DEVELOPMENT OF INDIA'S GREEN CONSTITUTION

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Abstract

The constitution of India in its true and original sense does not recognise any "environmental right" as a "Fundamental Right". The problems of environmental protection are as old as the Homo sapiens on the planet. But due to increasing industrialization and technological development tremendous changes were observed in the environment, due to which environmental jurisprudence started to come more into focus. India is a country of rich traditions, and in our ancient traditions the concept of protection of environment was enriched. With participation of India in various International conferences on environment issues started the journey on environmental judicial activism in India paving the way to 42th amendment and many landmark judgements. In the paper the author will discuss the changes in the nature of judiciary towards environment issues. The dynamic interpretation of Article 21 and bring the concept of Right of environment under the umbrella of implied fundamental rights. And in the journey of environmental sensitivity the legislators imposed the duty on the citizens also to take part in the environment development and sustainability by adding Article 48-A and Article 51(A)(g).

KEY WORDS

42th amendment, Article 21, Environmental activism, Environmental sensitivity, Implied Fundamental Rights

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Introduction

Environmental rights were conspicuously absent from the original version of our constitution. The constitution of India was prominently dominated by individual and business rights giving no way to the environment issues. The constitution of India is set to turn green from the proposed 182nd report of Law commission of India[2] that resulted in the formation of National Green Tribunal of India for specialised disposal of environment cases. This proposal of the law commission of India has its roots in the call that emanated from the corridors of the apex constitutional court that is the, Supreme Court of India in numerous significant cases[3]. The Supreme Court has elevated the right to healthy environment to a status of implied fundamental right under Article 21[4] of the Constitution in the process of progressive enrichment of the environmental jurisprudence with the principles like sustainable development; polluter pays principle, public trust doctrine, precautionary principle and integration of equity. This extension of constitutional umbrella over environmental issues through dynamic judicial activism has argued well for environmental governance in India. The constitution of a green branch of judiciary to adjudicate environmental matters will be further significant step towards improving the quality of environment at a time where India has been caught in a tussle between development and sustainable issues. Providing a better accessible environmental rights and justice is the parts of international agenda highlighted I instruments like Rio Deceleration on environmental and Development, 1992 and the Aarhus Convention, 1998. These institutional changes carry a greater significance.

Towards Green Constitution

The environmental jurisprudence was unknown to the Indian Judiciary. The 42th constitutional amendment changed the landscape by introducing the Article 48-A[5] and article

[2] Law Commission of India, '186th Report on the proposal to constitute Green Courts in India', September 2003.
[3] *M.C.Mehta v Union Of India*, Supreme Court of India, Judgement of 17th February 1986, 2SCC 176,201-202, *Indian Council of Enviro Legal Action* v *Union Of India,* Supreme Court Of India, judgement of 13 February 1996 3 SCC 212,252,
[4] Article 2 reads as: protection of life and personal liberty – no person shall be deprived of his life or personal liberty except according to the procedure established by law.
[5] Article 48-A reads as- Protection and improvement of environment and safeguarding of forest and wildlife- The state shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country

51(A)[6](g) into this enviro myopic document. The role of Supreme Court of India came into picture after the landmark judgement in A.D.M Jabalpur v Shivkant Shukla.

Starting from early 1980s, the Apex Court started to take steps towards the development of "green constitution" of Inida to protect and safe guard the citizens' health from deleterious effects of environmental degradation. In M.C.Mehta v Union of India (oleum gas leakage case), the Supreme Court propounded the standard of 'absolute liability' for payment of compensation to those affected by the accident in case in industries engaged in hazardous or inherently dangerous activities as opposed to the prevalent notion of " strict liability" under the Rylands v Fletcher.

The court has adopted expanded views of "life" under Article 21 and enriched it to include environmental rights by reading it along with Article47, 48-A, and 51A(g) and declaring"

" Article 21 protects rights to life as a fundamental right, enjoyment of life and its attainment including their righto life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental, ecological, air, water, pollution, etc., should be regarded as amounting violation of Article 21[7]

Steps towards development of Greener Constitution

By 1990's it categorically declared that 'issue of environment must and shall receive the highest attention from this court'[8]. India's Green Constitution now guarantee a right to healthy environment, right to clean air, right to clean water, enjoins the State and its agencies to strictly enforce environmental laws[9] while disclosing information in respect of decision which effects health, life and livelihood and disallows inadequacy of funds and resource as a pretext for evasion of obligations by the States.

