

ENVIRONMENTAL PROTECTION VIS-À-VIS JUDICIAL ACTIVISM

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Abstract: The black ebony staves of the judiciary which has thumped time and again for protection of man miniature against excruciating blows of evil is known on the aspiration for protecting the environment. The judiciary is having a coherent vision on environmental protection. However the problem of law making and amending is really onerous in this area. As there are certain things like industrialization, urbanization, cultural and moral values of humanity that hamper or create a razzmatazz of legal norms which are really hard to be deciphered out. In today's emerging jurisprudence, environmental rights incorporates of collective rights are described as 'third generation' rights. The "first generation rights" are generally political rights while "second generation" rights are called socioeconomic rights as found in the international convert on economic, social & cultural rights [1]. There is a prominent saying "The times have changed and you must too unless the times won't forgive you" so according to the changing trends of the society from time to time, law also has to evolve accordingly. Earlier, there were many human activists who worked for freeing the society from the existing problems. But in the fast moving world of today, where a person hardly finds time off for his family and close ones, it is a disappointing fact that there is no one to look after the matters of public importance. Hence, fields like Environmental protection go unnoticed. For this PIL has emerged as a Midas touch and is proving to be very effective. However the role of the judiciary is really important as the role of mitochondria of a living human cell. Had the judiciary turned the deaf ear towards environmental problems it could not be in any way came to celluloid. One significant fact to support the sensibility of the judiciary is the case of Subhash Kumar vs. State of Bihar [2] where in personal grudges of two parties the judiciary put life in the cold letters of the constitution i.e. the environmental protection which previously was a fundamental duty under article 51(A) also came as a fundamental right under article 21 of the constitution of India. No matter how criticized it is, no matter how unidentified it is but one thing to which everyone

takes leave to doubt is the massive contribution to the welfare of the environment.

Keywords: Environment, Justice, Protection, Judicial

I. DEVELOPMENT VERSUS INCLUSION

It is the conscience of the judges which plays the paramount role in the decisions regarding environmental issues. Moreover it is not a hard and fast rule that in environmental litigation the momentum will be on the side of the party who is opposing the spread of industrialization or urbanization but the endeavor of the judicial conscience will remain on the hauling out welfare of the public. As the soaring leaps of industrialization cannot be put at a halt blindly as not only it amounts to the stagnancy in the progress of the country however it also inculcate the new versions of litigation through the shoulder of "environment fortification justice". Elaborating it further the conscience of the judges has to be passed through the sharp edged weapon of iconoclasts so that their decision does not in any way defeat the provisions that are meant as the edifice of all the other legal norms. Where prayers were recited in church by using loudspeaker drums etc. there was a complaint of noise pollution. Directions were given by the High Court to authorities to follow guidelines for control of noise pollution as issued in 1995 AIHC 4168 and to make the church to keep the speakers at a lower level. It held that such directions by the High Court were not illegal in view of clear pollution control provisions. Appreciably our judiciary is imbibing rather welcoming the international pollution control principals. Compensation to be awarded must have some broad correlation not only with the magnitude and the capacity of the enterprise but also with the harm caused by it. This pro bono publico judicial process has three main features: first, judges are insulated towards political pulls and pressures so they give decisions according to best of their knowledge and checking everything on the anvil of public welfare. The second feature of the judicial process is that it frequently compels that the defendant project is challenged in court by an environmental group; the

promoters frequently spend more funds on environmental impact appraisal and pollution abatement than they otherwise might. Third, it should be remembered that the courts can only respond to the cases that come before them [3]. Courts of law in India are taking a really active part in conservation of environment as there is a famous case, the Ganga pollution Case [4], where massive judicial effort was taken to curb the environmental problem by cleaning the Ganga river. So there is every reason to believe that judiciary has played a role of conscience keeper.

