalize you. So, here is the situation where major international industrial giants, were are the horns of a dilemma, either to make investments to continue to do business domestically or completely close the business and they could not take either of these 2 options because both are going to be ruinous for their business. What was the third option?

Third option they invented which was a win-win situation for them, of moving those dirty industries into third world countries, developing countries and whereby they can continue to do business as usual with this outdated technology. Anyway, the rest of the world was undeveloped, underdeveloped, less than developed or still developing. These industrial measures and activities were something new to them unfamiliar to them and so if they offer to set their plant there in those developing factories, look at that, the industry here can expand and spread their wings.

More business capturing new markets, more business opportunities, bigger market and so you will continue to be in business at no extra cost. So, from highest level of stringent application of law where you have to be out of business to those countries where regulations are lax or non-existent and there, you can do business in a better way, race to the bottom of stringent regulation. That is why it is called as race to the bottom, from developed countries to the developing countries.

It is a win-win situation for them but what is there for the developing countries? As you know, developing countries have a bit of a struggle. They are still struggling to develop, they are still transitioning from the underdeveloped tag to the developing tag, from a situation of sustenance economy to a market economy and they do not have resources available with them, investment to make and here is somebody with ready to make investment set up a plant here. So, capital will come from elsewhere, there is investment and lot of employment opportunities for the people, when people are starved, looking for opportunities or employment, this is a boon.

If environment is affected, if health is affected, so what? When survival is at a stake, health and environment will come secondary. So, from the look of it, from pure economic angle, it is win-win for both and there has been a constant migration of either movement of hazardous substances from the developed world to the developing countries or hazardous technologies from the developed countries to the developing world or setting up of plants which would actually produce such goods with outdated technology.

This is a phenomenon that did not occur in one day but has been occurring and has been going on for well over 50, 60 years globally. Race to the bottom, trans-boundary movement of hazardous substances is a real fact. The second one. It is a rude wake-up call that people in Bhopal woke up to a grim reality of a release of a toxic substance called as methyl isocyanate (MIC) from Union Carbide Industry, a multinational company set up in Bhopal and the resultant worst environmental disaster ever to have occurred in the world is known to everyone of us.

On a previous occasion, in one of the earlier modules, I have dealt with that in great details. So, I am just flagging in for you to really have a look at it. It was a real rude wake up call, not just for India, for the rest of the developing world that something that is happening here is not something that is initiated here, but from elsewhere and you are made to pay a price, and at your cost somebody is developing, at your cost, at your [eril.

The third phenomena, it is an incident called the Khian Sea incident. A small story. A ship from Liberia, the name of the ship is Khian Sea. It was loaded with more than 14,000 tons of ash from

waste incinerators generated in Philadelphia. Please remember the countries. Philadelphia is in United States.

So, generation of this waste is in the United States. Liberia is at the upper portion of Africa. So, an African ship it is loaded with this material and what was it doing? From Philadelphia, it is trying to get it unloaded. What is it containing? 14,000 tons of ash from waste incinerators, a very toxic substance and maybe try to empty it.

It went from port to port. It started in New Jersey in the United States went to Dominican Republic, Honduras, Panama, Bermuda, Guinea Bissau, Dutch Antilles and in each of these ports, they were turned away. People were asking, "what do you have, why you want to dump it, no no you are going to pay the price, we know, but we are not going to take it because it is going to affect our lives. Get lost" And this was happening.

See, the production, the place, sometime around 1984-85 for well over a one and a half years. This ship was moving hither and thither. There were no takers for that and then it got finally dumped. Where? In a port. In Haiti, about some 4,000 odd tons of it, not the entire thing, a portion of it was dumped there and you know by what name it was dumped. The one who received it from them was made to believe it is top soil fertilizer. It is a misnomer. There is no fertilizer in it. It is actually the ash produced from incinerators, which is very toxic and it was being sold as top soil fertilizer, you take it, we give you some money for that.

It was unloaded there, the rest of the cargo was further distributed to so many other countries mainly in Africa, Senegal and Morocco in Yugoslavia, in Singapore and Sri Lanka and between Singapore and Sri Lanka, a bit of it was also dumped in the sea and look at the diabolical move on the part of the generator and the transporter.