[6] Article 51(A) reads as- Fundamental Duties- it shall be the duty of every citizen of India (g) to protect and improve the natural environment including forests, lakes, rivers and wild life and have compassion for living creatures

[7] Virender Gaur &ors v State of Haryana & ors, Supreme Courts Of India

[8] Tarun Bharat Sangh,Alwar v Union of India, Supreme Court of India

[9] Indian Council for Enviro Legal Action v Union Of India Supreme Court Of India

Significant environmental principles like polluter pays, precautionary principle, sustainable development, public trust doctrine and intergenerational equity have become entrenched in the Indian Law without explicit incorporation in any legislative framework.

In Vellore Citizens' Welfare Forum v Union Of India& ors, the courts employed the ' precautionary principle to invent the special principle of burden of proof in environmental cases where burden as to ' the absence of injurious effect of the actions proposed, is placed on those who want to change the status quo of polluter or the industrialist.

In the process the apex Court has gone beyond the statuary texts to refer extensively to international conventions and obligations of India and even to the historical environmental values reflected in the edicts of Emperor Ashoka and verses of Atharva Veda. The Supreme Court has in clear terms, advised the State to shed its 'extravagant unbridled sovereign power and o pursue a policy to maintain ecological balance and hygienic environment. The activist attitude ranges across a wide range of environmental issues like banning aquaculture industries in coastal areas to prevent drinking water from becoming saline., issuing directions for improving of air in the National Capital Territory of Delhi and protecting Taj Mahal, prohibiting cigarette smoking in public places, addressing issues of solid waste management, proscribing construction activities in the vicinity of lakes and directing the lower courts to deal strictly with environmental offences. In respect of forest governance, the Supreme Court has made an enormous contribution through the case of T.N Godavarman Thirumulpad v Union of India.

Continuing mandamus

Another landmark step towards protecting environment by issuing continuing mandamus, a three judge bench of the Court, known as the Green Bench or the forest Bench issued a continuing mandamus because where the mere issue of one time mandamus would be futile against a public agency guilty of continuous inertia in failing to perform public duties then the continuous mandamus can be issued[10] , operative for past twelve years and has been using it to deal with prominent issues including conversion of forest land for non-forest purposes, illegal felling, afforestation and compensation by private user agencies for using forest land.

Balanced Approach

[10] Vineet Narain v Union Of India, Supreme Court Of India 1997

The apex Court has been confronted with different cases requiring resolution of the tension between the 'right to development' and 'right to environment'. The issue involved a lot of pressure and tension, the Court opted for a middle way to sort the need of the hour and adopted a balanced approach in N.D Jayal v Union of India a case involving construction of large dam at Tehri in Himalayas foothills, where the Court refused to interfere by declaring the relationship of both the above mentioned rights

The courts observed that:

"Right to environment is an Implied Fundamental Right under Article 21. On the other hand, right to development is also one of them. Hence here the right to sustainable development cannot be singled out. Therefore, the concept of sustainable development is to be treated as an integral part under the concept of life under Article 21. Weighty concepts like intergenerational equity, public trust doctrine and precautionary principle which we declared as inseparable ingredients of our environmental jurisprudence, could only be nurtured by ensuring sustainable development."

But in recent past a slight inclination towards industrial development can be sensed from the judgments from the Apex Court. In Deepak Nitrite ltd v State of Gujarat &ors , a case dealing with the determination of standards of compensation for non-compliance of the pollution control board norms, the Court held that a mere non-compliance with the norms will not result in environmental damage.

In Karnataka Industrial Area Development Board v Sri C Kenchappa & ors, the Court overturned a direction by the Karnataka High Court to the appellant to a leave a land of one kilometre as a buffer zone to maintain the 'green area' around the periphery of a village[11]. In absence of any evidence, it adjudged that those directions would have hindered land acquisition for industrial development.

Justice P.N. Bhagawati once made a insightful observation:" we need judges who are alive to the socio economic realities of Indian life[12].

The statement above made explains a gradual shift and the changing approach of the judicial minds of our country from the concept of right to environment to right to development.