II. MESSENGERS TO PROVIDERS OF THE JUSTICE

The P.I.L is becoming the salvage to the poor and suppressed people and an instrument by which the ears of the judiciary could be lent quite easily. "The role of the telegram to the door of justice is very well played by one post card which was never before played that expediently by more than one smidgens of paper". Rural litigation case is said to be the harbinger of the revolution which has opened the floodgates of the PIL s for curbing environmental problems. The filing of petitions is not the only thing rather after filing the petition these are the judges who are to entertain petition and that typically depends on the bent of mind of the judges. The cases raising questions of the environmental degradation were really speaking cases against inaction of the state or wrong action of the state. The court made it clear that petition alleging environmental pollution caused by private industrial units as against the union of India, the state government, and the pollution control boards established under Environmental Protection Act 1986, which were supposed to prevent environmental hazards. Their failure to perform their statutory duties resulted in violation of the right of the residents to life and liberty guaranteed by article 21 of the constitution. The Court entertained a petition by the residents of Bangalore objecting to the approval of development schemes that were likely to adversely affect the quantity and quality of water of a river. The Court had to actually monitor restrictions on mining operations that were hazardous to the health of the people living in surrounding areas by appointing a committee to oversee the implementation of the court's directions. The Court has dealt with environmental issues such as pollution by tannery industries, protection and conservation of forests, urban and solid waste management, vehicular pollution in Delhi due to location of mechanized slaughterhouses, and protection and conservation of wildlife. The Supreme Court was also approach against degradation of the Taj mahal, pollution of the river Ganges by Calcutta tanneries that discharged untreated noxious and poisonous effluents into it, and

protection of the people from stone quarrying in the Dehradun region. The Court also laid down the principle that the polluter pays for the pollution. In another case, the Court held that in matters of environment, the burden of proof will lie on the party that wants to change the status quo [5]. As the *lassiez faire* is turning to the welfare state there is high time when somebody has to be the crusader or be the defender against the challenges in the society. Judiciary through P.I.L's is very well performing the duty. There are oodles of problems that are accumulating in front of us as the concept of environmental protection is a recent born practice in judicial parlance. Moreover the action of the administrative agencies cannot be taken in a lighter way. The judiciary has to concentrate on each and every action of administration in protection of environment which no denying the fact is considered as judicial activism but there is no harm in taking active cognizance of environment protection cases.

Article 226 and 32 of constitution of India are the two eyes of judiciary through which whole Indian territory could be put under vision by which our judicial system becomes a proactive and Janus-faced. The invocation of Article 226 and 32 is becoming so prominent because of its expedient nature instead of conventional suit which time and again labeled as "justice delayed is justice denied" which can be replaced as saying "decision delayed is decision denied" as there is no surety of justice thereafter. Furthermore the principals laid down in the Bhopal gas case, the supreme court formulated the doctrine of absolute liability for harm caused by hazardous and inherently dangerous industries by interpreting the scope of the power under Article 32 to issue directions or orders, whichever may be appropriate in appropriate proceedings. According to the court of law the power could be utilized for going new remedies and fashioning new strategies [6]. The Bhopal gas tragedy is not considered as one case which was more than a apocalypse at catastrophic level; rather it was that big disaster due to repercussions of which the souls of the died persons are still hanging in the air for the justice and the justice is not confined to deciding that very case; rather for making for framing such laws which are not only for the decisional benefit of the case, but for avoiding the upcoming Bhopals. The directions were given by the court for disciplining the development processes, keeping in view the demands of ecological security and integrity [7]. In one of the earlier cases rural litigation case that posed an environment development dilemma the Supreme Court gave directions that were necessary to avert an ecological imbalance such as constitution of expert committees

to study and suggest solutions establishments of a monitoring committee to oversee forestation programmes and stoppage of mining operations that had an adverse impact on ecology. Writs as Remedies in Environmental cases-

- The aggrieved individual or
- By way of 'public interest litigation'

The principle public law remedy is that of writs. But it should not be overlooked that our law of civil procedure contains specific to enable two or more persons having a legitimate interest in the subject matter to seek remedy through court for.

