

INDIAN JUDICARY AND ENVIRONMENTAL LAW

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Environmental protection is the practice of protecting the natural environment on individual, organizational or governmental levels, for the benefit of both the environment and human beings. A major element of environmental protection is sustainable development and India has always upheld and highlighted the importance of economic development without depletion of natural resources. Environmental law is undoubtedly one of the main pillars of environmental protection, but after many decades it is still suffering in most of the world from implementation. As it has been rightly noticed “almost all nations, including developing ones, have basic environmental protection laws in place, but an enormous gap exists between the letter of the law and what is actually happening on the ground. Through this article we endeavour to discuss the role played by the Indian Judiciary in protecting the environment, the various judicial remedies available to the citizens, including tortious and statutory remedies. The importance of the 42nd Amendment to the Constitution, the role of Public Interest Litigation and the different principles of environmental protection evolved by the judiciary have also been enumerated herein. The article also briefly discusses the shortcomings of judicial activism in India and also attempts to suggest effective and practical methods to combat the same.

INTRODUCTION

“We do not inherit the earth from our ancestors; we borrow it from our children.”

What this quote essentially states is that we should never take the earth and the environment for granted. It is not ours to exploit. We have borrowed it from our future generations and have the duty to return it to them unchanged. This idea is the very basis of the concept of Sustainable Development. The idea of sustainable development and environmental protection is not new. Ancient Indian scholars have from time immemorial stressed on the significance of conserving and protecting our environment. Kautilyan Jurisprudence for instance stresses on the need to maintain forests and prevent the cutting of trees. It is the dharma of each individual in the society to protect nature.

Modern day concepts of Environmental Protection are embodied in the various legislations that

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we have today, such as the Environmental (Protection Act) 1986, The Water (Prevention and Control of Pollution) Act 1974, The Air (Prevention and Control of Pollution) Act 1981 and the like. However, despite the various laws, pollution and environmental degradation remain a stark reality in India and around the world. As per an article published by the Hindustan Times in 2015, out of the 20 most polluted cities in the world, 13 are situated in India. Ganga and Yamuna are ranked among the 10 most polluted rivers in the world. A three-year analysis of the water quality in 290 rivers by the Central Pollution Control Board said about 66% of the stretches monitored had high organic pollution.¹ Today the statistics have without an aorta of a doubt soared, thereby only further confirming that the need of the hour is to combat this issue effectively.

JUDICIARY AS AN EFFECTIVE TOOL

Judicial action is one of the many tools to bring about environmental improvement, and an effective tool in that sense. The effectiveness arises from many factors such as the fact that judges are non-specialists who are relatively insulated from the political process. Judges also have a broad vision of national policies and interests. Moreover, since judges are not involved in electoral politics, they may be more willing than the other wings of the government to take unpopular decisions that are beneficial in the long run. Another feature of the judiciary is that it frequently compels the defendant project authorities to increase environment-related spending.² Over the years, the High Courts and the Supreme Court of India, have seized opportunities presented by cases to protect the environment and have embarked on complex administrative exercises. One such example is the *Ganga Pollution Case*³, a massive judicial effort to help clean the river Ganga.

¹ Chetan Chauhan *13 out of world's top 20 polluted cities in India, only three in China*, <http://www.hindustantimes.com/india/13-out-of-world-s-top-20-polluted-cities-in-india-only-three-in-china/story-myTrPZM8DHmQOhxB9cc5hI.html>

² Shyam Divan, Armin Rosencranz, *Environmental Law and Policy In India*, Second Edition, Oxford India Paperbacks

