

## **Is Indian Nuclear Law in Conformity with the Constitutional and International Law ?\***

**Abstract-** Indian nuclear laws and policies are in conformity with international law, India, though not a party to any of the non-proliferation treaties yet has declared its policy of no first use of nuclear weapons and a commitment to non-proliferation. Most of the law relating to nuclear energy is derived from the customary international law principles which are ipso facto part of Indian law. India also has accepted many rules of the IAEA with regard to nuclear safeguards and safety. Indian nuclear liability law also takes substantially from the language of International law – the CSC or customary principles like strict liability.

**Keywords-** Constitution of India, Treaties and Agreements, distribution of powers, the centre and state, Acts and Rules pertaining to Nuclear energy in India.

There are several treaties and other formal legal instruments brought into force under the aegis of the IAEA and OECD regarding nuclear a safety and Liability. One aspect of International law that is closely linked to nuclear activities is international environmental law. Although international environment law is of relatively recent origin, it already has established a core of fundamental legal principles that are pertinent to nuclear activities. The sources of these principles include both hard law as well as soft law. Hence, in relation to nuclear activities, apart from formal obligations, States are also bound by a host of customary principles. Some of these principles are considered more substantive, that is, focused on outcomes, as the “no harm” rule, the “polluter-pays” principle, and state responsibility: while others are more procedural, with their focus on means, such as the duty to notify, consult and negotiate; the principles of effective public participation in decision making; and the precautionary principle. Still others combine both substantive and procedural aspects, such as “good neighborliness” and the duty to cooperate. However, it is difficult to distinguish between the substantive and procedural principles. Aiming to ensure the safety of nuclear activities, there are also several subsidiary principles of customary law such as the principles of protection, prevention and precaution and to address the threat of trans-boundary radioactive pollution.<sup>1</sup>

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The Constitution of India is the Supreme law of the Land. Any policy of the legislative initiative must confirm to the constitutional philosophy and the Fundamental Right enshrined in that. As far as nuclear energy is concerned, the law applicable includes International treaties, customary principles, and the law in force at the time the constitution entered into force and post independence legislations.

### **1) Constitution of India and it's implication on Treaties and Agreements**

The basic provisions of the Constitution of India relevant for consideration of its interaction and inter-relationship with International Law are; (1) Article 51 (2) Article 73 (3) Article 245 & 246 (4) Article 253 (5) Article 260 (6) Article 363 (7) Article 372 and (8) VII schedule – entries 10 to 21.

Article 51 Promotion of International Peace and Security; the state shall endeavor to –

- a) Promote international peace and security
- b) Maintain just and honorable relations between nations
- c) Foster respect for International Law and Treaty obligations in the dealings of organized people with one another; and
- d) Encourage settlement of International dispute by arbitration.

The Article 51(c), Article 51 of the Constitution had its source and inspiration in the Havana Declaration of 30 November 1939. It is significant to note that the clause 'c' of Art. 51 specifically mentions 'International Law' and 'Treaty Obligations' separately.<sup>2</sup> According to Prof. C. H. Alexandrowicz the expression 'International Law', connotes Customary International Law and 'Treaty Obligations' stands for obligations arising out of International Treaties.<sup>3</sup> It is also significant to note that Art. 51 (c) treats both International Customary Law and Treaty Obligations on the same bases.

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<sup>1</sup>Ved P Nanda “ *International Environmental Norms*”- *International environmental norms applicable to nuclear activities, with particular focus on decisions of international tribunals and international settlements.*- *Denver Journal of International Law and Policy* › Vol. 35 Nbr. 1, December 2006, (186-7 pp49-50)

<sup>2</sup> Jagdish S. Halashetti, and Dr. Ramesh- *The Status of International Law under the Constitution of India*- <http://www.legalindia.in/the-status-of-international-law-under-the-constitution-of-india-June-2010>

<sup>3</sup>C.H. Alexandrowicz, ‘*International Law in India*’, ICLO (1952), p.292.

The Article 53: Executive Power of the Union:“(1) The Executive Power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him accordance with this Constitution.”

