

JURISPRUDENTIAL BASIS OF THE RIGHT TO CLEAN AND HEALTHY ENVIRONMENT

Shampa I. Dev♦

Abstract: Examining the basis of the right to a clean and healthy environment helps in an increased understanding of the nature of the right which in turn will further the job of devising effective strategies and policies to meet the interests of the environment and make the right a reality. This paper examines four strategies: Firstly protect environment rights by declaring it to be a right. This would protect it from mutilation at the hands of political processes, and thus would be a safer option, but its dimensions have not yet been crystallised. Secondly, it can be protected by making it part and parcel of human rights. Thirdly, the Interest Theory suggests that the interest of the environment must be protected for its own sake by creating such an interest. Fourthly, the notion of Intergenerational Responsibility which establishes that the present generation has an obligation/duty to preserve and protect the environment for a correlative similar right which the future generation enjoys. The article also examines the conflict between environment protection and developmental needs of humanity. Indian courts have referred to traditional Indian philosophy of 'Dharma' and have tried to adopt a balancing approach by integrating environment values with developmental values. Any theory that does not resolve the above conflict would clearly be insufficient.

Keywords: Jurisprudential Basis, Environment Rights, Rights/Duty Based Approach

1. Introduction

The Millennium Development Goals list 'Ensure Environment Sustainability' at Goal 7. Environment management, for all the attention it has attracted from policy makers and academicians, is still

♦Dr. Shampa I. Dev is an Associate Professor at School of Law, Christ University, Bengaluru.

an elusive concept. The two conflicting ends seem to be humanity's interest in development and comfort, resulting thereby in large scale felling of trees, releasing impure gases in the atmosphere, polluting water bodies, etc. Rapid industrialization and thereby depleting natural resources led to voicing of concerns for the environment. Development needs conflicted with environmental values. Cry for sustainable development and right to clean and healthy environment came to the fore.

These concerns resulted in many International Conventions as well as consequent changes in the municipal law. In India a plethora of legislations¹ were enacted for the protection and the conservation of natural resources and the environment. Environmental interests found support in judicial rulings² that addressed social realities and met the demands of the times with practical solutions towards nature conservation and maintaining ecological balance. Chief Justice Bhagwati in *Oleum Gas Leak Case*³ clearly treated right to live in a healthy environment as a fundamental right under Article 21 of the Constitution of India. There has been much debate since on the dimensions of this right.

This paper seeks to examine the basis of the right to clean and healthy environment. This will help in an increased understanding of the nature of the right which in turn will further the job of devising effective strategies and policies to meet the interests of the environment and make the right a reality. It investigates how best the interest of the environment can be protected and examines the approach of the courts and the tools it has devised to combat the problem.

Several varied and often contesting approaches have been suggested to deal effectively with environment degradation. Firstly protect environment rights by declaring it to be a right. This would protect it from mutilation at the hands of political processes, and thus

¹Environment Protection Act, 1986, Forest Conservation Act, 1980, the Wildlife Protection Act, 1972, the Air Act, 1981, the Water Act, 1974, etc.

²"Municipal Council, Ratlam v. Vardichand," *All India Reporter, Supreme Court* 1980, 1622, "M. C. Mehta v. Union of India *All India Reporter, Supreme Court*, 1988, 1037, "Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh," *All India Reporter, Supreme Court*, 1988, 2187, "T. Damodhar Rao v. Special Officer Municipal Corporation," *All India Reporter, Supreme Court*, 1987, *Andhra High Court*, 171.

³"M. C. Mehta v. Union of India," *All India Reporter, Supreme Court*, 1987, 1086.

would be a safer option, but its dimensions have not yet been crystallised. To a limited extent it is protected as a cultural right vested in indigenous people on the basis of the relation they have with the land. Secondly, it can be protected by making it part and parcel of human rights. Thirdly, the Interest Theory suggests that the interest of the environment must be protected for its own sake by creating such an interest. Fourthly, the notion of Intergenerational Responsibility which establishes that the present generation has an obligation/duty to preserve and protect the environment for a correlative similar right which the future generation enjoys.

The traditional Indian Philosophy of ‘Dharma’ seems to provide an overarching vision. A duty based approach could be a solution. For environment rights would be third generation rights that are enjoyed and realised by collective action of the concerned actors such as the individual, the community, the state and non state actors. Granting rights to people and imposing duties on the State alone to conserve and preserve the environment seems inadequate. India’s religious and cultural heritage has been shown to reveal knowledge of nature and rules of utilisation of natural resources that respect the integrity of nature.⁴ A concerted effort of all the concerned actors is the need of the hour that will help in making the right a reality. Indian courts have tried to bring environment justice by adopting a balancing approach and integrating environment values with developmental values. Any theory that does not resolve the conflict between environment protection and developmental requirements of man would clearly be insufficient.