³ *M.C Mehta v Union Of India*, 1988 SC 1037

JUDICIAL REMEDIES

Judicial remedies include both tortious remedies as well as statutory remedies. Actions brought under tort law are among the oldest of the legal remedies to abate pollution, such as nuisance, negligence and strict liability. Perhaps the deepest doctrinal roots of modern environmental law are to be found in the common law doctrine of nuisance. The law of torts recognizes two categories of nuisance, private nuisance and public nuisance. The first reported case of environmental pollution in India is *J.C Galstaun v. Dunia Lal Seal*⁴ in which the defendant factory was held guilty of causing nuisance by discharging foul smelling and noxious effluents into the drains. Where there is a failure of the duty to take care and this result in environmental pollution, a suit can be filed for the tort of negligence. In other words, when a particular duty is supposed to be carried out by a person and this duty is not performed, it amounts to actionable negligence.⁵ The English rule of 'strict liability' has been followed in India and has been applied to cases of environmental protection. A person, who keeps any intrinsically dangerous thing on his land, is liable if such thing escapes and causes loss or damage to others. The concept of absolute liability was evolved by Chief Justice Bhagwati in *Shriram Gas Leak Case*⁶, which is a stricter doctrine when compared to strict liability and none of the defences or exceptions to the Rule in *Rylands v. Fletcher*⁷ can be invoked in such cases. In order attract tort law; one must prove that it is actionable under the same by establishing special damage or injury. This means, no preventive action may be sought for fear of damage.

Statutory remedies on the other hand include an action under Sec.133 of Criminal Procedure Code. It is a speedier and more effective remedy to control environmental pollution. Under Sec.133, the Magistrate can in certain cases pass a conditional order directing the offender to remove the public nuisance which is causing the pollution. Sec.133 can be invoked against statutory bodies like municipal corporations and other government bodies if they are guilty of any act or omission which causes environmental pollution or any other public nuisance. The jurisdiction of the Magistrate can be invoked even if the individual has an alternate remedy in

⁴ 1905 9 CWN 612

⁵ *Mukesh Textile Mills v. Sastri*, AIR 1987 Kar 87

⁶ 1987 AIR 1086

⁷ UKHL 1, (1868) LR 3 HL 330

law. Action may also be brought under Sec.268 of the Indian Penal Code, 1860, against a person causing public nuisance. Although any citizen can initiate a prosecution under Sec.268 of IPC by a complaint to the Magistrate, the biggest minus is that the Magistrate can order a fine of Rs.200 only.

Apart from this, a writ petition can be filed under Article 32 in the Supreme Court of India or under Article 226 in the High Court. The writs of Mandamus, Prohibition and Certiorari are involved in environmental litigation. Mandamus is effective when an authority is vested with certain powers and wrongfully refuses to exercise such powers, as when a municipality fails or neglects to take action against a polluting industry. The writ of certiorari and prohibition are issued inter alia when an authority acts in excess of its jurisdiction or in violation of the principles of natural justice or commits an error which is apparent on the face of the record, as for instance, when a factory is permitted to be constructed on a plot reserved for a garden.

The Indian judiciary has shown its support to environmental protection and sustainable development in various cases and has opined that the “society has to prosper but not at the cost of the environment and in a similar vein, the environment has to be protected but not at the cost of development of the society- there shall be both development and proper environment and as such a balance has to be found.”⁸ The 42nd Amendment of 1976 introduced the Fundamental Duty under Article. 51A(g) and the Directive Principle of State Policy under Article 48. They emphasized on the duty of the state and the citizens to protect and improve the environment, including forests and wildlife and to have compassion to all living creatures. Though the 42nd Amendment brought the environmental aspect into the Constitution, it was the landmark case in 1978, *Menaka Gandhi v Union of India*⁹ that the Apex Court transformed Article 21(Right to life and personal liberty) of the Constitution as the baseline of all Fundamental Rights. The judiciary has interpreted in various cases that Right to life includes the Right to live in pollution free, salubrious and decent environment.¹⁰

⁸ Goa v. Diksha Holdings Pvt Ltd, AIR 2001 SC 184

⁹ AIR 1978 SC 597

¹⁰ M.C Mehta v. Union of India, 1988 1 SCC 471

ROLE OF PUBLIC INTEREST LITIGATION

Public Interest Litigation has had a profound effect on the development of environmental law in India. PIL allows any bona fide person to take a matter of public interest to the higher judiciary, even when the person who is supporting the cause is not personally or directly affected by the interest that is being brought to the courts. In *Rural Litigation and Entitlement Kendra vs. State of U.P*¹¹ the Supreme Court prohibited continuance of mining operations terming it to be adversely affecting the environment. In the landmark case *Vellore Citizens' Welfare Forum vs. Union of India*¹² the Supreme Court allowed standing to a public spirited social organization for protecting the health of residents of Vellore. In this case the tanneries situated around river Palar in Vellore (T.N.) were found discharging toxic chemicals in the river, thereby jeopardising the health of the residents. The Court asked the tanneries to close their business.