The Article 253: Legislation of giving effect to International Agreements -“Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the Territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any International Conference, Association or Other body.”

Under Article 53 the executive power of the Union vests with the President of India. It is pertinent to note here that the President acts under the aid and advice of the Union Cabinet.<sup>4</sup> Under Article 73, the executive power of the Union extends to all matters in respect of which parliament may make laws and to exercise of all powers that accrue to the Government of India from any International Treaty or Agreement. It is also important to note here that executive power has to be exercised in accordance with Constitution and the laws. Article 253 confers power on Parliament to make any law for the whole or any part of the country to give effect to any International Treaty, Agreement, Convention or decision.

Though signing and ratifying an international treaty is within the domain of the executive, implementation of such treaty falls under the domain of Parliament as explicitly provided under Article 253. Further it is to be remembered here that under Article 51, India commits itself to make endeavor to ‘foster respect for international law and treaty obligations’. Thus in the Constitution, International Treaties can be legally enforceable in India only when Parliament enacts an enabling legislation incorporating it under the domestic system. This attitude is also fortified by the fact that India continues to act under the influence of Common Law system accepted during British rule and continued even after the coming in to force of the Constitution<sup>5</sup>

The Supreme Court of India viewed that - “The effect of Art 253 is that if a treaty, agreement or convention with a foreign state deals with a subject within the competence of state legislature, the parliament alone has, notwithstanding Article 246(3), the power to make laws to implement

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<sup>4</sup> Article 74 of Constitution of India, 1950

<sup>5</sup> Article 372 of Constitution of India 1950

the treaty, agreement or convention or any decision made at any international conference, association or other body.”<sup>6</sup> And in other case the Constitution Bench of the Supreme Court observed -“A treaty entered in to by India cannot become law of the land and it cannot be implemented unless parliament passes a law as required under Article 253. The executive in India can enter in to any treaty be it bilateral or multilateral with any other country or countries”.<sup>7</sup>

The importance of putting Article 253 in the Constitution over and above the entries in List I of the Seventh Schedule was to clarify beyond doubt that for implementation of an international treaty, agreement or covenant or to give effect to a decision taken at an international forum, the Union Parliament could make any law irrespective of some items in the State List being attracted. Thus, the distribution of legislative powers between the Union and the States under the Constitution cannot come in the way of international law obligations being implemented through parliamentary law. The fact however is that the parliament has not so far made any law on treaty making powers and until that is done, the power of the executive in the matter of treaty-making shall remain unfettered.<sup>8</sup>

What is important to note here is that the common law treats International custom as part of municipal law unless it is inconsistent with municipal law in which case municipal law prevails over international law<sup>9</sup> and Article 372 sustained all the pre-constitution ‘laws in force’ until altered, repealed or amended except that all those laws that were repugnant to any provision of the Constitution were declared to be void. The importance of this provision here lies in the fact that continuance of “laws in force” means continuance of the British Common Law also as that was applied by courts in India in the pre-constitution period<sup>10</sup>.

Adopting a federal model, the Constitution of India provides for distribution of power between the centre and state. Article 246 has reference to the legislative and executive powers of centre

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<sup>6</sup> *Magnabhai Ishwarbhai Patel v. Union of India*-(1970) 3 SCC 400; AIR 1969 SC 783

<sup>7</sup> *State Of West Bengal vs Kesoram Industries Ltd. And Ors* 2004- Appeal (civil) 1532 of 1993 R.C.Lahoti, J. and S.B.Sinha, J.

<sup>8</sup> Dr. Subash C. Kashyap, *Constitutional Law of India*, pg22 Universal Law Publishing Co. Pvt. Ltd.: New Delhi, 2008.

