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ROLE OF JUDICIARY IN ENVIRONMENTAL PROTECTION

Introduction

The protection of environment was not important in post-independence era of India, because of need of industrial development and political disturbances. Post-independence, the main concern was to setup markets, industries, to make new jobs for the citizens. However, after the Bhopal Gas tragedy, Environment protection became priority. After this incident, the area of Environmental law widens in the country and judicial activity also increases. After 1986, when first act related to the environmental protection was passed, people showed some concern about it. The main purpose of the act was to implement the decisions of the United Nations Conference on the Human Environments. The Act is like a safe guard for the nature from the newly emerged industries and the urbanization. Before this act of 1986, a major enactment was come out just after 2 years after the Stockholm Conference in 1974. The Indian Parliament makes important change in the area of environmental management to implement the decisions that were taken at the conference. It was this time when environmental protection was granted a Constitutional status and environment was included in DPSP by the 42nd Constitution Amendment. The constitution also provides an obligations under Article 48 A and Article 51 A(g) to both the State and citizen to preserve and protect the environment. These provisions have been extensively used by courts to justify and develop a legally binding fundamental right to the environment as a part of Right to life and personal liberty under Article 21. Parliament enacted nationwide comprehensive laws; like The Wildlife Protection Act, 1972 and Water (Prevention and Control of pollution) Act, 1974. The Kerala High Court reiterated the position by holding that the Right

to Sweet Water and the Right to Free Air are attributes of the Right to Life, for; these are the basic elements which sustain life itself. Following these pronouncements, the Supreme Court also recognized and asserted the Fundamental Right to Clean Environment under Art.21 of the Constitution in very categorical terms. At the same time the judiciary in India has played a significant role in interpreting the law s in such a manner which not only helped in protecting environment but also in promoting sustainable development. In fact, the judiciary in India has created a new “environmental jurisprudence”.

Environmental Protection

Environmental law is a new domain in jurisprudence at the global level. At the national level, even three years ahead of Stockholm summit, India made a note in the IV Five Year Plan (1969 – 74) on integrating environmental factors into the planning. The IV plan document for harmonious development “recognized the unity of nature and man. Such planning is possible only on the basis of a comprehensive appraisal of environmental issue. There are certain instances, where proper and timely advice regarding environment could have helped in designing projects and in changing adverse effect on the environment which leads to loss of resources. It is necessary, therefore to introduce the environmental aspect into the planning and development.” A national committee on Environment Planning and Co-ordination was set up as a high advisory body to the Government. This Committee looked after issues related to environment. The right to live in a clean and healthy environment is not a recent invention of the higher judiciary in India. The right has been recognized by the legal system and the judiciary in particular for over a century or so. The right to live in a clean and healthy environment becomes a fundamental right; it is the only difference in today’s industrialization era, the violation of which, the Constitution of India will not permit. It was in later part of 80s when High Court and Supreme Court of India considered this right as fundamental right. Even before 1980s, people had enjoyed this right not as a fundamental right but as a right enforced by the courts under different laws like Law of Torts, Indian Penal Code, Civil Procedure Code, Criminal Procedure Code etc. In today’s emerging Law world, environmental rights are considered as third generation rights.

Doctrine and Principles Evolved by the Courts

The doctrines evolved by courts are a significant contribution to the environmental jurisprudence in India. Article 253 of the Constitution of India indicates the procedure on how decisions made at international conventions and conferences are incorporated into the legal system. The formulation and application of the doctrines in the judicial process for environmental protection are remarkable milestones in the path of environmental law in India.

Public Trust Doctrine

Indian legal system is essentially based on common law, and includes the public trust doctrine as part of its jurisprudence. The state is a guardian of natural resources, and natural resources are

available for public for their enjoyment by nature and it cannot be changed into private property. The state is under a legal duty to protect the natural resources.

In *M.C. Mehta v. Kamal Nath*, the Supreme Court applied this doctrine for the first time in India to an environmental problem. According to the Supreme Court, the public trust doctrine primarily rests on the principle that certain resources like air, sea waters and forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. Doctrine of Sustainable Development Environmental pollution and degradation is a serious problem nowadays. Judiciary to being a social institution has a significant role to play in the redressal of this problem. The progress of a society lies in industrialization and financial stability. But, industrialization is contrary to the concept of preservation of environment. These are two conflicting interests and their harmonization is a major challenge before the judicial system of a country. The judiciary, in different pronouncements, has pointed out that there will be adverse effects on the country's economic and social condition, if industries are ordered to stop production. Unemployment and poverty may sweep the country and lead it towards degeneration and destruction. At the same time, polluting industries impend the stability of the environment. The judiciary was, therefore, of the opinion that the pollution limit should be within the sustainable capacity of the environment.