The ship which had registration in Liberia was changed. The name of the ship was changed, the name of the ship was changed to Felicia and then to Pelicano. A huge outcry took place globally that look something which is unwanted in one country is being fed into so many other countries giving some alibis and wrong information at the cost of the lives of the people and making it

very difficult for people even to trace and track the wrong doer because there is no law to govern and regulate this internationally.

So, I am slowly gravitating you towards the need for making a well note that this global level and these incidents of this kind have contributed to that. Then you have in 1987, only a few major ones I am mentioning. There is an Italian Consignment Incident. What happened? A group of Italian companies came together. Not for any good purpose. They actually collected around 8000 drums of toxic substances and they shipped them to Nigeria. Look at the games that were played here.

(Refer Slide Time: 13:15)



Zoomed to fill

"relating to building trade" – sent back to source, in the course of which several persons got injured and hospitalized

- 1988: *The "Bangkok Bundle": hundreds of leaking barrels of toxic substances found on a wharf- sent from Singapore, to a non-existent Thai firm*
- 1988: *Asbestos export for "Re-cycling": attempts of a New York firm to export the material, to Guatemala, for the purpose of re-cycle and re-use, although unfit for the purpose, failed.*
- *GARBAGE IMPERIALISM OR TOXIC COLONIALISM OF THE WEST !*
- *Need for observance of The PRINCIPLE OF GOOD FAITH, TO INFORM and secure CONSENT*



They shipped it to Nigeria. It was really truly toxic substance and what did the label them, that these tankers contain material for building construction purpose and this was sent back to the source from Nigeria when they found the real game, the real truth behind this and while from Nigeria it was being sent back, Nigeria had to engage its own people. "We do not want this, you take it back, you gave a wrong impression, you gave us the lure of money that we will put it here, this can be used for building trade and for that you are paying rent, take it back. We now realize it is highly toxic substance that you are giving." And when they were forcibly taking it back to the country from whence came, they engaged several personnel, and these were injured, affected and hospitalized.

The next incident I bring to your attention is the Bangkok Bundle. Hundreds of leaking barrels of toxic substances found were in a wharf sent from Singapore to a non-existent Thai firm docked in the port of Bangkok unattended to, uncared for and you know when something lies on your port and that too from that stock, it is leaking, the kind of impact it would have on the neighbouring environment is unimaginable. Then there is one more incident just to bring to your attention a major one. The asbestos export for recycling.

Asbestos, a banned substance in United States, a newer firm attempted to export asbestos to Guatemala, one of those Meso-American countries. And what is the reason given to it? "We are

sending it for the purpose of recycle and then later for reuse.” But in actual fact, this is a material which is unfit for recycling, unfit for reused and luckily during the course of transit, this truth was found and this attempt was foiled.

Actually, on the floor of the United Nations, these issues were raised and many of the developing countries including India and African countries came together and they started questioning the western approach to environment, the western approach to human health impacts of certain unwanted, undesirable, toxic industrial actions, measures and by-products and they are called it as garbage imperialism or the toxic colonialism at the best.

Very powerful political forum, the General Assembly of United Nations and it was made very clear that these kinds of practices should end and if you really believe in human health and environmental health is common, uniform and a concern for the entire humanity and cannot be graded differently in different parts of the world based on color and region. It is unjust, unfair and unacceptable in the globalizing world.

And so, there is a clear resolution passed there that henceforth we really have to think of a robust international legal mechanism of dealing with this kind of a very very undesirable, highly abominable practice by adopting the principle of good faith to inform and secured consent and then with the enough safeguards to deal with this kind of an activity and lo behold, on the basis of all these developments, we come up with the major international legal arrangement called the Basel Convention.

(Refer Slide Time: 18:18)

II. BASEL CONVENTION



Convention on the Control of Transboundary Movements of Hazardous Wastes (HW) and Their Disposal, Basel, 1989:

- Designed to reduce the movements of hazardous waste between nations, and, in particular, to prevent their transfer from developed to less developed countries (LDCs) - reduction of its generation and promotion of environmentally sound management of hazardous wastes - does not address the movement of radioactive waste
- HW: Those listed in the annexures of the treaty and possessing a characteristic such as being explosive, flammable, toxic, or corrosive - includes, those considered to be a hazardous waste under the laws of either the exporting country, the importing country, or any of the countries of transit - definition, imprecise and prone to varied interpretation
- Primary requirement of environmentally sound disposal of it in the country of its generation
- Transboundary movement permissible, only when the importing country has the greater ability (- better technology/skill-sets) of disposal in a more economic way (- less expensive-), worked out through an arrangement, with prior informed consent, among the parties



What is this Basel Convention? It is an international treaty. It is a convention on the control of transboundary movements of hazardous waste, HW for short and their disposal and this was signed in a place called Basel in Switzerland, and that is why it is called as Basel Convention in the year 1989. What is its objective?