These PILs have given the judiciary enormous scope for intervening in environmental matters.¹³

PIL has proved to be a great weapon in the hands of higher courts for protection of environment & our judiciary has certainly utilized this weapon of PIL in best possible manner.

PRINCIPLES OF ENVIRONMENTAL PROTECTION

From the early 1980s, there have been numerous judgments where the Indian courts have shown active concern on environmental issues. From the *Ratlam Sanitation Case*¹⁴ to the *Taj Mahal Case*,¹⁵ there have been numerous judgments addressing pressing environmental concerns. Through these cases, the courts have propounded various doctrines, such as the Polluter Pays Principle, Public Trust Doctrine and the Doctrine of Intergenerational Equity to name a few. According to the Polluter Prays Principle, the cost of remedying the damage done to the environment should be borne by those causing the damage. The polluter must not only compensate the victims but also bear the costs for reversing the damage caused.¹⁶ As stated in

¹¹ AIR 1985 SC 652

¹² AIR 1996 SC 2715

¹³ http://shodhganga.inflibnet.ac.in/bitstream/10603/76671/13/13_chapter%206.pdf

¹⁴ 1980 AIR 1622

¹⁵ M.C Mehta v. Union of India & Ors, 1997 2 SCC 353

¹⁶ Indian Council For Enviro Legal Action v. UOI, 2011 8 SCC 161

the Public Trust Doctrine, the State is the Trustee of all natural resources and the public is the beneficiary.¹⁷ Hence, it is the duty of the State to protect these natural resources and use them for the benefit of the public. The Doctrine of Intergenerational Equity is a major aspect of the Principle of Sustainable Development. All of us have the duty to protect the natural and environmental heritage of our country for the benefit of the future generations. All resources are to be shared in common by the three generations, the past, the present and the future.

ROLE OF THE NATIONAL GREEN TRIBUNAL

National Green Tribunal was set up under National Green Tribunal Act, 2010 with an aim to provide for the expeditious disposal of cases relating to environmental issues. According to Pring and Pring, “this model allows the court to manage a caseload where the number and complexity of environmental cases fluctuates, and still ensure that the workload of the court is spread evenly among all the judges. It does not require the public to file in a separate court, which may be in a different location, and it does not require special community education about what constitutes an environmental case. Nor does it necessarily require appointment of judges who are trained in or even interested in environmental law”.¹⁸

The protection of the environment, conservation of forests and other natural resources along with enforcement of legal rights remain the priorities of the NGT. It also seeks to provide relief and compensation for damages to persons and property. NGT since its inception have taken various steps in order to reduce the menace of pollution and other activities adversely impacting the environment. Some of the recent steps by the tribunal include order of banning diesel vehicles older than 10 years in the national capital along with ban on burning of solid waste. These steps have been taken owing to the rising pollution levels which is evident from the the list of most polluted cities where the national capital, Delhi stands on the top. Another notable action of the NGT is the establishment of the Yamuna Conservation Zone. The NGT said that the health

¹⁷ . ehta v. amal ath, (1997)1 SCC 388

¹⁸ G. Pring - C. Pring, Greening Justice, Creating and Improving Environmental Courts and Tribunals, The Access Initiative, available at : moef.nic.in/downloads/public-information/Greening%20Justice.pdf, 2009, p. 21.

of Yamuna will be affected by the proposed recreational facilities on the river. The NGT thus recommended the Government to declare a 52 km stretch of the Yamuna in Delhi and Uttar Pradesh as a conservation zone