- Remedying public wrong (section 91, CPC)
- Remedying breaches of public trusts (section 92, CPC)

It is indubitable that the courts of law are having a very generous demeanor regarding the acceptance of P.I.L whenever there is question of degradation of environment. However, the judicial conscience in scrutinizing the P.I.Ls is becoming investigating and operational. Furthermore, the judiciary is becoming much attentive than ever before in eying the P.I.Ls coherently so that some amount of obstruction could be put to the floodgates for the P.I.Ls as in famous case of Subash Kumar vs. State of Bihar [8] the supreme court upheld that affected persons or even a group of social persons or generalist but not at the instance of persons who had a bias or personal grudge or enmity could initiate P.I.L for environmental rights. So there is every reason to believe that the relieving the concept of locus standi and emerging P.I.L has revolutionized the process of environmental protection.

III. BENCH AND BAR IN ENVIRONMENTAL PROTECTION

One thing which is too uncertain is the role of the Bar in the environmental protection. There is no denying the fact that it is the words of the judges which holds the paramount importance however it is an axiomatic truth that rationality and they clear the just over the facts for proper litigation. They are colossus in accentuating the pronouncements by judges and removing the dust from the anticipatory visions. M.C Mehta one of the world's most renowned and successful activists. A lawyer by profession and a committed environmentalist by choice, he has made the fight to protect India's environment his unending mission. He has pioneered legal activism for environmental protection and is proof that one man can make a difference [9]. The lawyers are salvage to the degrading environment but also a nightmare to

those who are encroaching the environment i.e. leaping towards industrialization and urbanization. Mr. Mehta is indubitably a public spirited lawyer time and again has set glorious precedents which actually has opened a way for the green colored pieces of paper i.e. PIL related to environmental problem to enter the dwellings of law. Furthermore Mr. Mehta who should be called as Mr. Green, in a case M.C Mehta vs. Union of India [10] concerned closing down a chlorine plant of Shriram industries. The one known as Oleum gas leak case was decided by five judges on the constitutional bench of the Supreme Court, in view of gravity of the legal questions under considerations. The court of law has welcomed this green letter of M.C Mehta with open arms and imposed absolute liability on the hazardous industry. In the next case there is case again M.C Mehta vs. Union of India [11] in which the contemplation was done regarding discharge of effluents by tanneries and chemical industries into river Ganga. The Supreme Court ordered its office to serve notice about institution of that case to all such industries and after hearing both sides ordered those tanneries not having pretreatment plants approved by the pollution control board to stop their discharge of trade effluents. In yet another of the Mehta series, the issue was whether the petitioner who was not a riparian owner could be granted standing to move for prevention of nuisance for pollution in river Ganga. The court held that he was a person interested in protecting the lives of the people who make use of the waters of the river and so could move. In the court's view, in public interest litigation, it is reasonable to allow any person to take proceedings on behalf of the community at large. So the attempts of M.C. Mehta has turned into anxiety which is really appreciable and the works of Justice Kuldeep Singh cannot be ignored but the point of worry or the question to be answered is who is another M.C Mehta and Kuldeep Singh. The activists working for the environment are not always genuine and that is why the P.I.L is criticized as cosmetic activism.

IV. NATIONAL AS WELL AS INTERNATIONAL ENDEAVORS

International treaties and conventions have laid down many norms. The first was the United Nations in its International Conference [12] in the year 1972, laid down its agenda as "to defend and improve the human environment for a present and future generation has become an imperative goal for mankind". It called upon all the Governments and people of the world to exert common efforts for the preservation and improvement of the Human Environment. This Conference at Stockholm became the turning point for Environmental Jurisprudence. It

laid down twenty-six principles, which are known as Magna Carta on Human Environment. The principles categorized under the various heads:

two proclamation rights [13];

four concerning the conservation of resources [14];

two on pollution [15];

eight on developmental issues [16];

nine on specific non-legal topics [17]; and

one on state responsibility [18].

Then there is the General Assembly Resolution in 1972 [19], emphasizing the need for the active cooperation among the states in the field of human environment. Then the Charter of Economic Rights and Duties of States, in 1974, which put its emphasis on the protection, preservation and the enhancement of the environment for the present and the future generations. It also takes in account that the states should ensure that the activities within their jurisdiction or control do not cause damage to the environment of other states. Thus the awareness started to build up and many bilateral and multilateral treaties were signed between states for the cause of environmental protection.