[11] M C Mehta v Union Of India
[12] Supreme Court of India 1981

Giving focus on the concept proposed by then Prime Minister Indra Gandhi in Stockham Conference 1982 about the "sustainable development" proposing a balanced approach in developing and environmental protection. Being a developing country giving upon any of the above mentioned rights would be injustice for our progress and citizens. Industrial development is the need of the hour for development of our country and environment is what we need to live in a good and healthy way.

Dilution of Locus Standi

Environmental litigation is also concerned with one important factor and that is the element of procedure involved in this litigation. Previously the procedure plus the locus standi was an element of issue but latterly now the apex Court has diluted the locus standi requirement and allow citizens to file Public Interest Litigation (PIL) for addressing violation of statuary mandates by the executive and the private parties or situations where legal loopholes still prevail.

PIL's have emerged as the most potent tool in the hands of Indian judiciary.

Green Courts: An Analysis

The theoretical foundation for environmental courts can be traced in the argument proposed by the postpones of specialised court in the know generalist versus specialised courts debate.

Special forums are believed to be able to evolved superior procedural norms and deliver better quality of jurisprudence due to direct and special knowledge of the field, practical knowledge and application

This brings uniformity, consistency and predictability in the decision making, enhancing the public confidence in the court of law.

The idea of a specialised green forum was borrowed from two successful examples of Australia and New Zealand.

The objective of securing 'environmental justice' through adoption of flexible and people oriented procedures offer another justification for such forums. Internationally the concept of easy and speedy justice in connection to environmental jurisprudence has been recognised as a important pact.

In India the National Green Tribunal Act 2010 (NGT) has been passed for effective and expeditious disposal of cases relating to environmental protection and conservation of forest and other natural resources including enforcement of any legal right relating to environmental matters and giving relief and compensation for damages to person and property.

- The tribunal shall be established under the effective control of Central government of India
- Tribunal shall have a full time chair person, a committee of maximum 20 and not less than 10 judicial full time members and expert members or as the central government may think fit.
- The chair person shall be of special knowledge and expert member.
- The tribunal shall settle disputes for nay matter relating environmental issue or natural resources.
- To award compensation and damages for the damage caused to the accused.
- Jurisdiction includes all the subject matters of environment and natural resources protection
- The Tribunal have appellant jurisdiction under section 16 of the Act for the specified cases.
- The Tribunal shall in the case of accident apply the principle of no fault.
- The application under section 14, 15 and 16 can be made my the agrevied person, the owner of the property, legal representative of the deceased, any duly authorised person or organization.
- The Tribunal is not bound by the Procedure laid down by The Code Of Civil Procedure,1908 but is guided by the principles of natural justice.
- The Act has provided the Tribunal with the powers to regulate its own procedure.
- The tribunal shall also not be bound by rules of evidence under The Evidence Act 1872
- For the purpose of discharging the duties under this Act the Tribunal shall have the powers of a Civil Court
- While granting compensation or award the Tribunal has to follow the principle of sustainable development, polluter pays principle and precautionary principle.

- If any person aggrieved under the Act is not satisfied has the right to go in appeal to Supreme Court.

Conclusion

With the increasing awareness towards our environment and treatises, activities at international level the importance of environmental jurisprudence gained importance. The journey of providing the right to environment a status of implied fundamental right has been long and adventures, but with changing dimensions and industrial development importance the concepts of sustainable development, polluter pays and precautionary principle started to come in picture and gained more importance.

In the current time the matters relating to environmental jurisprudence are dealt with all the consouncises and in the light of all the factors responsible for development and changing dimensions, of the country. The formation of National green tribunal is also a step in furtherance to achieve the goal of sustainable development. But a question that arises is weather the role of NGT is a mere picture of what we have been signing in the international instruments and not the appropriate authority as it should be. The right to appeal in Supreme Court in the case of award by the NGT does not solve the basic idea of speedy justice and simplicity in the procedure, the loop goes on and on and the power to appeal is a connecting point of the loop. What can be done is providing an option of review by another judge under NGT can solve the issue of complexity to a very great extent.

Bringing up new authorities and legislations will not solve any issues of a country like ours what is required is to simplify the nature and procedure of the Acts and shorting the loops and circles of the justice.