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Procedural and Substantive Innovations and its Applications by Supreme Court for Environmental Jurisprudence

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Introduction

The growing interference of Court in environmental issues, however, is being seen as a part of the pro-active role of the Supreme Court in the form of frequent creation of successive strategies to support rule of law, enforce fundamental rights of the citizens and constitutional decorum aimed at the protection and improvement of environment. A number of unique innovative methods are identifiable, each of which is new and in some cases opposing to the conventional legalistic understanding of the judicial function.[1]

It is important to note that these judicial inventions have become part of the larger Indian jurisprudence ever since the Court has started overriding in the affairs of executive in the post emergency period.[2] The methods initiated in resolving environmental litigation,

[1] Jamie Cassel's, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?',37 (3) *The American Journal of Comparative Law* 495 (1989).

[2] Gobind Das, 'The Supreme Court: An Overview', *in* B.N. Kripal et al. (eds), *Supreme But Not Infallible* (New Delhi: Oxford University Press, 2001). The author argues that the Indian Supreme Court had always been uncomfortable with former Prime Minister of India, Mrs. Indira Gandhi's regime; during the late sixties her economic and political policies were struck down in the Bank Nationalisation and Privy purse cases; in the early seventies the Court was locked in the Kesavananda battle and again in her election cases; when the Court supported her emergency in the Shukla case and Detenu case it was execrated by public opinion; and during the Janata rule the Court was confirming legal attempts for her political extinction in

however, have been almost entirely dominating the environmental jurisprudence process for more than the last twenty years. The innovative methods in environmental jurisprudence, however, have both procedural and substantive characteristics.

Concept of PIL

The most important procedural innovation for environmental jurisprudence has been the relaxation of traditional process of standing in the Court and introducing the concept of Public Interest Litigation (PIL).[3]

Up to 1970s, court case in India was in its simple form because it was seen as a quest for the justification of personal vested interests. During this time period, beginning of litigation was right only to the individual aggrieved party. A complete change in the situation in the 1980s with efforts taken by Justice P.N. Bhagwati and Justice V.R. Krishna Iyer was marked by attempts to bring wider issues disturbing the general public at large within the domain. The ambit and extent of PIL were stretched in 1980s from the initial prisoner rights concerns, to others like bonded labour, child labour, inmates of various asylums, ensuring the rights of the poor to education, to shelter and other essential services, sexual harassment of women at working place, preventing corruption in public offices, accountability of public servants, and utilization of public funds for development activities.

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the Special Courts Bill and Assembly Dissolution cases. Whenever the Court opposed her policies it had to pay the penalty in the form of suppressions of judges and constitutional amendments. In the post-emergency period (1975-77), the Court decided not to interfere with the major political and economic decisions of government and opened up new fields of interest and different areas of judicial activities; it chose the poor, the helpless, the oppressed in the name of social justice, constitutional conscience, and the rule of law.

[3] In the Indian context, some of the legal scholars prefer the expression 'Social Action Litigation' to 'Public Interest Litigation', as this tool for justice to protect basic rights of individuals and communities has, through innovations of higher Court in India, for greater positive impacts on the social lives of the people in India than the United States, where the PIL movement took roots. For more details, *see* Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India', *in* Tiruchelvam and Coomaraswamy eds., *The Role of the Court in Plural Societies,* (New York: St. Martin's Press, 1987).

The biggest hurdle in the path of litigation for environmental justice had been the traditional concept of *locus standi*. Earlier when the third party approached the appellate Court for seeking relief against an injury they did not incur directly, the action was not maintainable as the appellate Court focused its attention on the identity of the petitioner rather than the subject of petition. But now the Court's approach has changed and it has been ruled that any member of the public having sufficient interest, may be allowed to initiate the legal process in order to assert diffused and meta-individual rights. Generally, in environmental litigation, the parties affected by pollution are a large, diffused and unidentified mass of people. Therefore, the question arises as to who ought to bring such cases to the Court's notice where no personal injury, in particular, has been noticed. In such situations, the Court has emphasized that any member of the public having sufficient interest may be allowed to initiate the legal process in order to assert diffused and meta-individual rights in environmental problems.[4]

A number of cases on environmental issues have been initiated through PIL. Beginning with the Dehradun lime stone quarrying case[5] in 1983, followed by the *Ganga Water Pollution* case, *Delhi Vehicular Pollution* case, *Oleum Gas Leak* case, *Tehri Dam* case, *Narmada Dam* case, *Coastal Management* case, industrial pollution in Patancheru, and *T.N. Godavarman* case, all of them came to Court's attention through PIL. These cases have been initiated by Non-Governmental Organizations (NGOs), and environmental activists on behalf of other individuals and groups or public at large, to ensure the implementation of statutory acts and constitutional provisions aimed at the protection of environment and enforcement of fundamental rights. It has been found from Indian Supreme Court Case reports that out of 104 environmental cases[6] from 1980-2000 in the