<sup>9</sup> *Chung Chi Cheung v. R. A.C.* (1939), 160 at y 168 see also Gurdip Singh, ‘Status of Human Rights Covenants in India’, *IJIL*, p216

<sup>10</sup> *Ibid* - pg 29

and state respectively. Under Schedule VII of the Indian constitution, the list I confer power on the centre regarding atomic energy and mineral resources necessary for its production (entry 6) industries (entry 52) and regulation of mines and mineral development to the extent necessary and declared by Parliament to be in public interest (entry 54). The centre also has residual power in the sense that if an item were not listed in any of the three lists, the centre would have power to regulate such matters (entry 97). There are some entries in list II (which deals with the powers of the states) through not directly on atomic energy but having a bearing on atomic energy. These incidental matters are public health and sanitation (entry 6). Regulation of mines and mineral development subject to the power of the power of the Union (entry 23) and industries (subject to the power of the Union) (entry 24).

The concurrent list III refers to matter on which both the Union as well as state has the power ultimate power vesting on the Union. The matters that are pertinent to nuclear energy are electricity (entry 38) forest (entry 17 A) economic and social planning (entry 20) etc. Besides Article 246, it is worth mentioning are Article 249 which empowers the Union to legislate in respect to matters in the State list in the national interest and Article 252 under which Parliament may make any legislation for the state by consent of the state concerned and the same may be adopted by the other states.

All nuclear activities and not just those confined to nuclear weapons, are cause for serious concern because of their potential threat and harm. The April 1986 Chernobyl accident, the worst industrial disaster ever, has alerted the international community, that nuclear power plants pose a grave danger not only to the region in which they are located but to distant lands, as well.

Chernobyl has also sharpened our awareness of what severe ecological and health impacts an unintended release of radiation can have on such vast geographical area.<sup>11</sup>

Listed below are some of the Acts and Rules pertaining to Nuclear energy in India, but only The Atomic Energy Act of 1962 has been discussed below in detail for circumscribed understanding of the Nuclear Law in India.

#### 1. The Atomic Energy Act, 1962

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<sup>11</sup>*Ved P Nanda- International Environmental Norms Applicable to Nuclear Activities: Updating International Nuclear Law / ed. by Heinz Stockinger ... [et al.] Publisher Wien : Graz Year 2007 Pages 185-203*

2. Atomic Energy (Working of the Mines, Minerals and Handling of prescribed substances) Rules, 1984
3. Atomic Energy (Safe Disposal of Radioactive Wastes) Rules, 1987
4. Atomic Energy (Factories) Rules, 1996
5. Radiation Protection Rules, 2004
6. Civil Liability for Nuclear Damage Act 2010
7. Notification of Civil Liability for Nuclear Damage Rules 2011

### **1) The Atomic Energy Act, 1962**

The establishment and regulation of the nuclear energy regime in India has largely been effected through the provisions of the Atomic Energy Act, 1962 ('1962 Act' hereinafter). Although the essential scope of this enactment has been to facilitate the development of atomic energy, the range of the regulatory arm of this enactment is much longer and broader to include any activity that relates to or involves a radioactive substance. In other words, any substance, whether a material or a mineral that could be regarded as radioactive substance, could come under the purview of this enactment. The precursor to the 1962 Act has been the Atomic Energy Act, 1948, a legislation enacted soon after India's independence by the Assembly.

This also shows the urgency and the perception with which the immediate political establishment of post independent India sought to locate the development and use of nuclear energy. The 1948 enactment envisaged the constitution of an Atomic Energy Commission (AEC). The Department of Atomic Energy was established in 1954. The 1962 Act replaced the 1948<sup>12</sup> enactment. This enactment essentially provides for the "development, control and use of atomic energy for the welfare of the people of India and for other peaceful purposes and for matters connected therewith"<sup>13</sup>. The Act came into force from 15<sup>th</sup> September-1962.

The Act is to provide for the development, control and use of atomic energy for the welfare of the people of India and for other peaceful purposes and for matters connected therewith. Under the Act, the Central Government is required to prevent radiation hazards, guarantee public safety

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<sup>12</sup> Repealed vide Section 32 of the 1962 Act.

<sup>13</sup> Preamble to the Atomic Energy Act, 1962

and safety of workers handling radioactive substances and ensure the disposal of radioactive wastages. The Act provides the Centre the authority to regulate nuclear research, the manufacture and to transport the radioactive substances along with production and supply to generate nuclear energy.