In *Vellore Citizens Welfare Forum v. Union of India*, the Supreme Court opined, the traditional concept that development and ecology are opposed to each other, is no longer acceptable, sustainable development is the answer. Sustainable Development means to fulfill the need of present generation without compromising the needs of future generation. Sustainable development is a balancing concept between ecology and development.

Polluter Pays Principle:

The countries moving towards the industrial development had to face the serious problems of giving adequate compensation to the victims of pollution and environmental hazards. That the polluter must pay for the damage caused by him is a salutary principle evolved very early in Europe when that continent was haunted by a new spectre, that of unprecedented pollution.

In *M.C. Mehta v. Union of India*, a petition was filed under Article 32 of the Constitution of India, seeking closure of a factory engaged in manufacturing of hazardous products. While the case was pending, oleum gas leaking out from the factory injured several persons. The significance of the case lies in its formulation of the general principle of liability of industries engaged in hazardous and inherently dangerous activity.

Precautionary Principle

The precautionary principle says that if any action or project has some possible risk which can cause harm to public and environment and the person who is taking that action has knowledge about those risk, that in the absence of scientific measures that action or project is harmful, then

the burden of proof lies on those persons who are taking that action that it is not harmful. The Precautionary principle says that there is a social responsibility to protect the public from any kind of harm, in case when scientific investigation points towards a risk. These protections can be relaxed in the case when person taking action can prove with sound evidence that no harm will result.

In *Vijayanagar Education Trust v. Karnataka State Pollution Control Board*, Karnataka the Karnataka High Court accepted that the precautionary doctrine is now part and parcel of the Constitutional mandate for the protection and improvement of the environment. The court referred to *Nayudu cases*¹¹ which laid down that the burden to prove the benign nature of the project is on the developer if it is found that there are uncertain and non-negligible risks.

Indian Judiciary's Role in Development of Environmental Jurisprudence

Professor Upendra Baxi, who has often supported the judicial activism in India, has also said that the "Supreme Court of India" has often become "Supreme Court for Indians". By the powers vested in the Judiciary, and through its activism, it has actively contributed in the strengthening of the fundamental rights granted by the Constitution. In addition to this, the Stockholm Conference on Human Environment, 1972 has further contributed in strengthening the environmental law regime in India and also acted as the facilitating agent behind enacting the 42nd Constitutional Amendment Act, 1972. This amendment has introduced certain environmental duties both on the part of the citizens (Article 51A(g)) and on the state (Article 48A). Under the constitutional scheme the legal status of Article 51(A)(g) and 48A is enabling in nature and not legally binding per se, however, such provisions have often been interpreted by the Indian courts as legally binding. Moreover, these provisions have been used by the courts to justify and develop a legally binding fundamental right to environment as part of right to life under Article 21. In *Asbestos Industries Case*¹² the Supreme Court extensively quoted many international laws namely ILO Asbestos Convention, 1986, Universal Declaration of Human Rights, 1948, and International Convention of Economic, Social and Cultural Rights, 1966. In this case the court dealt the issues relating to occupational health hazards of the workers working in asbestos industries. The court held that right to the health of such workers is a fundamental right under article 21 and issued detailed directions to the authorities. In *Calcutta Wetland Case*¹³ the Calcutta High Court stated that India being party to the Ramsar Convention on Wetland, 1971, is bound to promote conservation of wetlands.

Judicial remedies for Environment Pollution

Tortious liability and statutory law remedies are the two remedies which are available in India in case of environmental protection. The tortious remedies available are trespass, nuisance, strict liability and negligence. The statutory remedies incorporate: Citizen's suit, e.g. an activity brought under Section 19 of the Environmental (Protection) Act, 1986,

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The Constitutional aspects on Environmental Law

In the Indian Constitution it was the first time when responsibility of protection of the environment imposed upon the states through Constitution (Forty Second Amendment) Act, 1976. Article 48A states that, the State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country." The Amendment also inserted Part VI-A (Fundamental duty) in the Constitution, which reads as follows: Article 51A(g) "It shall be duty of every citizen of India to protect and improve the natural environment including forests, lakes, and wildlife and to have compassion for living creature."

In *Sachidanand Pandey v. State of West Bengal*, the Supreme Court observed "whenever a problem of ecology is brought before the court, the court is bound to bear in mind Article 48A and Article 51A(g).