ENVIRONMENTAL JURISPRUDENCE IN INDIA WITH REFERENCE TO INITIATIVES OF SUPREME COURT FOR ENVIRO-SOCIAL JUSTICE

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ABSTRACT

The legislative and executive efforts have been notable over the past two decades towards including the Principles of Environmental Protection in the Legal Jurisprudence in India—most notably the 46th Amendment to the Constitution of India in 1976 which explicitly laid down Environmental Protection as a part of the Constitutional Mandate and the enactment of the Environment Protection Act of 1986. Though there have been initiatives taken by the Legislature and the Executive, the Judiciary has taken a lead in this race through careful judicial thinking of the Supreme Court which has been providing more tools both qualitative and quantitative to deal with issues related to Environmental Protection. Due to non-compliance of its own laws by the State machinery, the Judiciary invented a new method of Judiciary-driven implementation of the regulations in India. The courts have also done their share by liberally interpreting the various provisions of the Constitution and other statutes towards ensuring social justice. The ‘Green Bench’ of the Supreme Court developed the Principles of Absolute Liability and Sustainable Development under the broad ambit of environmental considerations as well as innovative techniques like Spot Visits (whereby Judges visit to see the situation first hand) and Expert Committees. These innovations can be classed under two heads—Implementation of Court Directions and Interference in the Working of the Executive.

There are nevertheless lacunas in every mode of judicial operation and they are to be highlighted and the author proposes to study whether the faith reposed by the Indian population on the Indian Judiciary has been justified in the past and whether and to what extent can we expect the Judiciary to fulfill the needs of Environmental Jurisprudence in India in the future.


INTRODUCTION

Environmental Law is a developing branch of law in India and has not yet established its roots firmly in the soil of the Indian judicial system though we can definitely say that such roots have struck water. This growth is conspicuous by the remarkable activism on part of the judiciary and the legislature in the latter part of the 20th century. A large number of socio-economic problems faced in the nation were discussed by the courts in various cases over a broad range of issues which cropped up from time to time, with the eventuality that old laws
were sharpened to meet the changing societal needs. New laws were framed to meet the emerging challenges—the Environment Protection Act of 1986 being a watershed.

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MATERIAL AND METHODS

The methodology adopted by the researcher is mainly doctrinal in nature due to the nature of the study at hand whereby books and journals have been used extensively by the author to examine the subject at length and to conduct a discourse on it. It might be interesting to note at this juncture that the scope of this research paper shall be restricted to examining the socio-economic needs of the people in the Indian Sub-continent only; as a result of whom the materials shall be restricted to such narrow scope as well.

RESULTS AND DISCUSSION

The Supreme Court has contributed to the environmental jurisprudence in India through a two pronged approach of interpreting the Constitution and laying down dicta to protect the environment and also through innovating in the processes of enforcing these protections such that they do not remain empty promises.

In the first part of the discussion we shall look at the dicta of the Supreme Court. One of the first steps taken by the Supreme Court of India was the incorporation of the right to a pollution free environment—to water and air—for full enjoyment of ‘life’ in the list of rights guaranteed to an Indian citizen under the expandable vision of Article 21 of the Constitution. This was done by taking the balancing interest approach to the interpretation of the Constitution in the Subhash Kumar v. State of Bihar.1

Another innovation has been the development of the “Absolute Liability” Principle in the case of M. C. Mehta v. Union of India2 where Justice Bhagwati laid down a stricter principle of law than the principle of strict liability in the sense that all the exceptions to the Ryland’s v. Fletcher rule were not held applicable in this particular principle applicable to enterprises engaged in hazardous activities and the size of the industry determined the amount of compensation payable by it. The transition has been said to be constitutionalism of the tort law4.
The concept of sustainable development has been introduced in the Indian judicial scenario by the judges of the Supreme Court including such international principles in the context of the development that was necessary in the view of the developing economy that India was and to a certain extent still is. In M. C. Mehta v. Union of India the Supreme Court even went so far as to say that life, public health and ecology is entitled to a priority over unemployment and rural poverty. One of the earliest cases where the Supreme Court dealt with the concept of inter-generational equity was in the case of Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh where the question that arose was regarding illegal and unauthorized mining damaging and destroying the local environmental system and causing ecological imbalance. The Apex court held that some assets are permanent and should not be exhausted in one generation and also opined that environmental protection and maintaining ecological balance should be placed on the same standing as economical development of the economy. The Court after much deliberation ordered the mining work to stop and held that although this would cause economical loss to the laborers but this was a price that had to be paid for protecting and safeguarding the rights of the people to live in a healthy environment with minimal disturbance of the ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affection of air, water and environment.

