Institutionalizing International Environmental Law

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Transnational Publishers

Published and distributed by Transnational Publishers, Inc.
Ardsley Park
Science and Technology Center
410 Saw Mill River Road
Ardsley, NY 10502

Phone: 914-693-5100
Fax: 914-693-4430
E-mail: info@transnationalpubs.com
Web: www.transnationalpubs.com

Library of Congress Cataloging-in-Publication Data

Desai, Bharat.
Institutionalizing international environmental law / by Bharat H. Desai.
p. cm.
Includes bibliographical references and index.
ISBN 1-57105-313-1
1. Environmental law, International. 2. International agencies.
I. Title.

K3585.D475 2003
363.7'0526—dc 2003060819

Manufactured in the United States of America

PREFACE

The concept of this work emerged from the discussions I have had with my teacher and colleague, Rahmatullah Khan, who has inspired me in my teaching and research career in the field of international law and international environmental law. I am indebted to him for carefully going through the manuscript and making valuable suggestions.

Main work on the draft of the manuscript was carried out during my stay as a Humboldt Fellow at Institute of International Law, University of Bonn, Germany. I am thankful to my generous host and Director at the Institute, Rodolf Dolzer, with whom I enjoyed discussions, especially on the issue of revitalization of international environmental institutions. I found in Thomas Buss a warm friend who made my stay comfortable at the Institute. He was always there to help whenever I ran into problems with the computer having software in German. Other members at the Institute, Mrs.Lehmann, Doris Gassen, Helga Drossard and Charlotte were very helpful.

I express my deep sense of gratitude to the Alexander von Humboldt Stiftung for the generous fellowship support that made possible my year long stay in Bonn and one month visit to the Max-Planck Institute for CP & International Law (Heidelberg) as well as my visits to various institutions in Bonn, Brussels, The Hague, Geneva, Gland, Paris and Copenhagen. Without this support it would not have been possible to carry out the work. I am personally thankful to all the concerned AVH staff members, especially Cecilia Nauderer, Ute Hien, Steffen Mehlich, Gerrit Limberg, Gisela Janetzke who left no stone unturned in facilitating my work as well as in making my family's stay in Bonn most comfortable.

The city of Bonn in the Rhine Valley is warm and friendly. My long walks along the banks of the serene Rhine were a boon to shake off fatigue and boredom while returning after a long days of work from the University.

I have benefited from discussions with many individuals, either personally or through emails, during the course of this work. It includes: Jose Alvarez, Jim Armstrong, Upendra Baxi, Per Bekken, Alan Boyle, Edith Brown Weiss, Jutta Brunnee, Francoise Burhenne, Wolfgang Burhenne, Michael Zammit Cutajar, Nitin Desai, Charles de Liva, Elisabeth Dowdeswell, Danial Esty, Lowel Flanders, David Freestone, Hilary French, Jochen Frowein, Mohan Gopal, Michael Graber, Ellen Hey, Calestous Jumas, Donald Kaniaru, Lee Kimball, Maritta Koch-Weiser, Claude Martin,

Thomas Mensah, Arnulf Mueller-Helmbrechet, Kazuhiro Nakatani, Daniel Navid, Janos Pasztor, Nick Robinson, Peter Sand, Surya Subedi, Iwona Rummel-Bulska, Alexander Timoshenko, Klaus Toepfer, Mostafa Tolba, Geir Ulfstein, Vesna Vujicic, Jake Werksman and Rudiger Wolfrum.

I have been able to utilize the material from the libraries of the following institutes: Jawaharlal Nehru University, IUCN Environmental Law Centre, Max-Planck Institute for CP and International Law, Institute of International Law of University of Bonn, UN Framework Convention on Climate Change, and the UN Information Centre Bonn. I thank the librarians and the staff of these libraries for making access to the relevant material possible.

Thanks are due to C.S.R.Murthy for his valuable comments on Part I of this work and whose expertise on international organizations proved to be an asset to chisel my thoughts on the subject. I also thank B.S.Chimni for his comments and suggestions. I am thankful to my other colleagues at JNU, R.P.Anand, V.S.Mani and Y.K.Tyagi, for their encouragement as well as comments during presentations at the weekly Friday seminars of the Department that helped in improving the work.