Section 2 defines "atomic energy" as energy released from atomic nuclei as a result of any process, including the fission and fusion processes; "fissile material" means uranium-233, uranium-235, plutonium or any material containing these substances or any other material.

The clause (h) under the section 2 of this Act ,provides the meaning of "radiation" rays that includes gamma rays, X-rays, and rays consisting of alpha particles, beta particles, neutrons, protons and other nuclear and sub-atomic particles, but not sound or radiowaves, or visible, infrared or ultraviolet light and that "radioactive substance" or "radioactive material" means any substance or material which spontaneously emits radiation in excess of the levels prescribed by notification by the Central Government. And section 16, provides the Control over radioactive substances. The safety provision on mining, treatment, storage, or use and disposal are dealt under section 17 of the Act.

General powers of the Central Government are discussed under section 3 of the Act and states that the Central Government has powers to manufacture, to produce, develop, use and dispose of atomic energy either by itself or through any authority or Corporation established by it or a Government company and carry out research into development or use of atomic energy.

The 1962 Act places all activities to do with nuclear energy under the sole authority of the chairman of the AEC. This includes initiating, executing and promoting atomic energy, controlling its exploration, planning and manufacturing all atomic material and any related hardware in India, and all nuclear research and developmental activities. Section 3 of the 1962 Atomic Energy Act confers power concerning nuclear energy on Central Government, including: (c) to declare as "restricted information" any data not so far published or otherwise made public relating to -

(i) the location, quality and quantity of prescribed substances and transactions for their acquisition, whether by purchase or otherwise, or disposal, whether by sale or otherwise;

- (ii) the processing of prescribed substances and the extraction or production of fissile materials from them;
  - (iii) the theory, design, construction and operation of plants for the treatment and production of any of the prescribed substances and for the separation of isotopes;
  - (iv) the theory, design, construction and operation of nuclear reactors; and
  - (v) research and technological work on materials and processes involved in or derived from items (i) to (iv);
- (d) to declare as "prohibited area" any area or premises where work including research, design or development is carried on in respect of the production, treatment, use, application or disposal of atomic energy or of any prescribed substance.<sup>14</sup>

Under the section 18 the "restricted information" is discussed including the location, the processing of fissile materials and the theory, design, construction and operation of plants for the treatment. The provisions for control over radioactive substances or radiation generating plant are mentioned.

The Central Government, under section 5 exercise controls over mining or concentration of substances containing uranium and any such concentrations need to be disclosed to the central government and the Central Government may by notice in writing restrict the mining or comply with terms and conditions for mining. Disposal of Uranium, under section 6 is carried out by the Central Government through prescribed notification. Any person authorized by the Central Government may, enter any mine, premises or land under section 8 and has the Power to conduct inspection and retain possession thereof for a period not exceeding seven days.

Section 10 and 11 provides for compulsory acquisition of rights to work minerals, including the right to and occupy the surface of any land for the purpose of erecting any necessary equipment, buildings and installing any necessary plant.

Whenever the Central Government acquires, in accordance with any law, any mine or part of a mine, a compensation in respect of such acquisition shall be paid in accordance with section 21,

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<sup>14</sup> See the Atomic Energy Act 1962



but in determining the amount of such compensation, no account shall be taken of the value of uranium which may be obtained from such mine or part of a mine.

Section 20 denies any person or organization not authorized by the AEC the right to invent or to patent anything which the AEC believes to be relates to atomic energy and Section 21 (5) gives the AEC absolute authority over any legal or formal arbitration<sup>15</sup>.

The section 23 of the Act states the authority to administer the Factories Act 1948; the Central Government can establish and own any factory and establish with corporation or by itself as a Government Company. The section 24 sates about Offences and Penalties for contravenes of any rules which includes be punishable with imprisonment for a term which may extent to five years, or with fine, or both. Delegation of power is discussed under sections 27, to State Government or such officer or authority subordinate to a State Government as may be specified. The Central Government under 30 section of this Act has Power to make rules related regulating by licensing, compulsory acquisition of mines and plants, regulating the production, import, export, transfer, refining, possession, ownership, sale, use or disposal of material.