2. Protecting Environment Rights as a Right in Itself

Environment Rights fall under third generation rights⁵ that are enjoyed collectively by the people. These can be realised by human solidarity. The extent of damage caused to the environment can be attributed to lack of solidarity. Moreover, this very factor brings in more complexity and ambiguity, thereby making it difficult to spell out the right in clear terms. Needless to say these rights are the most

⁴Krishnamurti and Schoettli, “Environment in India’s Religious and Cultural Heritage’ in Bandopadhyay et. al., *India’s Environment*, Dehra Dun: Natraj, 1965, 159-171.

⁵The first generation rights are the civil and political rights and the second generation rights are the social, economic and cultural rights whereas the third generation rights are the solidarity rights.

debated ones and lack legal and political recognition. But just because the law of the land does not say in clear terms that everyone is entitled to a right to clean and healthy environment does not make it any less important than it is.

To a limited extent environment has received protection as a part of cultural rights of the indigenous people on account of the relationship they have with the land. Hence tribal land is protected from going into the hands of non tribal person.⁶ Forest land⁷ and agricultural lands⁸ also enjoy some protection from interference. Ecology plays a major role in the cultural moorings of some, and cultural rights are more strongly recognised. But in this way only a few pockets⁹ on the earth are protected.

A broader right to clean and healthy environment has been read by judicial interpretation through Article 21 of the Constitution of India. Article 21 grants the right to life as a fundamental right. Right to life includes right to live with human dignity. Life cannot be enjoyed without healthy environment. It is extremely important to have an ecological balance that is free from pollution of air and water. Hence protection and preservation of environment is an absolute must. Any contra action would cause environmental pollution. "Environmental, ecological, air and water, pollution etc. should be regarded as amounting to the violation of the Constitution."¹⁰

This circuitous route through the Article 21 of the Constitution of India for the assertion of a right to clean and healthy environment has not helped much. If a substantive right to clean and healthy environment is directly incorporated in the Constitution, it will be immune from the pulls and pressures of political processes. Yet

⁶Non-tribals are barred from buying land in tribal areas. Also see "Pradeep Kishen v. Union of India," *All India Reporter, Supreme Court*, 1996, 2040.

⁷Forest Conservation Act, 1980 imposes restrictions on the use of forest land for non- forest purposes. Also see T. N. Godavarman Thirumulpad v. Union of India 1996 (9) Scale 2.

⁸No Objection Certificate is required to convert agricultural land to non-agricultural use.

⁹Other relevant laws are Karnataka Parks Preservation Act, 1975, Preservation of Trees Act, 1976, The Mines and Minerals Act, 1957.

¹⁰The Supreme Court of India in "Virendra Gaur Vs Union of India," *All India Reporter, Supreme Court Cases*, 1995, 577 at 580.

incorporating such a right would involve considerable planning¹¹ and expenditure and therefore it may not be immediately possible.

The existing body of laws relating to environment stress more on the procedural aspects of the right. This includes right to information, right to be heard, ensuring public participation in the decision making process, administrative or judicial review of the decisions, etc.

Even though laws have been passed for the protection of environment, the enforcement of the same has been tardy, to say the least. The efforts of the Supreme Court while dealing with Public Interest Litigation, relating to environmental issues is to see that the executive authorities take steps for implementation and enforcement of law.¹²

3. Environment, a Human Right

In the recent years the concept of human rights has been gaining more and more ground. Some of these rights¹³ are for collective enjoyment by the community. Taking the human rights approach to protect the environment makes the task simpler. The third generation rights as these also require State action. But most importantly, they can only be realised by the united action of all concerned actors on the social scene – from the individual to the international community, including public and private bodies. Human rights are universal, indivisible and inalienable. The term ‘inalienable rights’ refers to a set of human rights that are fundamental, which are not awarded by human power, and that cannot be surrendered, in any circumstances. Yet for the realisation of these rights concerted efforts of the state as well as individuals are required.

¹¹If a right to clean and healthy environment has to be spelled out, the first step should be to define its scope particularly in cases of clashes with existing rights, e.g., freedom of trade and profession. Refer “M. C. Mehta v. Union of India,” *All India Reporter, Supreme Court*, 1988, 1037 for answer to the question: Should environmental standards be a reasonable restraint on right to do business?

¹²“Indian Council for Enviro Legal Action v. Union of India,” *All India Reporter, Supreme Court Cases*, vol. 5, 1996, 281 at 300.