The work would not have seen the light of the day but for the support provided by my wife, Sonal, and concession given by my son, Jay, to work for extended hours—irrespective of the season and the weekends—the time that they naturally expected me to spend with them. The book is dedicated to both of them, along with my parents.

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16 October 2003
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INTRODUCTION

The present study seeks to explain the rationale of the law-making process in terms of the linkage between that process and the development of institutions in the field of global environment.

Law, it is recognized, is an important tool employed to ensure the orderly functioning of a society. This is much more so in the case of an international society comprising sovereign states. The process of international regulation of state behaviour is anchored in the consent of the states themselves. The very origin and development of international law bears testimony to this fascinating process. It has assumed an interesting dimension and poses special challenge in the specific case of conservation of natural resources and protection of the environment.

The corpus of international environmental law generated by this new challenge can be divided into various phases. Notably, the pace as well as the content of this development has necessitated institutional structures. Therefore, the process of 'institutionalization,' or the expression through institutional forms, has kept pace with the process of development of this nascent branch of international law. In a way, the ***institutionalizing*** process of international environmental law has become an inevitable and integral part of the intergovernmental efforts to lay down a threshold of state behaviour in environmental matters. In fact, development of international environmental institutions has become a common feature of this process.

The central effort in the present work has been to study the ***process*** and to underscore the linkage between international environmental law and international environmental institutions. It goes to show that while international environmental institutions are products of the need for institutionalized international cooperation, once these institutions are set up, generally, they acquire their own momentum in catalyzing international environmental law. In the development of international law for the protection of the environment, institutions constitute a product of the process as well as contributor to it. Still it is a truism to state that the 'institutionalizing' process is mainly dictated by the political will of the states. The multilateral environmental negotiations remain essentially a state-centric process in spite of the active role played and influence exerted by the civil society groups at the conference venues and outside. As a result, it is the sovereign states, which still remain the final arbiters for the creation and functioning of international environmental institutions.

The efficacy of institutions has thus to be measured by the expectations of states.

Two caveats on the scope and nature of the study will be in order: First, the objective is not to provide a comprehensive view either of the development of the entire body of international law, nor the development of all of international environmental law. Given the limitations of this analysis, the essential focus is on the institutional dimension of international environmental law. Second, there has been almost an explosion of international institutions, especially since the establishment of the United Nations. They exist both at intergovernmental level as well as non-governmental level. The present study, however, seeks to focus on institutions, which operate at the governmental level only. Moreover, there is a great amount of literature available in international institutional law where the technical difference between 'institutions' and 'organizations' is generally laid down. The author has used both the phrases conterminously in order to avoid monotony of a single phrase.

Institutions are products of a complex process of 'institutionalization' and they engage in norm-building in various complex areas of interdependence. In the environmental field, a variety of institutions have sprung up, especially since the 1972 UN Conference on Human Environment.

The discussion in the book is arranged in three parts: Part I examines the relationship between law and institutions. It probes conceptual aspects of 'institutions' and the problems of international institution building process by way of providing a useful background to understand the process in the specific context of environmental field.

The three chapters in Part II constitute the heart of the study. It makes an effort to understand the changing character of international environmental law and how international law has sought to grapple with the challenge of environment. The discussion has been centred around major landmarks in multilateral environmental cooperation, namely before the 1972 Stockholm Conference, from Stockholm to 1992 Rio Earth Summit and Rio and after (including 2002 Johannesburg Summit). It then looks at the main characteristics of the law-making process, and in turn, the process of 'institutionalization.' Another chapter examines in detail the growth of international environmental institutions, the role of the UN General Assembly, the institutional forms, the legal basis and the types of institutions. In the context of international institutional law, the study of international environmental institutions provides a mosaic which is not generally examined either in the literature of international environmental law or institutional law. The interface between the two streams of international law helps in explaining the process of 'institutionalization' of international environmental law.