[4] *RLEK v. State of Uttar Pradesh and Others*, Supreme Court of India, Judgement of 19 December 1996, AIR 1985 SC 652.
[5] The Dehradun lime stone quarries litigation filed by the Rural Litigation and Entitlement Kendra in 1983 was the first PIL on environmental issue in the country before the Supreme Court.
[6] The information is based on the All India Reporter from January 1980 till December 2000, Supreme Court Cases.

Supreme Court of India, 54 were filed by individuals who were not directly the affected parties and 28 were filed by NGOs on behalf of the affected parties. This suggests that the instrument of PIL has provided an opportunity to the third party to represent on behalf of the affected people and the environment itself.

Notwithstanding the above progressive implications of the concept PIL for environmental jurisprudence, certain practical difficulties and constraints have emerged in recent years from judicial entertainment of PILs dealing with environmental cases. A close look at the history of environmental cases suggests that with the liberalization of the *locus standi* principle, there has been a flurry of PILs on environmental issues.[7] Taking advantage of the Court's lack of expertise on observation of technicalities, PILs are being filed with little or no preparation.

Another immediate concern is the inconsistent approach of the Court in entertaining and rejecting PILs. The judicial restraint towards environmental litigations, especially challenging infrastructure projects, offers a well illustration in this context. In such nature of litigations, the Court has not only rejected PILs but has also made gratuitous and unmerited remarks regarding abuse of PIL.

Expansion of Fundamental Right to Life

The six fundamental rights of Indian citizens are specified in Articles 14-32 of the Indian Constitution such as right to equality (Articles 14-18), right to freedom (Articles 19-22), right against exploitation (Articles 23-24), right to freedom of religion (Articles 25-28), cultural and educational rights (Articles 29- 31) and right to Constitutional remedies (Article 32). There are four Constitutional provisions that are directly relevant to protect the fundamental rights of citizens. Under Article 13, the Court is granted power to judicially review legislation, so that the laws inconsistent with the fundamental rights may be held void. In addition, Article 32 confers on every citizen the Court's original jurisdiction for the enforcement of his or her fundamental rights. Through this provision,

[7] Jona Razzaqhue, *Public Interest Environmental Litigation in India, Pakistan And Bangladesh* (Hague: Kluwer Law International, 2004).

individuals can approach the Court to seek the protection of their fundamental rights. Article 32 and 226 of the Indian Constitution grant wide remedial powers to the Supreme Court and High Courts of each Indian State in Constitutional cases. Under Article 136, the Supreme Court has discretionary power to grant special leave to appeal from any judicial order, judgment, or decree in the land thereby providing another route for judicial review. The earliest understanding of these provisions had been a narrow procedural one where fundamental rights and other Constitutional provisions were interpreted as procedure established by law.[8]

Moreover, inconvenient Court decisions on the Constitutionality of state action were simply overturned by amending the Constitution until the 'basic structure' of the Constitution was declared unalterable.[9] In 1978 the Court breathed substantive life into Article 21 by subjecting state action interfering with life or liberty to a test of reasonableness; requiring not only that the procedures be authorized by law, but that they are 'right, just and fair'.[10]

An account of the interpretation of right to environment as a part of fundamental right to life would illustrate the efforts of Court to expand the scope of existing fundamental right to life. For instance, in the *Ratlam Municipal case*, the Court has upheld that public nuisance is a challenge to the social justice component of the rule of law. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies. Likewise, in the *Dehradun Lime Stone Quarrying case*, the Court has made it clear that economic growth cannot be achieved at the cost of environmental destruction and peoples' right to healthy environment. In the *Doon Valley case*, concerning mining environment, the Court has interpreted Article 21 to include the right to live in healthy environment with minimum disturbance of ecological balance and

[8] *A.K. Gopalan* v. *Union of India*, Supreme Court of India, Judgement of 19 May 1950, AIR 1950 SC 27.
[9] *Kesavananda Bharti* v. *Union of India*, Supreme Court of India, Judgement of 24 April 1973, AIR 1973 SC 1461.
[10] *Maneka Gandhi* v. *Union of India*, Supreme Court of India, Judgement of 25 January 1978, AIR 1978 SC 597

without avoidable hazard to them and to their cattle, house and agricultural land and undue affection of air, water and environment.