Of the judges who constituted the so-called ‘Green Bench’ in the Supreme Court at that period of time, a note-worthy mention might be made of Justice Kuldip Singh who delivered the judgment in the Vellore Citizens Forum v. Union of India case whereby the concept of sustainable development was applied for the first time in an Indian case. J. Singh had observed in his judgment that ecological protection and economical development should not necessarily be seen as radically opposite to each other, rather the answer to the balance should lie in sustainable development. With this judgment this principle was adopted to incorporate a customary international law in the Indian environmental jurisprudence. This shows that the Indian Judges not only interpret law but also make laws by continually drawing on the wealth of laws developing on the international scenario and incorporating such fresh and important principles in the Indian jurisprudence to gradually expand the plethora of laws available in India to cover any given environmental issue.

An important off-shoot of the concept of sustainable development has been that of the ‘Polluter Pays’ Principle. It started as a principle in International Environmental Law where the polluting party pays for the damage done to the natural environment. This principle favors a curative approach which is concerned with repairing ecological damage, and is not as bothered with the idea of fault. Once a person is seen to be guilty, such person is liable to compensate for such acts irrespective of the fact as to whether he was involved in the development process or not. Remediing the damaged environment is part of the process of “Sustainable Development” and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. The judiciary in India recognized the Principle in the judgment delivered by the Supreme Court of India in Indian Council for Enviro-Legal Action v. UOI & Ors. The Court held that “The Polluter Pays Principle means that absolute liability of harm to the environment extends not only to compensate the victims of pollution, but also to the cost of restoring environmental degradation. Remediation of damaged environment is part of the process of sustainable development.”
In this case a number of private companies operating as chemical companies were creating hazardous wastes in the soil and polluting the village area situated nearby without the required licenses. The Court ruled on the PIL that "Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on'. Consequently, the polluting industries were held to be absolutely liable for the harm caused by them to villagers in the affected area, etc and they were ordered to take all necessary measures to remove sludge and other pollutants lying in the affected areas. The "Polluter Pays” principle as interpreted by the Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation.

Thus, we see that the Courts have been carrying out the majority of the work as the legislative initiative on these pertinent and contemporaneous matters have been few and far in between. Some critics have termed it as a facet of the judicial activism on part of the Supreme Court in not waiting for such laws to be passed or such international obligations to be ratified by India and instead making laws of its own initiative. But as Justice Ahmadi has put it finely: “When the derelictions of constitutional obligations and gross violations of human rights are brought to the notice of the Supreme Court, it cannot be expected to split hairs in an effort to maintain the ‘delicate balance’ of power between the wings of Government; it must act and act in a positive manner that will provide relief, which is real and not illusory, to the parties who exercise their fundamental right in invoking its jurisdiction”10.

To come to the second aspect of the discussion as to the initiatives taken by the Supreme Court we shall turn to the concept of Public Interest Litigation (PIL) and how it has been used to relax the traditional system of locus standee whereby when a third party approached a court for seeking relief against an injury which they did not occur themselves, the court would focus attention on the standing of the petitioner to ask for such relief instead of the subject of the petition itself. But now the Court’s approach has changed and it has ruled that any member of the public having sufficient interest may be allowed to initiate the legal process in order to assert diffused individual rights. Generally, in environmental litigation, the parties affected by pollution are a varied and unidentified mass of people. By allowing for third parties to intervene and file cases, the Courts broke the first barrier in the path of effective environmental litigation in India. We will see that most of the cases decided by the Supreme Court have been initiated by third parties like NGO’s or environmental activists on part of the affected people.

