

CONSTITUTIONAL ISSUE INVOLVING ENVIRONMENT: A BRIEF STUDY

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ABSTRACT

If we look at society from a historical perspective, we realize that protection and preservation of the environment has been integral to the cultural and religious ethos of most human communities. Nature has been venerated by ancient Hindus, Greeks, Native Americans and other religions around the world. They worshipped all forms of nature believing that it emanated the spirit of God. Hinduism declared in its dictum that (t)he Earth is our mother and we are all her children.² The ancient Greeks worshipped Gaea or the Earth Goddess. Islamic law regards man as having inherited "all the resources of life and nature" and having certain religious duties to God in using them.³ In the Judeo-Christian tradition, God gave the earth to his people and their offspring as an everlasting possession, to be cared for and passed on to each generation.⁴ In this research piece the author had tried to focus on core areas of environmental law in India by emphasizing on constitutional law.

IMPORTANCE OF THE RELATIONSHIP BETWEEN THESE TWO SPHERES

Over the years, the international community has increased its awareness on the relationship between environmental degradation and human rights abuses. It is clear that, poverty situations and human rights abuses are worsened by environmental degradation. This is for several obvious reasons;

- *Firstly*, the exhaustion of natural resources leads to unemployment and emigration to cities.
- *Secondly*, this affects the enjoyment and exercise of basic human rights. Environmental conditions contribute to a large extent, to the spread of infectious diseases. From the 4,400 million of people who live in developing countries, almost 60% lack basic health care services, almost a third of these people have no access to safe water supply.

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² Atharva Veda (Bhumi Sukta).

³ See *Islamic Principles for the Conservation of the Natural Environment*, 13-14 (IUCN and Saudi Arabia, 1983).

⁴ *Genesis* 1:1-31, 17:7-8.

- *Thirdly*, degradation poses new problems such as environmental refugees. Environmental refugees suffer from significant economic, socio-cultural, and political consequences. And fourthly, environmental degradation worsens existing problems suffered by developing and developed countries. Air pollution, for example, accounts for 2.7 million to 3.0 million of deaths annually and of these, 90% are from developing countries.

Environmental and human rights law have essential points in common that enable the creation of a field of cooperation between the two:

- *Firstly*, both disciplines have *deep social roots*; even though human rights law is more rooted within the collective consciousness, the accelerated process of environmental degradation is generating a new environmental consciousness.
- *Secondly*, both disciplines have become internationalized. The international community has assumed the commitment to observe the realization of human rights and respect for the environment. From the Second World War⁵ onwards, the relationship State-individual is of pertinence to the international community. On the other hand, the phenomena brought on by environmental degradation transcends political boundaries and is of critical importance to the preservation of world peace and security. The protection of the environment is internationalized, while the State-Planet Earth relationship has become a concern of the international community.
- *Thirdly*, both areas of law tend to universalize their object of protection. Human Rights are presented as universal and the protection of the environment appears as everyone's responsibility.

THE CONTRIBUTION OF THE SUPREME COURT OF INDIA

The Constitution (Forty Second Amendment) Act 1976 explicitly incorporated environmental protection and improvement as part of State policy through the insertion of Article 48A. Article 51A (g) imposed a similar responsibility on every citizen to protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for all living creatures.

⁵ Michael J. Kane, Promoting Political Rights to protect the Environment, The Yale Journal of International Law, Volume 18, Number 1, pgs.389-390.

One of the main objections to an independent right or rights to the environment lies in the difficulty of definition. It is in this regard that the Indian Supreme Court has made a significant contribution. When a claim is brought under a particular article of the Constitution, this allows an adjudicating body such as the Supreme Court to find a breach of this article, without the need for a definition of an environmental right as such. All that the Court needs to do is what it must in any event do; namely, define the Constitutional right before it. Accordingly, a Court prepared to find a risk to life, or damage to health, on the facts before it, would set a standard of environmental quality in defining the right litigated. This is well illustrated by the cases that have come before the Supreme Court, in particular in relation to the broad meaning given to the Right to Life under Article 21 of the Constitution. The right to life has been used in a diversified manner in India. It includes, *inter alia*, the right to survive as a species, quality of life, the right to live with dignity and the right to livelihood. However, it is a negative right, and not a positive, self-executory right, such as is available, for example, under the Constitution of the Phillipines. Section 16, Article II of the 1987 Phillipine Constitution states: The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature . This right along with Right to Health (section 15) ascertains a balanced and healthful ecology.⁶ In contrast, Article 21 of the Indian Constitution states: No person shall be deprived of his life or personal liberty except according to procedures established by law. The Supreme Court expanded this negative right in two ways. *Firstly*, any law affecting personal liberty should be reasonable, fair and just. *Secondly*, the Court recognised several unarticulated liberties that were implied by Article 21. It is by this second method that the Supreme Court interpreted the right to life and personal liberty to include the right to the environment.