The paramount international effort at the preservation of the environment during the century after the Stockholm Conference is the Earth Summit [20]. The document produced at the Earth Summit has 40 chapters having 800 pages. In this conference, 108 States participated. They together adopted three major agreements aimed at changing the traditional approach to development:

Agenda 21 — a comprehensive programme of action for global action in all areas of sustainable development;

The Rio Declaration on Environment and Development — a series of principles defining the rights and responsibilities of States;

The Statement of Forest Principles — a set of principles to underlie the sustainable management of forests worldwide.

The Earth Summit succeeded in presenting new perspectives on economic progress. It was lauded as the beginning of a new era and its success would be measured by the implementation, locally, nationally and internationally, of its agreements. The Earth Summit proved colossus amongst all subsequent UN conferences, which have examined the relationship between human rights, population, social development, women and human settlements and the need for environmentally sustainable development.

Thereafter in the World Conference on Human Rights, held in Vienna in 1993, emphasized the right of people to a healthy environment and the right to development, controversial demands that had met with resistance from some Member States until the Earth Summit.

India was also one of the signatories of the Stockholm Conference. Therefore in light of the promise made at the Conference, the Indian Parliament passed the 42nd amendment to the Constitution in 1976 [21] and incorporated especially two Articles relating to protection and improvement of the environment. Thus India became the first country in the world to leap forward for preventing this precious aura and have provisions in the Constitution.

Despite the provisions in Indian Constitution the Parliament has enacted various laws governing the protection and preservation of the environment. For example:

- Water (Prevention and Control of Pollution) Act, 1974.
- Air (Prevention and Control of Pollution) Act, 1981.
- Environment (Protection) Act, 1986.
- Forest Conservation Act, 1980.
- National Highways Act, 1983.
- The Drugs and Cosmetics Act, 1940.
- Motor vehicle Act, 1988.
- Industries (Development and Regulation) Act, 1951.
- Wild Life Protection Act, 1972.
- Atomic Energy Act, 1962 etc...

In series of the endeavor there are more than 100 Centre and State Legislation providing different measures to control and maintain the safe environment in one or the other way. Even I.P.C. [22] and Cr.P.C. [23] contain various provisions for punishing those nefarious persons who cause damage to the environment and threatening the existence of mankind.

V. EXCRUCIATING REALITY THROUGH LEGAL LENS

All the enactments and norms established contain provisions for the protection of the environment by imposing a duty on every citizen as well on the State, but when these provisions are implemented human rights of individuals are violated in the name of environmental protection. It is not always true to say

that the laws pertaining to protection of the environment violate human rights, but there are provisions under certain laws which when exercised abridge the rights of persons in exercising their free will. For instance in the Forest Conservation Act, 1980, in which the Central Government the sole authority to give directions regarding the reserved forests and on such recommendations only the State Government can further make rules. By utilizing this power the State Government has made rules, which say that no person shall be allowed to enter into the forests or go out without the permission of the forest authorities. Similarly the rules again say that any property lying in the reserved area belongs to the Government and no other use of forest land or any portion of it can be made for any non-forest purpose [24]. Here the rule is enacted to protect the forest, but the question arises about the rights of persons who were residing in these forests. These Tribal people were the protectors of these forests, the rights of the sons of the soil. By implementing these provisions the rights of these tribal people are infringed who were dependent on these forest for their livelihood.

In one pretext or the other most of these environmental laws violate the rights of the people, the reason is that the government in creating awareness or protecting the environment forgets about human rights. These Acts hardly give any consideration to the living beings called human and the human face because their first concern was environmental protection. For protecting and preserving Human Rights the courts have to interfere to provide an appropriate remedy to the aggrieved, excavating their rights from Article 21 [25].

The Supreme Court through a catena of decisions has opened many facets of Article 21 to protect the human rights with the environment. In Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh [26] the right to a clean environment as an integral part of right to life.