Part III brings into sharp focus the issues that figure in the contemporary discussion of the ways of strengthening the international environmental institutions in the future. It comprises the debate on the proliferation of international environmental institutions within the UN system and problems of coordination, synergy and inter-linkages. Since it has been widely perceived that various existing institutional structures do not work in harmony, states are actively considering how best to revitalize international environmental institutions. The discussion critically looks at the role of UNEP as a principal UN institution in the field. The last chapter examines the blueprints for revitalization of institutional architecture in the global environmental field, including especially the UNEP constituted Open-ended Intergovernmental Group of Ministers on International Environmental Governance, as well as the World Summit on Sustainable Development (2002 Johannesburg).

Given the plethora of global conferencing, it will be interesting to take a closer look at how international environmental institutions are thrown up in the course of development of international environmental law. In the process, various actors including international institutions also play a crucial role in the development of international environmental law. It is significant that in the process of 'institutionalizing' at the international level, states extrapolate their own experiences with institutions at the national level. It goes to show that international institution building process is an organic process directly geared to the needs of the states. The study seeks to underscore the fact of international life that institutions are essentially tools, operating within legal parameters, for the states to address the global ***problematique*** in the environmental field.

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PART I
LAW AND INSTITUTIONS

CHAPTER 1

LAW AND INSTITUTIONS

A. LAW AND SOCIETY: A SYMBIOSIS

1. Introduction: The Concept of Law

The role of law is not assessed in a vacuum. It has to be seen in the context of a given society. What is 'law' has greatly exercised the minds of scholars and philosophers for centuries. In fact, in the process of trying to understand one of these basic postulates of human society, varied explanations have been given. Most of the definitions of law have been centred on the understanding about its role in a given community or society of humans. As a result, it is interesting to find, essentially, an ***anthropocentric*** approach in this endeavour.

In earlier times, efforts were made in various societies to impart sanctity to a particular behaviour expected on the part of their members. This took many forms. Most important in this was to consider 'law' as ordained by some divine element. It later took the form of ***natural law***. It seems the basic purpose in this exercise was to inject some element of fear in the minds of subjects so that they follow the desired law. There are enough references in the legal literature to this effect.

With the emergence of the state system, an emphasis upon the divine origin of law is no longer invoked. In the modern context, therefore, it is the state that prescribes law, with all necessary connotations. A definition of law generally takes into account its ***function*** rather than content. Therefore, one needs to understand the role or function that law performs *for* the society. Basically, this comprises regulation of human conduct. The final shape a law takes depends upon the structure, operating conditions and needs of members in a society. As was the case with traditional human communities, law need not be in a written form. It can very well be in the form of an unwritten sermon, edict or code. It may be sufficient if law originates from a defined structure in the state/society, coupled with the need to carry it out in the general interest of its members. Moreover, the nomenclature is also irrelevant. The most important aspect is how it is given effect to and how members of the community view it in actual practice.

As a result, law and society are complementary to each other. The former emerges out of the needs of a society. In fact it becomes a pivot around which orderly functions of the society and conduct of its members revolve. Therefore, they can be regarded as "correlative"[1] terms. Law and society both have a close organic nexus. A law uprooted from its societal context cannot but be barren and without its moorings. Similarly a society's existence is conditional upon some form of law, howsoever rudimentary it may be. Law may even be regarded as a glue or force, an 'order of humans' that keeps members of a society together in a coherent and orderly manner. This symbiotic relationship is at the basis of growth of both society and law.

The term 'law' has been variously defined over the years. It has been regarded by Jenks as an "essential element"[2] for the existence of a given social order. Similarly, Corbett has considered it as "clearly essential"[3] in the community. Kelsen has described it as an "order of human behaviour."[4] Taking the ***functional*** view, Lauterpacht has regarded it necessary to "regulate the conduct of men by reference to rules."[5] However, it may not be too far fetched to say, as argued by Schwarzenberger, that most of the definitions of law offered by jurists "suffer from a noticeable degree of subjectivity and arbitrariness"[6] and may fail the test of universality.