*Rural Litigation and Entitlement Kendra v. State of U.P.*⁷ was one of the earliest cases where the Supreme Court dealt with issues relating to environment and ecological balance. The expanded concept of the right to life under the Indian Constitution was further elaborated on in *Francis Coralie Mullin v. Union Territory of Delhi*⁸ where the Supreme Court set out a list of positive obligations on the State, as part of its duty correlative to the right to life. The importance of this case lies in the willingness on the part of the Court to be assertive in adopting an

⁶ See the case of *Minors Oposa v. Sec. of the Department of Environment*, 33 ILM 173 (1994).

⁷ AIR 1985 SC 652.

⁸ AIR 1981 SC 746.

expanded understanding of human rights. It is only through such an understanding that claims involving the environment can be accommodated within the broad rubric of human rights. The link between environmental quality and the right to life was further addressed by a constitution bench of the Supreme Court in the *Charan Lal Sahu*.⁹ Similarly, in *Subash Kumar*,¹⁰ the Court observed that right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life. Through this case, the Court recognised the right to a wholesome environment as part of the fundamental right to life. This case also indicated that the municipalities and a large number of other concerned governmental agencies could no longer rest content with unimplemented measures for the abatement and prevention of pollution. They may be compelled to take positive measures to improve the environment.

The Supreme Court has used the right to life as a basis for emphasizing the need to take drastic steps to combat air and water pollution.¹¹ It has directed the closure or relocation of industries and ordered that evacuated land be used for the needs of the community.¹² The courts have taken a serious view of unscientific and uncontrolled quarrying and mining,¹³ issued orders for the maintenance of ecology around coastal areas,¹⁴ shifting of hazardous and heavy industries¹⁵ and in restraining tanneries from discharging effluents.¹⁶

Another expansion of the right to life is the right to livelihood (article 41), which is a directive principle of state policy. This extension can check government actions in relation to an environmental impact that has threatened to dislocate the poor and disrupt their lifestyles. A strong connection between the right to livelihood and the right to life in the context of environmental rights has thus been established over the years. Especially in the context of the rights of indigenous people being evicted by development projects, the Court has been guided by the positive obligations contained in article 48A and 51A(g), and has ordered adequate compensation and rehabilitation of the evictees.

⁹ *Charan Lal Sahu v. Union of India* AIR 1990 SC 1480.

¹⁰ *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420.

¹¹ *V. Mathur v. Union of India*, (1996) 1 SCC 119.

¹² *M.C. Mehta v. Union of India*, (1996) 4 SCC 351.

¹³ *Rural Litigation and Entitlement Kendra v. State of U.P.*, AIR 1991 SC 2216.

¹⁴ *Indian Council for Enviro-Legal Action v. Union of India (Coastal Protection Case)*, (1996) 5 SCC 281.

¹⁵ *M.C.Mehta v. Union of India*, (1996) 4 SCC 750.

¹⁶ *M.C.Mehta v. Union of India (Ganga Water Pollution Case)*, AIR 1988 SC 1037.

Matters involving the degradation of the environment have often come to the Court in the form of petitions filed in the public interest. This mode of litigation has gained momentum due to the lenient view adopted by the Court towards concepts such as *locus standi* and the proof of injury approach of common law. This has facilitated espousal of the claims of those who would have otherwise gone unrepresented. It is interesting to note that, unlike Indian courts, the Bangladeshi and Pakistani courts apply an aggrieved person test, which means a right or recognised interest that is direct and personal to the complainant.

THE IMPORTANCE OF DEMOCRATIC AND INDIVIDUAL PARTICIPATION

A development strategy which does not take into account the human, social and cultural dimension could have only adverse repercussions on the environment. A national development strategy is viable from the economic, social and ecological standpoint only if it gains the active adherence of the various social strata of the population. The United Nations Conference on Environment and Development was of the view that that one of the fundamental prerequisites for the achievement of sustainable development was broad public participation in decision-making. Furthermore, the Conference recognized, in the specific context of environment, "the need for new forms of participation" and "the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in (pertinent) decisions."¹⁷ The Conference implicitly linked the notion of real participation in the right of access to information by noting that "Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures". The link between participation and information can also be found in Principle 10 of the Declaration of Rio.

The Constitution as Sounding Board: Article 21 and the Pro The judiciary, in their quest for innovate solutions to environmental matters within the framework of public interest litigation, looked to constitutional provisions to provide the court with the necessary jurisdiction to address specific issues. Furthermore, Article 142 afforded the Supreme Court considerable power to mould its decisions in order that complete justice could be done. As the Supreme Court is the final authority as far as matters of constitutional interpretation are concerned, it assumes a sort of

¹⁷ A/CONF.151/4(Part III), chap. 23, paras. 23.1 and 23.2.

primal position in the Indian environmental legal system. For example, the fundamental right contained in Article 21 is often cited as the violated right, albeit in a variety of ways.¹⁸

In *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*¹⁹, Bhagwati, J., speaking for the Supreme Court, stated that:

We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings

In *Subhash Kumar v. State of Bihar*²⁰, the Court observed that:

The right to live is a fundamental right under Article 21 of the Constitution, and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution

The Supreme Court, in its interpretation of Article 21, has facilitated the emergence of an environmental jurisprudence in India, while also strengthening human rights jurisprudence. There are numerous decisions wherein the right to a clean environment, drinking water, a pollution-free atmosphere, etc. have been given the status of inalienable human rights and, therefore, fundamental rights of Indian citizens.