¹³Right to self determination, right to natural resources, right to enjoyment of group culture, religion, language, etc. find mention in International conventions.

4. Interest Theory

Another view prevalent is that environment must be protected for the sake of environment in its own interest. It is an interest that needs protection. The bearer of the right cannot waive it, extinguish it, or leave it unenforced. Delving into the theory of rights, Interest Theory is found in the writings of Bentham and later Jhering,¹⁴ Mac Cormick¹⁵ and Raz.¹⁶ Allen's definition¹⁷ seems to fit best in the context of environmental rights. Allen claims that right is a legally guaranteed power to realise an interest. When a claim is made by an individual that he has a right to a clean and healthy environment it is nothing but a power conferred in him to realise the interest of the environment.

It remains doubtful as to how would Allen respond to a query on – whose interest is the law seeking to protect and on whom the right would be conferred. Is it the interest of the environment or is it the interest of the individual who serves to be benefitted by having a clean and healthy environment. Can plants and animals benefit from any right conferred on them and if any of their interest is recognised? I suppose it would be more appropriate to view protection of environment interests as not rights conferred on plants but as duties imposed on individuals in respect of them. It is in fact humanities own interest in having a clean and healthy environment that reflects in the law imposing some duties on the people.

5. Intergenerational Equity

Intergenerational equity compels us to think of tomorrow. Nature is a gift that the present enjoys. Earlier generations have enjoyed it, used it, and the remaining is being enjoyed by the present generation. What the present generation leaves will remain for the future generation. The question, however remains: Does the present generation, have a responsibility or an obligation towards the future generation, that they should pass on the natural resources on to the future in the same state in which they had inherited it from the past generation? Is there an

¹⁴Jhering emphasized on the function of law as an instrument for serving the needs of the human society. Paulos Z Eleutheriades, *Legal Rights*, New York: Oxford University Press, 2008, 10.

¹⁵Mac Cormick, "Rights in Legislation" P. Hacker and J. Raz, eds., *Law, Morality and Society*, Oxford: Clarendon Press, 1977, 189.

¹⁶Raz, "Right based Moralities" in R. G. Frey, ed., *Utility and Rights*, Minneapolis: University of Minnesota Press, 1984, 42.

¹⁷Peter Curzon, "Problems of Rights: Essential Features" in *Jurisprudence Lecture Notes*, London: Cavendish Publishing Limited, 1998, 236.

obligation on them to use natural resources in such a manner that it remains in the same state? The Supreme Court seems to agree. Article 5 of the Draft International Covenant on Environment and Development¹⁸ stated that the freedom of action of each generation is qualified by the needs of the future generations.

This leads to another question: Is the present generation entitled to all the resources that are freely available? According to Robert Nozick,¹⁹ there are three sets of rules of justice defining

1. How things not previously owned by anyone may be acquired;
2. How possession may be transferred from one person to another; and
3. What must be done to rectify injustices arising from violations of (1) & (2).

Nozick elaborates on the rules of acquisition. He agrees with John Locke, interpreting that a person has a right to (1) own what he makes and (2) to appropriate anything not already owned, provided he leaves ‘enough and as good’ for others, i.e., provided his appropriation leaves them no worse off.

Reading the above in the context of environment, the implications would be that natural resources may be used, keeping in mind that ‘enough and as good’ is left for the ‘others’ as they too have an equal right to appropriate. Here the word others depict persons apart from the one appropriating. Nozick would then agree principally that every person acquiring must take care that they leave for the other users present or future enough (quantity) and as good (quality).

UNESCO adopted the Declaration²⁰ on the Responsibilities of the Present Generation towards the Future Generation in the year 1997. Article 1 of this Declaration states: “the present generations have the responsibility of ensuring that the needs and interests of present and future generations are fully safeguarded.” The declaration covers a variety of issues including protection of the environment.

¹⁸ International Union for Conservation of Nature Commission on Environment Law, Gland, Switzerland, 2004 Third Edition: Updated Text, Prepared in cooperation with the International Council of Environmental Law Cambridge, UK.

¹⁹Robert Nozick, *Anarchy, State and Utopia, Entitlement Theory*, New York: Basic Books, 1974.

²⁰ UNESCO adopted the Declaration on the Responsibilities of the Present Generation towards the Future Generation in the year 1997.

This anthropocentric approach claims that concerns need to focus on the welfare of human beings. Doubts are expressed on the impracticability of the principle of inter-generational equity. There is no circumstance for justice, which should support the principle of inter-generational fairness, as the future generation is only of possible people, and therefore without identity.²¹ They are not legal persons in the eyes of law since they are not in existence presently. Indian Constitution, however, has already made social justice provisions and conferred benefits on the future generations of those who were in the past at the receiving end of burdens. To correct past injustices corrective justice has been employed. Legal systems have also recognised the rights of unborn child in terms of property, reputation, injury to the body, etc.