It is designed to reduce. Please note carefully. The major idea is to reduce the movements of hazardous waste between nations especially in relation to the transfer from developed to less developed countries. This is the major objective. Second, reduction of its generation. The very production has to be reduced. And third, to promote environmentally sound management of hazardous waste through technical and financial collaboration and cooperation.

That is the objective. It does not address the movement of radioactive waste because it is dealt separately and independently with regard to nuclear accident separate arrangements are there. So, other than all hazardous waste come under the umbrella of this law. The objectives are very clear.

We want to reduce and we want to safely dispose them in an environmentally sound manner and both in the exporting country, in the country of transit, in the country of import with enough safeguard measures put in place in them and that is the Basel Convention. It is about hazardous substances or hazardous waste.

What are they? According to this Convention, a list of them are given in the annexure to this treaty. A number of substances, processes and mechanisms are mentioned and these are designated as hazardous substances and these are the ones that possess certain very distinctive characteristic features like they are explosive, flammable, toxic or corrosive.

So, if you address and approximate to this description then that substance is a hazardous substance. It also includes those that are considered to be hazardous waste under the loss of either the exporting country, the importing country or any of the countries in transit because when there is a transboundary movement or movement across nations.

If there is a law in each of these countries which have added to the list of what is there at the global level, they are also considered as hazardous. The problem with this kind of a description and definition is a little bit of lack of clarity because you say that this is the list that we have. One is the agreed list amongst all the parties to this arrangement, 180 countries are parties to this. I have mentioned it earlier.

And secondly, in this agreed list, some of them some of them are banned, some of them are regulated, some of them are put under very severe restrictions and then to add to the confusion and problem, there may be an additional list which are there in the exporting country, which are there in the importing country, which are there the transiting country. That means when you get into a transaction of this kind to really identify and know whether this is a hazardous substance.

It requires a very high degree of proficiency, knowledge, experience and expertise and because of this imprecision, this is an expression which is prone to varied and differing interpretation and in law, anything that is capable of being interpreted in a number of ways, it is an invitation for looseness and poor implementation. The problem lies in definition but anyway let me move on. The basic objective is not exactly to stop such a movement because it is impractical but what we do is, how do we handle this? How do you handle it in a more acceptable way? What is the primary requirement?

The requirement is to handle an environmentally sound disposal measure by the country of its generation. So, the first and the foremost requirement is you have generated it. It is generated in your country. You should find ways and means of its self-disposal in our own country in your backyard. Dispose in your backyard. Do not spread it elsewhere. This is the first requirement.

But supposing the movement of this is to be permitted at the international level then that is possible, that is permissible and that is facilitated under this arrangement, only when the following conditions are satisfied. What are they? Number one, the importing country has a greater ability than what you have.

That means it has better technology. It has better skill sets of disposal. So, you must give a justification as to why you are exporting it because the other one is a better facility. It is a better skill. It is a better ability and it is able to dispose it off in a more economical way than I could. So, it makes perfect business sense for me and it is also a paying proposition for the importing country.

It is beneficial for both of us and it is not harmful for the environment. That is important. Ability to dispose it off in a safe, environmentally benign way is the underlying theme and this has to be worked out through an arrangement with prior informed consent among the parties. See, the major problem is ignorance when you get into arrangements.

Now, here this law makes it very clear. It should be through a right royal contraction arrangement. The terms and conditions should be known well beforehand for the parties. That is the reason why the expression used is prior in form consent. That means the exporting country should have to be make very clear to both the transiting and the importing country about the pros and cons of the entire situation in relation to the toxic substance. Unless that is made out very clearly, there cannot be such a kind of a transaction.