This exercise has been further emphasised in the Ganga water pollution case by Justice Venkataramiah, who has extended the right to life to include the right to defend the human environment for the present and future generation.[11]

Spot Visit

Another important procedural innovation of the Court in resolving environmental dispute has been found in judges' personal interest to have first-hand information through spot visit to understand the nature of environmental problem and the issues revolving around it. In the *Ratlam Municipal* v. *Vardhichand* case, before arriving at a decision, Justice V.R. Krishna Iyer visited the Ratlam town and assessed the problem and then directed the Ratlam Municipality to take appropriate measures to construct proper drainage system in the city. Similarly, in the Doon Valley case, Justice P.N. Bhagwati visited the area and found that the environmental litigation involved certain complex issues including the rights of the workers, traders and fragile ecology of the area. He then appointed an independent committee to assess the problem and based on the recommendation of the committee, the Court directed the state government of Uttar Pradesh to close down certain mining units which were illegally operating and allowed other mining units to operate only with certain conditions to ensure the protection of environment. In the Narmada Dam case, the visit of Justice S.P. Bharucha to the dam site also made a difference in the outcome of the case. In his dissent judgment, Justice S.P. Bharucha expressed dissatisfaction with the rehabilitation process and the way environmental clearance was given to construct the dam in the river valley.[12]

11 See *M.C. Mehta* v. *Union of India.*

12 *Narmada Bachao Andolan* v. *Union of India and Others*, Supreme Court of India, Judgement of 18 October 2000, AIR 2000 SC 3753

The spot visit of judges has enabled them to assess the environmental problem on the ground and hence the decisions given by these judges have made a difference in the outcome of the case. However, most of the judges share the view that it is neither feasible nor possible for them to make spot visit to arrive at a decision always.

Application of Environmental principles and Doctrines

Environmental principles, such as *polluter pays principle*,[13] *precautionary principle*[14] and *public trust doctrine*[15] have been adopted by the Court in its concern to protect the environment from further degradation and improve the same. It is important to note that these principles have been developed in various international agreements and conferences to control and prevent further environmental degradation.

Drawing inference from international environmental principles, the Court of India has applied various principles to resolve domestic environmental problems. For example, the Polluter Pays Principle was invoked by the Court of India in the *Indian Council for Enviro-Legal Action* v. *Union of India*. Giving the judgment, the Judges held that 'we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country. Once the activity carried on is hazardous or inherently dangerous, the polluter carrying on such activity is liable to make good the loss caused to any other affected party by polluter's activity irrespective of the fact whether the polluter took reasonable care while carrying on his activity'.[16] In this case, the Court has stated that the *'Polluter Pays Principle'* means that the absolute liability for harm to the environment extends not only to compensate the victims of the pollution but also the cost of restoring the environmental degradation. Subsequently,

[13] *The Polluter Pays Principle* is a principle in international environmental law where the polluting party pays for the damage done to the natural environment.

[14] *Precautionary Principle* aims to provide guidance for protecting public health and the environment in the face of uncertain risks, stating that the absence of full scientific certainty shall not be used as a reason to postpone measures where there is a risk of serious or irreversible harm to public health or the environment.

[15] *The Public Trust Doctrine* is the principle that certain resources are preserved for public use, and that The government is required to maintain it for the public's reasonable use.

[16] *See Indian Council for Enviro-Legal Action.*

'Polluter Pays Principle' as interpreted by the Court has been recognized as a fundamental objective of government policy to prevent and control pollution.[17]

The precautionary principle, as applied by the Court in the *Vellore Citizens' Welfare Forum* v. *Union of India*,[18] imposes an obligation on every developer, industry and governmental agency to anticipate, prevent and attack the causes of environmental degradation. The Court also held that if there are threats of serious and irreversible damage than any lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. Finally, the Court emphasized that the onus of proof shall be on the actors or the industrialists to show that their action is environmentally benign. The precautionary principle had also been emphasized in cases such as *M.C. Mehta* v. *Union of India* and *A. P. Pollution Control Board* v. *M.V. Nayudu case.*[19]

further 'public trust' doctrine has been referred to by the Court in *M.C. Mehta* v. *Kamal Nath.*[20] The doctrine extends to natural resources such as rivers, forests, sea shores, air etc., for the purpose of protecting the eco-system. The State holds the natural resources as a trustee and cannot commit breach of trust. In the above case, the State's order for grant of a lease to a motel located on the bank of the river Beas, which resulted in the Motel interfering with the natural flow of the water, has been quashed and the public company which got the lease has been directed to compensate the cost of restitution of environment and ecology in the area.