METHODS TO COMBAT THE SHORTCOMINGS OF JUDICIAL ACTIVISM IN INDIA

The Indian Judiciary is able to form some strong foundation for environmental protection, but the developments brought about by judicial activism have been proven insufficient to bring satisfactory outcomes.¹⁹ According to a research conducted by Yale, The Environmental Performance Index, 2014 has bracketed India among the “bottom performers” on several environmental indicators including health impact, air, water and sanitation. Currently, the judiciary follows a three legged approach. The first of these can be described as a ‘pro-project’ approach wherein judges tend to emphasize the potential benefits of a particular project or commercial activity. The second approach can be described as that of ‘judicial restraint’ wherein judges defer to the determinations made by executive agencies and experts with regard to the environmental feasibility of a project. The third approach is that of rigorous ‘judicial review’ wherein judges tend to scrutinize the environmental impact of particular activities.

What is now needed as legal philosopher H.L.A. Hart describes is “voluntary cooperation in a coercive system.”²⁰ The polluters, including industrial giants and smaller factories should be coerced into voluntarily participating in the protection of our environment. This can be achieved by introducing small incentives, such as certain tax exemptions for factories complying with all environmental and safety standards, public acknowledgment and recognition of such factories and industries etc. Similarly, penalty must be imposed on the non-compliers. This can be in the form of fines or in extreme cases they may even be forced to stop their production activities. An interesting approach was adopted in Switzerland where bin bags (for municipal solid waste) are taxed with pay-per-bag fees in three quarters of the communes. This effect of this was that the recycling rate doubled in twenty years.

¹⁹ Mahajan Niyati, *Judicial Activism for Environment Protection in India*, (2015)
<http://www.isca.in/IJSS/Archive/v4/i4/2.ISCA-IRJSS-2014-327.pdf>

²⁰ HLA Hart, *The Concept of law*, 198(2nd edition), 1994

The judiciary must also endeavour to increase public awareness on environmental issues. The media being the fourth pillar of a popular government has always been successful in catching the attention of all sections of the society. Hence attempts must be made for the judiciary to join hands with the media. This might be in the form of organizing public awareness programs, street plays or even seminars.

There is also a need for regular inspections of factories and industries, to ensure that they are complying with the environmental standards laid down. Currently, reviews by Environment Impact Assessment Division of the Ministry of Environment, Forest and Climate change are in the nature of project summaries.²¹ There is a need to bring greater scientific and technical clarity to the same in order to ensure a comprehensive understanding. Strict action must be taken against the non compliers and offenders. These inspections should not be mere routine checks but should be taken seriously. There must be a mechanism by which the judiciary can be kept updated on these inspections and the subsequent results of the same. Judiciary can also pass orders directing agencies to computerise the tracking mechanism thus, ensuring greater transparency to the same. Date recorded must include- the inspection dates, observations, changes to be made and period within which such change should be made.

It is also necessary for Supreme Court Judges presiding the “Green Bench” to have a fair knowledge about environmental concerns. This shall be ensured by conducting training programmes with regards to environmental issues across the globe.

CONCLUSION

As Gaylord Elson, the founder of ‘Earth Day’ and former Senator of The United States rightly stated “*The ultimate test of man's conscience may be his willingness to sacrifice something today for future generations whose words of thanks will not be heard.*” Time has now come for the judiciary to act in higher conscience and put environment before economy to save our planet and secure a place of living for our future generations. But this cannot be achieved by the Judiciary alone. We as citizens must also recognize our duty to protect the environment and contribute to

²¹ Pranay Lal and Veena Jha , *Judicial activism and the environment in India. Implications for transnational corporations.* http://openarchive.cbs.dk/bitstream/handle/10398/6956/lal_judicial.pdf?sequence

this ambition in every small way we can. Let us set an example for our future generations and start living more responsible and environment conscious lives. Let us vow to make the earth a cleaner and healthier place for our children and children's children. Let us ensure the birds of the sky and fish of the sea have an equal right to safe and clean homes as we do. Let us join hands with the judiciary, the executive and the legislature and make the world a place worthy of life and living.

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