Other conflicting area where environmental lacks human face are:

Under the right to life, drinking water is one of the fundamental requirements, but simultaneously the State is obliged to preserve the ground water or to restrict the use so that it can be prevented from being wasted [27].

The State has an obligation to protect the forest but at the same time has to protect the tribal people whose livelihood is based on forest.

State is bound to close down those industries, which are hazardous for the environment, but at the same time has to keep in mind the livelihood of the people who work there.

VI. SUGGESTIONS

Issues not merely to be political will:

The issue of environmental protection can be addressed to each and every effected individual and state entity. The state should not only impose the environmental policy as the political will over the individuals but the level of understanding should also be developed amongst the individuals. The reason being these environmental issues will be confined to government policies and guidelines will not bear any fruit.

Need of clinical environmental education:

The problem can be very well addressed to masses with the help of clinical environmental education, as there will be specialized treatment to sensitize people about environmental problems. Moreover, innovative minds can come out with very real solutions.

Environmental census:

There should be an environmental census i.e. a questionnaire should be made about the general awareness on environmental protection and to distribute it to the people which would be helpful in the collection of data on prevailing conditions.

Pro-active approach of the judiciary:

The judiciary should be proactive in entertaining and resolving environmental disputes. Judicial Activism can act as a potent weapon to curb problems of commercial pollution. There should also be the establishment of Green Benches whose only duty would be to dispose of matters relating to the environment and giving guidelines for environmental protection.

Separate allocation of funds for environmental protection:

There should be separation of funds for issues related to environmental protection and international financial institutions should leap forward to take care of nations.

Provisions for environmental protection officers & Cells:

Governments of the nations should make provisions for environmental protection officers, those who should have the power to accept grievances against

the public authorities who are not responding to legislative policies of environment protection.

Dialogic activism by judiciary:

The judiciary should go for dialogic activism i.e. through judgements it should enter a dialogue with several agencies of states to implement the agenda of environmental protection.

International environmental court:

There should be an international environment court like the International Criminal Court to adjudicate environmental issues between the nations.

Mechanism of speedy incorporation of treaties and conventions in domestic legal system:

Nations should adopt a mechanism of speedy incorporation of treaties and conventions in municipal legal systems.

Rational needs:

Nations should endeavour to humanize the thinking of citizens so as to lessen the reliability on materialistic and luxury needs.

Environmental petition:

There should be a separate environmental litigation petition which should be acknowledged by judges as the subject matter is of the entire community.

A sober action plan at the very basic level:

Besides the international nature of the problem, it affects the individual also. So at the very basic level the plans should be formulated to mandate the steps of environmental protection.

Environmental protection as social security legislation:

The central government as well regional governments should formulate their legislative policies as to include the issue of environmental protection to become part of social security legislation. Issues of environmental protection should be at a par with the issues of Maternity benefit, disabled protection, and labour protection.

Inclusion of pollution in definition of international crime to ascertain individual criminal responsibility:

The irresponsible acts of a nation should be termed as international crime so that individual responsibility should be ascertained. A degree should be defined for a country so that excessive pollution should not happen due to irresponsible activities.

Promotion of eco-friendly commodities by the commercial sector:

There should be more and more emphasis on eco-friendly products by the forerunners of the society so that others are influenced to use those kind of products.

Environment Tax:

There should be the evolution of an environment tax. It should be implemented in proportion to the amount of exploitation by the private sector.

VII.CONCLUSION

Thus, the Supreme Court of India had taken into account the right to a healthy environment along with the right to sustainable development and balanced them. This concept of right to a healthy environment and sustainable development are the fundamental human rights implicit in the right to life, which has been constructed as such in many countries. The entire judicial construction by the Supreme Court and the High Courts also reveal the humanitarian approach to these environmental laws with the help of public interest litigations. The Indian Supreme Court was the first to develop the concept of right to healthy environment as a part of life under Article 21 of our constitution [28]. This principle is now been adopted and followed in various other countries now.

It is really flabbergasting that the law in its very way has encountered time and again the ditch which is itself created by law. Elaborating it further, the laws which are made to serve for the right of people are intersecting with the laws which already exist.

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