EMERGING RIGHT TO ENVIRONMENT IN INDIA

By

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Environmental pollution is a problem not of a region, nation, community of the States but of the world community. The Chernobyl to Bhopal Mars Disaster has left many irrepairable and uncompensated losses for the present and future generations as well. In this scenario the right to environment remains unnourished and in some cases yet to be born. In this paper an honest attempt is made to examine the international law and Indian constitutional law to protect and improve the environment. An attempt is also made to survey briefly the dynamism shown by the Indian judiciary in evolving the right to environment in India. Lastly, the present paper emphasises the need to evolve a specific fundamental right to environment.

International Attempts to Protect the Environment:

At the international plane, the second half of the 20th Century saw pressure groups which for example included Richard L. Ottinger (1969-70)[1], E.F. Roberts (1969-70)[2] and H.W. Hondius(1973)[3] who claimed a livable and decent environment for the world community at the same time the development process must be allowed to continue. The pressure groups succeeded when the Stockholm Conference, 1971 resolved in its first Principle:

> "Man had the fundamental right to adequate condition of life, in an environment of a quality that permitted a life of dignity and well being…"

The environment of quality and "a life of well being" do not mark a separate and a higher position for the said right in the growing industrialization of the world and the right remained in subordination of the commercialized developmental growth. Even after a decade from Stockholm conference, the right in the African Charter on human and people's rights remained entangle in the developmental problems.

Article 24 provided that:

> "All people shall have the right to a general satisfactory environment favorable to their development."

The word "shall' was now introduced to give a firm and mandatory status to the right but it lost much of its force with the words "general satisfactory" and "favorable" bringing dichotomy rather than integration between the environment and development. Inspite of the lukewarm approach, the international scholars[4] continued their crusade against the pollution of environment and claimed a better right to environment. But the

1. Richard Ottinger, "Legislation and Environment: Individual Right and Government Accountability", Cornell L.Rev. 666(1969-70).
2. E.F.Roberts, "The Right to Decent Environment", Cornell L.Rev .674(1969-70)
3. F.W.Hondius, "Environment and Human Rights", 41 yr. Book of Assoc of Attenders and Alumni of the Hague Academy of Int. Law 68(1971)
4. -W. Paul Gormely, "The Right of Individual to be guaranteed a pure, clean and decent environment, Future programs of the council of Europe in legal issues of European Integration 23-65; 1975.
   - "The Right to a safe and decent Environment" Indian J. Int'l Law 1(1988).
   - Dube Yuon, "The right to a healthy Environment" Environmentalist 185(1986).

mandatory aspect was once again diluted when the Rio Conference, 1992 in its declaration on environment and development in Principle 1 provided for " a healthy and productive life in harmony with nature". The words "healthy" and "productive" are once again make mixture of the conflicting interest : environment and development. Thus the Rio declaration though it talks of "harmony" its direction is rather disharmony. Secondly principle 1 talks about "nature" which has been changing from natural to unnatural nature and natural environment is a myth and not reality. Thus the development of international environmental law from Stockholm to Rio hardly provided a clear direction and a firm root to the environment to the global soil. Rather the right to exploit the nature and pollute the environment, a part of developmental process, held the field.

Indian Constitutional Law to protect the Environment:

Coming to Indian Constitutional Law, it was unfortunate that environment was a casualty in the marathon exercise in the Constituent Assembly. In 1976, 42nd Amendment Act of the Constitution of India incorporated *inter alia* the following tow articles[5]:

> Article 48-A of the Constitution of India provides protection and improvement of environment and safeguarding of forests and wild life- "the State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country".

Article 51-A(g) of the constitution of India provides fundamental duties—

> "It shall be the duty of every citizen of India, to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures".

Thus it was only the environmental duty which got place and its counterpart, the right to environment was left out in the constituent exercise. This constitutional vaccum was fortunately filled in by the Indian judiciary.

Role of Indian Judiciary to protect the Environment:

It is not only the apex court but also the High Courts who have shown dynamism in evolving the right to environment in India.. A brief survey of their approaches may be worthwhile to highlight the emerging shape of the right. The "Ratlam Municipality" case[6] starts the deliberation of Human Right in the polluted environment where the health of the residents of particular locality of the Ratlam City was held hostage because of its bankruptcy. Justice Krishna Iyer ruled out the ugly and shameless plea and held that the Human Right had to be respected regardless of budgetary provision. In this case though a reference was made to the Human Right but it was the Criminal Procedure Code which was activised to rouse the municipality from its long hiberation.

In the subsequent cases Article 32 of the Constitution of India was put into operation, which in itself is an evidence to prove that the court treated the right to protect and improve the environment as a fundamental right. In 1985 Justice Bhagawati court gave an expansive meaning to right to environment in *Rural Litigation and Entitlement Kendra v. the State of U.P.*[7]. In this case the court stated:

> "The Right of the people to live in healthy environment with minimum disturbance of ecology balance and without avoidable

5. P.M. Bahkshi, Constitution of India, Universal Law Publishing Co. (P) Ltd. New Delhi, 2000, Pp.94-96.

6. Ratlam Muncipality v. Vardhichand AIR 1980 SC 1622

7. AIR 1985 SC 625

hazard to the them and to their cattle, house and agriculture land and undue affection of air, water and environment."

The Supreme Court in this case talks about the right is on the one hand " healthy environment " and on the other hand "minimum disturbance to ecology balance" and "unavoidable hazard" giving no clear direction to the environmental justice in action. But one appreciable development was that it recognized three consumers of the right to environment 1. Man 2. Animal 3. Property and their inter-relationship with air, water and environment[8].