Thus, it appears that various explanations offered by eminent scholars may not be able to provide a universally acceptable definition in as much as they do not reflect differences of fundamental character. It would

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1 J.L. Brierly, ***The Basis of Obligation in International Law and Other Papers***, Edited by H. Lauterpacht and C.H.M. Waldock (Oxford: Clarendon Press, 1958), p. 250.

2 C. Wilfred Jenks, ***Law in the World Community*** (London: Longmans, 1967), p. 57.

3 Percy E. Corbett, ***The Growth of World Law*** (Princeton, N.J.: Princeton Uni. Press, 1971), p. 7.

4 Elaborating on this as a ***system of rules***, Kelsen observes: "Every rule of law obligates human beings to observe a certain behaviour under certain circumstances. These circumstances need not be human behaviour, they may be, for instance, what we call natural events. A rule of law may oblige neighbors to lend assistance to the victims of an inundation. Inundation is not a human behavior, but it is the condition of a human behavior prescribed by the legal order. In this sense, facts which are not facts of human behavior may enter into the contents of a legal rule. But they may do so only as related to human behavior, either as its condition or as its effect"; see Hans Kelsen, ***General Theory of Law and State*** (Cambridge, Mass.: Harvard Uni. Press, 1949), p. 3.

5 H. Lauterpacht, ***The Function of Law in the International Community*** (Oxford: Clarendon Press, 1933), p. 3.

6 In fact Schwarzebberger argued that: "Law as such exists only in the realm of concepts. It is an abstraction from the realities of past and the existing legal systems. If a definition of Law is to be what it sets out to be, it should be catholic in the sense of embracing any system of norms which, at any time or place, men have accepted as law, be it natural or positive; primitive, archaic or mature; unitary or federal; democratic, authoritarian or totalitarian; municipal or international"; see Georg Schwarzenberger, ***The Frontiers of International Law*** (London: Stevens & Sons, 1962), p. 9.

rather be worthwhile to understand law in a societal context. This can bring it closer to reality, since perceptions not only change with personalities but also with changing times and societal requirements. As a result, the author would not prefer to offer a definition of law, which can be reserved for jurisprudential semantics. It would, however, be sufficient for our purpose to understand law as a societal phenomenon that aims at regulating human behaviour for its orderly functioning.

2. Law and International Society

The function of law in the international society remains almost the same as in a national society. This is despite the fact that members of the international community, primarily, are sovereign states. International law has an essential function of regulating the conduct of states in their relations with each other and is grounded in the ***consent*** of states. This fact, however, has led to some doubts about its efficacy. In this context, Lauterpacht has succinctly observed:

> (E)ssential feature of the rule of law is constantly put in jeopardy by the conception of the sovereignty of States which deduces the binding force of international law from the will of each individual member of the international community.[7]

The reality of the function of international law is not diminished in an international society comprising states as well as, in the modern context, non-state entities. The question "is international law law?" has often exercised the minds of scholars, since Austin expressed the view that it is "positive morality."[8] The examination of the role or function of international law has to be distinguished from the question of its efficacy, or for that matter sanction behind it. The fusing of both can result in problems of understanding the real nature of this body of law.

In fact international law has been, historically, regarded as ***euro centric*** in character. It emerged from the needs of a particular time in history to serve the interests of the then European maritime powers. The passage of time and gradual "expansion"[9] of the international society to

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[7] Lauterpacht, n. 5.

[8] Austin, ***The Province of Jurisprudence Determined*** (1832), ***Lecture VI*** (1954 edition), p. 259.

[9] The body of international law, as it is known today, has originated from a narrow basis i.e. the needs of Christian states of Europe and, initially, it did not take cognizance of other well developed systems of law outside of Europe. In this context Verdross has, to some extent, made candid observation: "In the course of history ***different*** forms of international law have appeared. Even in antiquity there was a Greek, a Mediterranean, a Hindu and a Chinese international law. In the later Middle Ages we find not only a Western European, but also an East European and an Islamic international law. All these norms have