(Refer Slide Time: 26:35)

- * Disposal includes, recovery, recycling etc.
- * *Basel Ban: to Antarctica and to those countries which have banned import of hazardous substances- provision made for banning export of HW, to LDCs, even for the purpose of recycling- EU has adopted it in its regional Legal Frame- Organisation of African Union (OAU) , has adopted prohibition of the imports into Africa of any hazardous (including radioactive) waste, through Bamako Convention, 1998- The Waigani Convention (Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region), 2001, is another regional agreement on the same lines-not much successful or effective*
- * Parties can enter into bilateral and multilateral arrangements, even with non-parties, on terms that are, "no less environmentally sound" than the Basel Convention
- * provides for cooperation between parties, ranging from exchange of information on issues relevant to the implementation of the Convention to technical assistance, particularly to developing countries



Please note here. It facilitates the environmentally sound disposal. Let us be clear as to what is disposal. Disposal, I have already made it abundantly clear at the outset, disposal does not only mean dumping or throwing it away somewhere. You bring it from somewhere from an exporting country and in the importing country, you just take stock of it.

No. Disposal includes number one, that is safe disposal includes not only of course dumping in the ground in landfill in an environmentally safe way, that is one requirement. It also includes recovery and recycling. So, you may set up a plant for recovering something which is valuable from this waste. Waste to riches is what and when I told you flourishing business, this is what I mean. So, it actually facilitates recovery and recycling, provided, you have the know-how and the technology for getting into that kind of an activity.

The law also provides for a ban. There is a clear strict no-no of such a kind of a transboundary movement from the country of origin to Antarctica. There is a complete ban of hazardous substances to be moved into Antarctica and to those countries which have banned import of hazardous substances, each country has its own list of those substances that cannot be imported by them. So, if you are generating that, you cannot, even with a new agreement you cannot get it to that because it is against law. Provision is also made for banning of export of these substances to less developed countries.

This is the real problem. Unsuspecting, innocent, less developed countries, which have no bargaining power these were regularly, relentlessly transported as those examples I have given you clearly indicate. Even for the purpose of recycling you shall not transport, export these substances to these less developed countries.

Following this international arrangement, the European Union has adopted it in its regional legal frame that there shall not be any export of hazardous substances to especially less developed countries in the African continent and similarly organization of African countries have adopted prohibition of imports into Africa of any hazardous, including radioactive substances through an international legal arrangement at the regional level called the Bamako Convention.

There is also another convention that was organized amongst nations in the southern Pacific region called The Waigani Convention, convention to ban the importation into foreign island countries of hazardous and radioactive wastes and to control the transboundary movement and management of hazardous waste within the south Pacific region. This was in the year 2001. This is another regional arrangement on the same lines.

To tell you the truth, none of these so-called safeguard measures, none of these regional arrangements are very affective or most successful. By and large, it is successful within European Union, but it is not so successful in Africa either clandestinely or even when it is known turning a Nelsons eye, these arrangements are still going on and unfortunately the regulatory mechanisms are very weak in this regard.

There is also a scope under this arrangement that the parties can enter into bilateral and multilateral arrangements even with non-parties on terms that are no less environmentally sound than the Basel Convention. I hope you are following it. It actually means that there can be an arrangement between a party to this Basel Convention and a non-party, that is some country because, I said about 185 odd countries are parties to this arrangement. So, there are at least another 30 odd countries like United States, which has not ratified this arrangement.

With United States and other countries, you can enter into an arrangement, provided that is very important that in those countries there is also clear laws which are approximate into whatever that is there in the Basel Convention or even superior to what is there in Basel Convention. That means they are no less environmentally sound than the Basel convention, that we all know. That means what?

The minimum requirement is whether you are a party or not a party to Basel Convention. Any arrangement that you have with anybody, the baseline is the safeguard that was specified under this arrangement needed to be conformed to without any single exception. This is basically an arrangement for cooperation between parties ranging from exchange of information on issues relevant to the implementation of the convention to technical assistance especially to developing countries.