DEVELOPMENT OF ENVIRONMENTAL LAW PRINCIPLES

The Court has successfully isolated specific environmental law principles upon the interpretation of Indian statutes and the Constitution, combined with a liberal view towards ensuring social justice and the protection of human rights. The principles have often found reflection in the Constitution in some form, and are usually justified even when not explicitly mentioned in the concerned statute. There have also been occasions when the judiciary has prioritized the

¹⁸ Article 21: No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹⁹ AIR 1981 SC 746.

²⁰ AIR 1991 SC 420.

environment over development, when the situation demanded an immediate and specific policy structure²¹

The Precautionary Principle

Beginning with *Vellore Citizens Welfare Forum v. Union of India*²² the Supreme Court has explicitly recognized the precautionary principle as a principle of Indian environmental law. More recently, in *A.P. Pollution Control Board v. M.V. Nayudu*²³, the Court discussed the development of the precautionary principle.²⁴ Furthermore, in the *Narmada* case²⁵ the Court explained that *When there is a state of uncertainty due to the lack of data or material about the extent of damage or pollution likely to be caused, then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution.*²⁶

The Polluter Pays Principle

The Supreme Court has come to sustain a position where it calculates environmental damages not on the basis of a claim put forward by either party, but through an examination of the situation by the Court, keeping in mind factors such as the deterrent nature of the award.²⁷ However, it held recently that the power under Article 32 to award damages, or even exemplary damages to compensate environmental harm, would not extend to the levy of a pollution fine.²⁸ The polluter pays rule has also been recognized as a fundamental objective of government policy to prevent and control pollution²⁹

²¹ *M.C. Mehta v. Union of India*, (1987) 4 SCC 463. The Court held: *life, public health and ecology has priority over unemployment and loss of revenue problem.*

²² AIR 1996 SC 2715

²³ AIR 1999 SC 812.

²⁴ *S. Jagannath v. Union of India (Shrimp Culture case)*, AIR 1997 SC 811.

²⁵ *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 3751.

²⁶ P. Leelakrishnan, *Environmental Law*, *Annual Survey of Indian Law*, Volume XXXVI, 2000, pp. 252-257.

²⁷ the explanation for the principle of absolute liability in *M.C. Mehta v. Union of India (Oleum Gas case)*, AIR 1987 SC 965, and its subsequent application in *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212

²⁸ *M.C. Mehta v. Kamal Nath*, AIR 2000 SC 1997

²⁹ Ministry of Environment and Forests, Government of India, *Policy Statement for Abatement of Pollution*, para 3.3, February 26, 1992.

Sustainable Development and Inter-generational Equity

What is meant by the phrase sustainable development ? The definition which is used most often comes from the report of the Brundtland Commission, in which it was suggested that the phrase covered *development that meets the needs of the present without compromising the ability of future generations to meet their own needs.* However, different levels of societies have their own concept of sustainable development and the object that is to be achieved by it. For instance, for rich countries, sustainable development may mean steady reductions in wasteful levels of consumption of energy and other natural resources through improvements in efficiency, and through changes in life style, while in poorer countries, sustainable development would mean the commitment of resources toward continued improvement in living standards.

Sustainable development means that the richness of the earth's biodiversity would be conserved for future generations by greatly slowing and, if possible, halting extinctions, habitat and ecosystem destruction, and also by not risking significant alternations of the global environment that might by an increase in sea level or changing rainfall and vegetation patterns or increasing ultraviolet radiation alter the opportunities available for future generations.

The Right to Livelihood

In certain cases, the judiciary has to choose between the preservation of environmental resources in state, and the right of communities to extract value out of those resources. To facilitate this choice, the courts have evolved a right to livelihood for communities affected by new state-run conservation initiatives. A clear position on this issue is not immediately forthcoming, as the decision depends heavily upon the factual matrix of each dispute. The Court has also observed the environment-development debate, and stated that the most desirous position is a harmonious form of co-existence of these ends.

The Doctrine of Public Trust

To further justify and perhaps extract state initiative to conserve natural resources, the Court enunciated Professor Joseph Sax's doctrine of public trust, obligating conservation by the state. In *M.C. Mehta v. Kamal Nath* the Court held that the state, as a trustee of all natural resources,

was under a legal duty to protect them, and that the resources were meant for public use and could not be transferred to private ownership.

CONCLUSION

Thus, the arrangement of environmental management is composed of a harmonious blend of initiatives from the legislature, the executive, and the judiciary. The higher judiciary plays a rather stalwart role owing to its unique position and power, and due to the circumstances of inefficiency within the executive and the existence of a skeletal legislative framework. The principles of Indian environmental law are resident in the judicial interpretation of laws and the Constitution, and encompass several internationally recognized principles, thereby providing some semblance of consistency between domestic and global environmental standards.