The *M.C. Mehta* case[9] further expanded the right into three directions: 1."life, health and ecology in Article 21; 2. The aquatic organisms, left out of previous case law also became the beneficiaries of the right; and lastly the right included" the right to defend the Human environment for the present and future generation[10], "bringing to life the right of those who are yet to be born. This makes the living human being a trustee of the environment. But in the year 1990 the Supreme Court constricted its vision to the citizen's fundamental right to have the enjoyment of quality of life and living as contemplated by Article 21 of the Constitution". This interpretation gave a literal meaning to the word "life" leaving other components of environment outside the right to environment. And secondly, environment which does not know geographical limits, was Restricted to Indian citizens only. However, in *M.C. Mehta v. Union of India*[12], the Supreme Court while dealing with hazardous industries, hot mix plants, had directed closure of such plants and also issued suitable directions.

In a joint hearing of a reference petition and an appeal regarding noise pollution vis-à-vis right to life enshrined in Article 21 of the Constitution, the Supreme Court gave directions on 18.07.05 to control noise pollution from firecrackers, loud speakers and vehicular noise. The court found that the amendment to Noise Pollution Control and Regulation Rules, 1999 was not accompanied by any guidelines and hence was capable of being misused, defeating the very purpose of the rules themselves. The court removed the relaxation empowering the State to permit use of loudspeakers/public address system between 10.00 PM. and 12.00 AM. midnight on cultural/religious occasions for 15 days. The court completely banned bursting of sound emitting firecrackers between 10.00 PM. and 6.00 AM. And beating drum / tom-tom/ trumpet or sound any instrument/ amplifier at night except in public emergencies[13].

The High Courts also have not been lagging behind the judicial activism. The protection of "life" under Article 21 of the Constitution of India was the star attraction for the High Courts. Justice Chowdary in the Damodar Rao case[14] interpreted Article 21 to embrace "the protection and preservation of nature's gift without which life cannot be enjoyed". This was a part of the right of "enjoyment of life and its attainment". The land earmarked as a park, was ordered to be converted into a residential area which the court declared as contrary to Article 21 of the Constitution. Similarly the High Courts of Himachal Pradesh[15] and Kerala[16] took the stand that the mining operation and the auto workshop repair process respectively

8. Ibid. 656
9. M.C. Mehta v. Union of India AIR 1988 SC 1037
10. Ibid. 1039
11. Chhetriya Pradushan Mukti Sangarsh Samiti v. State of U.P. AIR 1990 SC 2060
12. 1997 (1) Scale (SP) P.31
13. Noise Pollution with Forum, Prevention of Envn. and Sound Pollution v. Union of India (civil appeal No. 3735 of 2005 decided on 18.07.2005)
14. Damodar Rao v. S.O. Mun. Corpt., HYD. AIR 1988 A.P. 171
15. Kinikri Davi v. State, AIR 1988 H.P.
16. Madhavi v. Tilakan, 95 Cri.L.J. 1989, 499.

attracted Article 21. In the later case, a right to live in a peaceful atmosphere emerged. But, the question remains: were the High Courts of Andhra Pradesh and Himachal Pradesh correct in applying Article 21 to matters which did not directly affect the life? In Atta koya Thangal's case[17] where the ground water was interfered with, Justice Sankaran Nair extended the right to "life" to the "right to sweet water" or "the right to have clean water". In this series, Koolwal's case[18] deserves special mention. Apart from Article 21 the insanitary conditions also pressed in Article 51 A(g) which according to Justice Mehta created a corresponding right in favor of the citizen to move the court for enforcement of the environmental duty cast on the State under Article 48-A. This way the right was made available not only for the protection of life but also for the protection and improvement of environment and to safeguard the forests and wild life of the country. Thus the Indian judiciary prove to be highly innovative and progressive.

Need for a separate fundamental Right:

There is an urgent need to formulate a separate Fundamental Right to protect and improve the environment. In the above scenario the question arises- why we need a separate and specific fundamental right? No doubt the 42nd Amendment Act and the Judiciary have made an important start but there are misgivings and left outs. Firstly, the above judicial activism will not be available when there is no immediate and direct threat on the human life. For example, the deforestation, denuding park, mining operation *etc.*, cannot be said to have direct effect on man's life immediately. Further, there may be and are many pollutants of which man has become almost resistant or a part of the Indian life, but micro and macro organisms and plants might find it difficult to survive in such pollutants. Secondly, a supplementary right carved out of other fundamental rights cannot have much force; moreover, the third generation rights require a special setup and that too when it has to fit in between the two powerful and conflicting interests environment and development. Thirdly, the 42nd Amendment Act provided the fundamental duty of the citizen and the obligation of the State, but it missed the co-relationship between the right and duty and therefore a specific right would provide a missing wheel to the chariot of Bharatiya environment. And lastly, the enforcement of such a right would expose the inaction, miss action, and at time over action of the ecociders and also those who play an important role in the protection and improvement of environment. So the Constitution of India may be amended to include the following provision:

> "Protection of Environment - All persons shall have the right to clean and livable environment throughout the territory of India, subject to any law imposing reasonable restriction in the interest of general public".

This provision should be attached to Article 21 of the Constitution, because without this basic right, the right to life and personal liberty will not have much meaning. Further, being a part of Article 21, this right will enjoy all the benefits, which Article 21 has.

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17. Attakoya Thangal v. Union of India 1990 KLT 580

18. L.K.koolwal v. State of AIR 1988 Raj. 2.