[17] *See* Government of India, National Environmental Policy, 2006, available at http://www.envfor.nic.in/nep/ nep2006.html
[18] *Vellore Citizens' Welfare Forum v. Union of India*, Supreme Court of India, Judgment of 28 August 1996, AIR 1996 SC 2716.
[19] *Andhra Pradesh Pollution Control Board* v. *Prof. M.V. Nayudu*, Supreme Court of India, Judgement of 27 January 1999, AIR 1999 SC 812.
[20] *M.C. Mehta* v. *Kamal Nath*, Supreme Court of India, Judgement of 13 December 1996, 1997 (1) SCC 388.

Unfortunately most of the above principles borrowing from international environmental agreements by the Court have neither been followed consistently nor been institutionalized to make a long term impact for the environmental jurisprudence process.

Expert Committee

The Court's dependence on expert committee has traditionally been part of the jurisprudence process, irrespective of the nature of litigation. The Supreme Court's use of discretion power whether to appoint independent expert committee or rely on state appointed expert committee on environmental issues, however, has brought substantial changes in the outcome of the environmental litigation.

The Court's strategy of appointing committees, which are supposedly expert bodies sometimes also results in leading to a different set of unforeseen problems while solving disputes. The ***Central Empowered Committee*** (CEC), for example, in the *T.N. Godavarman case*,[21] which was constituted vide a Court's order is perhaps one of the most glaring examples. The procedural requirements mandate that the Central Empowered Committee can recommend certain things to the Court in the light of facts presented before them. Again, it is only when the Court endorses such recommendations that the order would be more effective.

Apart from this, there have been serious concerns over the functioning and composition of such Court appointed committees.

The reports of expert committee given to apex Court also raise problems of their evidentiary value. No Court can base its decisions on facts unless they are proved according to law. This implies the right of an adversary to test them by cross-examination or at least counter affidavits. However, in the *S. Jagannath* v. *Union of India* case, the Court did not permit even counter affidavits to be filed in response to ***National***

[21] The Court in its order on 9 May 2002 constituted an Authority at the national level called the Central Empowered Committee. The task assigned to it included the monitoring of the implementation of the orders of the Court, removal of encroachment, implementation of working plan, compensatory afforestation plantation and other conservation issues.

Environmental Engineering Research Institute's (NEERI) report thereby making it difficult for individual affected parties to set out their own case. In such instances, the Court has unnecessarily invited criticism as using its discretionary power by not allowing other parties to participate in the decision making process.[22] In the *Taj Trapezium* case, the Court relying upon the report of NEERI, ordered closure and relocation of several small-scale units, especially the foundries in the area. The report, unfortunately was not based on all facts and its methods, analysis and conclusions left a lot to be desired from a reputed scientific and research organization.[23]

It is also being strongly felt that the statutory obligation of the executive is being diluted by creation of such committees, which now have assumed a status of permanent statutory bodies as such committees are now being created under the Environment Protection Act as Special Environment Protection Authorities and their terms depend on the Central Government's will. In other words, Court initiated committees or commissions are being converted into statutory authorities thereby creating a parallel power structure within the governance frame.

As a result of constant reminders of the Supreme Court for establishing Environmental Court in India, a Green Tribunal Act has been passed in the year 2010. It is a kind of a ray of new hope for India. But the advancement in science and technologies will cause new problems with it. It might be possible that the new problems and challenges we will face in the field of environment for which the present legal system may not be proved adequate

Conclusion: A closer look at the judicial decision-making process on environmental issues makes it clear that the efforts made by judiciary to arrive at the decision in resolving environmental disputes has gone beyond the interpretation of the law in its strict sense. Its decisions are innovative and often deviate from the constitutionally

[22] Ashok H. Desai and S. Muralidhar, *'Public Interest Litigation: Potentials and Problems'*, *in* B.N. Kripal *et al*. (eds.), *Supreme but Not Infallible* 180 (New Delhi: Oxford University Press, 2001).
[23] Raghuram, 'The Trouble with the Trapezium', *Down to Earth*, 15 April 1996, page 32.

assigned role to judiciary to interpret the law. The judgments given by the Supreme Court are projected as innovative because the Court has gone beyond the legal text to protect the environment thereby bringing and adding new dimensions to the environmental governance process. On the other hand, questioning the validity of government policy, interfering in the appointment of expert committee members, creating parallel structure for protection of forest, etc. have been seen as deviation from the traditional notion of judicial function as an adjudicatory body. The interference of judiciary in the affairs of other organs for the protection of environment has been labeled as a violation of the theory of separation of powers and against the spirit of democracy.

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