Care for the welfare of the future generation is necessary for an eco-civilization. In an eco-civilization human beings and their actions would be in tune with nature. We would be conscious of the repercussions of our action. Human needs are taken care of by the environment. It is from the environment that we collect our requirements. Equitable standard of living is a device to improve the condition of environment. The analogy of intra-generational equity must be used to accomplish inter-generational equity. It therefore demands that the adjustments be made in the patterns of utility and distribution of resources between the present and the future users.

The concept of sustainable development²² reflects the same idea: Every generation owes a duty to succeeding generations. Sustainable Development is the development that meets the need of the present without compromising on the ability of the future generation to meet their needs. It casts an obligation on the present generation, to use or exploit the natural resources in a manner not creating any liability or encumbrances or disability for the upcoming generation. It propounds a sense of trusteeship in the present generation, to safeguard the interest of incoming generation. It presupposes that the present generation holds it in trust for the future generation.

6. Dharmic (Religious and Moral) View of Environment

A cardinal feature of traditional culture within the collective psyche of Indian society is the notion of Ahimsa (meaning non-violence) which

²¹A. Desai, *Justice, Environmental Jurisprudence*, Allahabad: Modern Law House, 2002.

²²"Hind Stones Case," *All India Reporter, Supreme Court*, 1981, 711.

creates a strong sense of nonviolence that reflects not only elements of nature conservation but also anathematizes notions of law favouring any rampant or violent development.²³ Ahimsa instils in people, tolerance and sets them at peace with their surrounding natural environment, be it human beings, animals or plants. The belief in the cycle of births and rebirths provides a religious foundation for the doctrine of Ahimsa. Hence it deters individuals from committing acts that may harm the interest of their immediate natural surroundings. It also makes their actions environmentally benign. The importance of the five main elements of nature – *Prithvi* (land, soil, stones, etc), *Jal* (Water resources including cloud), *Agni* (Fire), *Vayu* (Air) and *Vanaspati* (Vegetation, trees and plants including fungi) – has been emphasized. Sun, air, fire, water and earth were considered as manifestations of divine personification.²⁴ *Prakrti* (nature) is therefore worshipped and respected and not violated or mutilated. Vandana Shiva,²⁵ a well known ecologist in India has argued that forests have always been central to Indian civilization. They have been worshipped as Aranyani, the Goddess of the Forest, the primary source of life and fertility, and the forest as a community has been viewed as a model for societal and civilizational evolution. Like trees, rivers were considered Goddesses. Rishis warned against deforestation and cutting of trees as such acts would result in poor rainfall.²⁶

The concept of systematic management of forests was envisaged by Kautilya, whereby, the quantum of punishment for felling of trees was proportionate to the utility of the trees.²⁷ State has to maintain forests, selling of trees were fined, damaging forests invited penalty, forest produce could not be exploited and wild life would be protected in the jungles.

²³George Kotturan, *Ahimsa: Gautama to Gandhi*, New Delhi, Sterling Publishers, 1973.

²⁴S. C. Shastri, *Environmental Law*, Lucknow: Eastern Book Company, 2004, 1-5; cf. P. Leelakrishnan, *Environmental Law in India*, Nagpur: Butterworths Wadhwa Lexis Nexis, 2008.

²⁵Vandana Shiva, *Staying Alive: Women, Ecology and Development*, London: Zed Books, 1988.

²⁶V. P. Agrawala, *Forests in India*, New Delhi: Oxford & IBH Publishing Company, 1985, 53; Leelakrishnan, *Environmental Law in India*, Nagpur: Butterworths Wadhwa Lexis Nexis, 2008, 9.

²⁷Leelakrishnan, *Environmental Law in India*, 10; see also Divan and Rosencrantz, *Environmental Law and Policy in India*, New Delhi: Oxford University Press, 2007, 24.

Religion taught to protect and worship nature. The Constitution of India also lays down duties with respect to the environment. This tradition of observing duties (dharma) towards the environment continued to the present day. A reflection of that can be found in the Fundamental Duties chapter of the Constitution of India.

Article 51 (A) Everyone has a duty (f) To value and preserve the rich heritage of our composite culture. (g) To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures. Though these fundamental duties have not been made enforceable by the courts, the courts have adopted other methods to enforce the same. In *L. K. Koolwal v. State of Rajasthan*,²⁸ the Rajasthan High Court observed that a citizen's duty to protect the environment under Article 51-A (g) of the Constitution bestows upon the citizen's the right to clean environment.