(Refer Slide Time: 33:00)

- 
- attributes responsibility to one or more of the States involved, and imposes the duty to ensure safe disposal, either by re-import into the State of generation or otherwise
 - Establishes regional or sub-regional centres for training and technology transfers regarding their management and minimization of their generation, to cater to the specific needs of different regions and sub-regions
 - Convention amended from time to time to address concerns about certain kinds of movements: on the pretext of recycling and other kinds of uses - like, dealing with "dumping plastic waste" in developing countries - contaminated and most mixes of plastic wastes brought under the purview of PIC Procedure before trading (- Developed countries like the U.S. and Canada have been exporting their mixed toxic plastic wastes to developing Asian countries with the claim of their recycling there)
 - Illegal hazardous waste traffic, a crime- locks provisions for its enforcement- parties are directed to evolve their own protocols for enforcement !

Actually, this is aimed at attributing responsibility to one or more countries which are parties to this arrangement bilateral or multilateral arrangements and imposes the duty to ensure safe disposal either by re-import into the State of generation, or otherwise. I will give a simple example. State A generates the hazardous waste. State B is the country of transit. State C is the importing country.

What is required is, a very minimum requirement. Amongst these 3 countries, there should be at least one country which has the capability and the ability to environmentally soundly dispose this particular substance. So, should there be a problem, export is done, it is transited through another country state B, it has reached state C. Unfortunately, state C does not have the capability. Then?

Either in state B or in state A which has that capability, they should take it for safe disposal. So, it is almost like a contract of indemnity and guarantee. If you cannot dispose, I as the country of origin, send it back to me. I will dispose it off. If I as a country of origin and you as a country of import cannot dispose it off, the country of transit, which is permitted for that and that should be ready to the agreement that it will act as insurance cover that it will have the facility to dispose it off safely.

So, amongst you, you should work out a mechanism as to how to safely dispose of. There is no way the waste so generated should be allowed to rot in one place as to spread injury, cause harm, alarm, affect life, limb, health and degrade environment anywhere.

That is a loud message passed through this law. It establishes regional and sub-regional centres for training and technology transfers regarding the management and minimization of the generation to cater to the specific needs of different regions and sub regions. In fact, more than a dozen such sub regional centres are established following this arrangement for this particular purpose. The Convention is amended from time to time to address concerns about certain kinds of movements on the pretext of recycling and other kinds of uses like dealing with dumping of plastic waste, this is a very serious problem in developing countries.

Actually, contaminated and most mixes of plastic wastes are brought under the purview of this prior informed consent procedure before such a treaty and you must know developed countries like United States and Canada have been indulging in this kind of an activity. Especially, to developing Asian countries with a claim that they are going to be recycled there. These cannot be recycled and they are used as dumping sites of these toxic, hazardous, undisposable, non-disposable, non-renewable plastic waste.

Microplastics are some of those that are actually happening even now to a large extent unchecked and for that, a very rudimentary procedure is developed that they should be a prior informed consent. "I give consent, I know about the consequences, I give consent". Then nothing stopping you from sending it to me, but the real suffering is for the people, for the environment which will have a lasting impact for generations to come that is another problem.

Illegal hazardous waste traffic is made a crime under this law. So, the Basel Convention makes any kind of a waste traffic. It is called as traffic because it is illegal. It does not conform to the regulations here. It is called a crime and what does crime mean? In simple commonsensical terms, a crime is an offense against humanity of community against the nation. That means there has to be stringent penal action. So, when you declare something as a crime, there should be a punishment for that and there is no compromise, without an exception.

Unfortunately, this Convention lacks provisions for its enforcement, there is no punitive element at all in this. So, it is a toothless tiger. You call it a crime, but there is no punishment for that, but there is something saving this. Parties are directed to evolve their own protocols for their enforcement.

See, exactly contractual arrangement. We know that it is a crime but different legal systems are of different methods of dealing with crimes. So, you work out a mechanism amongst yourself. So, it is a voluntary thing. You work it out, you decide through mutual arrangement, you decide in dealing with such a kind of a criminal act.

Well, in brief this is the section on the transboundary movement of hazardous waste. I have given you what the law provides for, the weaknesses and shortcomings in it, but at the same time I said that this is actually the available legal frame in vogue in practice, in application at the global level.

From this, in the next section, we move on to a couple of domestic legal arrangements concerning waste management just to give a flavour and a sample of what is prevalent at the

domestic level that is in India. One is biomedical waste and another on solid waste management. That will be in the next 2 sections of our inquiry.