Also the remedies provided by the Supreme Court have been improvised over the environmental litigations such that in cases where the offenders could not be brought to book by traditional methods, the Court has devised new methods to bring them to task. For example in the case of M.C. Mehta v. Union of India11, where a petition was filed against the tanneries in Kanpur and the Kanpur Municipal Corporation to stop polluting the River Ganga, the Court published notices in leading national newspapers calling all tanneries with wastes flowing into the river in any part of India to make a representation before the court.
Similarly in the case of T. N. Godavarman v. Union of India\textsuperscript{12}, the petitioner filed to protect the rich forests in the Nilgiris from indiscriminate and illegal timber felling in the region—but the Supreme Court expanded the petition to formulate a change in the existing forest policy in India itself.

Another important development in the environmental jurisprudence has been the personal interest shown by the Judges in getting first hand knowledge about the environmental problems at hand by visiting the place themselves. The spot visits enable the judges to see the real situation first hand and more resounding decisions. This method has been resorted to by Judges like J. Barucha, J. Bhagwati, J. Krishna Iyer. The latter was among the first to pay a spot visit in the case of Ratlam Municipality v. Vardichand,\textsuperscript{13} where he visited Ratlam town to assess the problem for himself and then directed the concerned authorities to take necessary steps. Sometimes though judges cannot change the course of a judgement but even then their dissenting voices may represent a sizeable section of the population. An example of this would be Justice Barucha’s dissenting opinion in Narmada Bachao Andolan v. Union of India & Ors.,\textsuperscript{14} where he visited the dam site and expressed strong dissatisfaction with the rehabilitation packages doled out as well as the potential damage that might be caused to the environment.

An important development in the arena of environmental jurisprudence came about with the 186\textsuperscript{th} report of the Law Commission of India whereby the Commission undertook to study the environmental issues at a call by the Supreme Court for the same. In it the Commission recommended the setting up of a separate branch of Environmental Courts in each State which courts would consist of 3 members who were either sitting/retired Judges of a High Court or had 20 years of experience as member of the Bar—with preference being given to member who had previous experience in environmental issues. Each court would also to have an independent panel of ‘commissioners’ who would tender their opinion and expertise on environmental matters and would necessarily be environmental experts. The courts will have all powers of ordinary courts of law barring the constitutional power of issuing writs.

But there have been many criticisms of the formation of these Green Courts, the major one being that the independence of these courts would be compromised because they would be nothing more than statutory tribunals formed under a statute, rather they should have been made a branch of the High Courts. An argument as to why the Green Courts have been formed at all in the first place is the argument that the Constitutional Courts do not have the required expertise to deal with scientific issues. Another issue with these courts has been the exclusion of environmental activists from the panel as well as the limited scope for public participation in the adjudicatory process.\textsuperscript{15}

\textbf{CONCLUSION}

In India the judges have been very conscious of the problem of environmental issues because of the non-recoverable nature of the environmental components. The added factor that contributes to a continued flow of jurisprudence is the ultimate aim of the Indian Constitution at a welfare state. The development of environmental jurisprudence in India is obliged to the Apex Court for the progress it has achieved till date, for it is through the sensitivity of the ‘Green Judges’ that a number of environmental issues have been addressed as well as the legislative
incompetency to provide sufficient legislations or the executive apathy to implement such existing rules however skeletal they might be. As has been stated if laws were all that were required to keep India clean, then it would be the most pollution free country in the world—but unfortunately it is not so. For achieving the consciousness at the grass roots level it is imperative to spread information and educate the public at large of the concerned environmental laws, constitutional rights and obligations as well the landmark judgments' given by the Supreme Court to expand the scope of environmental jurisprudence in India.

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