The nuclear establishment in India is protected by the Atomic Energy Act of 1962, but this policy framework is unjustified for a civilian nuclear sector devoted to generating electricity. Under the provisions of the Act, the government is permitted to deny information to citizens requesting details of nuclear power plants or nuclear material being used for research or industrial purposes. In line with this, the DAE does not proactively disclose details of safety measures at nuclear power plants, or of accidents which may occur. Requests for these details from DAE are more often than not denied citing sections 8 and/or 9 of the Act.

The 1962 Act, as stated above, is a framework legislation providing, inter alia, broad areas for regulation specifically of the use and development of radioactive substances. Section 30 of the 1962 Act itself specifies areas in which rules and regulations are needed. If one looks at these broad areas it is clear that these rules and regulations are necessary for effective implementation and operation of the 1962 Act<sup>16</sup>.

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<sup>15</sup> *Ibid*

<sup>16</sup> *Section 30 (4) requires that each rule made under the 1962 Act be laid before the Parliament.*

But, there are restrictions on information and rules that prescribe measures to guard against unauthorized dissemination or use of such restricted information; declaring any area as prohibited area and prescribing measures to provide against unauthorized entry into or departure from this area; reporting of information relating to the discovery of uranium, thorium and other prescribed substances and payment of rewards for such discoveries; control over mining or concentration of substances containing uranium; regulating by licensing and encouraging by award of concessions including rewards, floor prices and guarantees, mining and prospecting for other prescribed substances; compulsory acquisition of prescribed substances, minerals and plants; regulating the production, import, export, transfer, refining, possession, ownership, sale, use or disposal of the prescribed substances and any other articles that in the opinion of the Central Government may be used for, or may result as a consequence of the production, use or application of atomic energy<sup>17</sup>; regulating the use of the prescribed equipment<sup>18</sup>; regulating the manufacture, custody, transport, transfer, sale, export, import, use or disposal of any radioactive substance; regulating transport of such prescribed substances as are declared dangerous to health developing<sup>19</sup>, controlling, supervising and licensing the production, application and use of atomic energy; fees for issue licenses; manner of serving notices etc. and promoting co-operation among persons, institutions and countries in the production, use, application of atomic energy and in research and investigation in the field.

Energy law has its origin in environmental law and is closely linked to development law. We have a well established body of international law rules pertaining to nuclear. Every state has an obligation to structure its nuclear law so as to be in harmony with those principles of International law- both treaty and customary rules. Development compulsion and ecological

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<sup>17</sup> For the definition of what is a 'prescribed substance' (which is very often used in the 1962 Act and rules framed) see Section 2 (g) of the 1962 Act according to which "any substance including any mineral which the Central Government may, by notification, prescribe, being substance which in its opinion is or may be used for the production or use of atomic energy or research into matters connected therewith, and includes uranium, plutonium, thorium, beryllium, deuterium or any of their respective derivatives or compounds or other materials containing any of the aforesaid substances".

<sup>18</sup> For the definition of what constitutes a 'prescribed equipment' see Section 2 (f) of the 1962 Act according to which, "any property which the Central Government may, by notification, prescribe, being a property which in its opinion is specially designed or adapted, or which is used or intended to be used for the production or utilisation of any prescribed substance, or for the production or utilisation of atomic energy, radioactive substances, or radiation, but does not include, mining, milling, laboratory and other equipment not so specially designed or adapted and not incorporated in equipment used or intended to be used for any of the purpose aforesaid"

<sup>19</sup> See Section 17 (2) of the 1962 the Act

needs must be balanced mutually and with aspiration of the people. It is in this background that Indian nuclear law has been appreciated. Legislation have tried to strike a balance between the desirability of monopoly of state in atomic energy and the need for private initiative in core development and ecological, protection while paying attention to the health needs and rights of the workers. New scientific technologies involving nuclear radiation for diagnostic and therapeutic purposes and for preservation of food pose new challenges to the legislation and require a proactive role on the part of the successive government.