6. Judicial Approach

"Activism I suppose, is life, if judicially judges are not active, they are dead, because life means activism,"²⁹ said Justice V. R. Krishna Iyer and asserted the province of the judiciary to do justice. The 42nd Constitutional Amendment incorporated 48A and 51A (g) and furnished the foundation for demand. Article 142 lent a helping hand with the concept of complete justice arresting the fascination of the court. Article 32 was brought into action. New tools like Public Interest Litigation, Polluter Pays³⁰ Principle, Precautionary Principle,³¹ Sustainable Development,³² Public Trust Doctrine, *Parens Patriae*,³³ Absolute Liability Principle³⁴ came to be developed. Soon there was a shift from individualism to community orientation as it was seen as a necessary and mandatory requirement of the aims and ideals of the Constitution. The importance of duties was realised. It was the only way in which real environment justice could be attained. The courts crafted environment jurisprudence deftly around these ideals. Constitutionally recognised values provided a guiding factor.

²⁸All India Reporter Rajasthan High Court Decision, 1988, 2.

²⁹WWF Report on Environmental Laws, 29.

³⁰Bichhri Case, *All India Reporter, Supreme Court*, 1996, 1446.

³¹"Vellore Citizens Case," *All India Reporter, Supreme Court*, 1996, 2715.

³²"Narmada Bachao Andolan Case," *All India Reporter, Supreme Court Cases*, 2000, 664.

³³"Charn Lal Sahu v. Union of India," *All India Reporter, Supreme Court*, 1990, 1480.

³⁴"Oleum Gas Leak Case," *All India Reporter, Supreme Court*, 1987, 965.

A plethora of legislations have been enacted to deal with the problem. Newer forms of safeguards and new strategies have been adopted to arrest the menacing march of environmental pollution. Legislations alone have not been able to deal with environmental degradation caused mainly by the man-generated pollution. The compelling circumstances have ushered in a new era, a new jurisprudence, judiciary being the chief architect.

In a modern welfare state, justice has to address social realities and meet the demands of time. Protection of the environment throws up a host of problems for a developing nation like India. Administrative and legislative strategies of harmonization of environmental values with developmental values are a must and are to be formulated in the crucible of prevalent socio-economic conditions in the country. In determining the scope of the powers and functions of administrative agencies and in striking a balance between the environment and development, the courts have a crucial role to play. As seen above the Indian Courts steeped in Indian Traditional values have devised various tools to combat pollution and to manage the subject appropriately. In short, the development of environmental jurisprudence in India manifests ‘neo-dharmic’ jurisprudence in postmodern public law. It accommodates ideas currently voiced by experts around the world for protecting the environment in forms modified by the Indian legal culture.³⁵ The ultimate interest of the environment had to be preserved.

7. Conclusion

Environment issues are too important to be left merely at the whims of lofty ideals and policies that are inadequate in addressing the problem as a whole. Leaving the task to the political processes would merely bring further delay. Pinning accountability on the State alone would not solve the problem. Cultural Rights help in preserving only a few pockets on the earth. Intergenerational equity principle falls weak as the future legal persons are nonexistent today. Conferring the Right to Clean and Healthy Environment directly or declaring it to be an inalienable Human Right would still be incomplete in that it does not force an enforceable obligation.

The key lies in the duty based jurisprudence of the yesteryears. A cumulative effect seems to be more effective. In the words of

³⁵C. M. Abraham, *Environmental Jurisprudence in India*, Amsterdam: Hotei Publishing, Netherlands, 1999.

Jawaharlal Nehru, "There has been far too much emphasis on rights and far too little on obligations. If obligations were undertaken, rights would naturally flow from them."³⁶ Then the interest of the environment can be protected for the sake of environment. The present and the future interest of the people in having a wholesome environment to live in can also be protected. Our legal system is primarily right based. Only if a right is established can we get others to comply. But in the context of environment, since it is essentially a third generation right it cannot be realised without community participation. Hence a duty based approach should be adopted. Demanding rights won't solve problems, observing duties will.

Where the right is to be cumulatively realized by all the members of the society, there has to be common duties and responsibilities. It commands an ecocivilization that is oriented towards community welfare. The consciousness of the consequences of our actions, the awareness that we hold the earth in trust for future generation is an absolute must. Dharma teaches us to stay attuned with nature. It teaches us to be conscious of our actions. Protection and preservation of environment must be undertaken not only by the government but also by every citizen. That should be our prime duty.

³⁶"A Crisis of the Human Spirit, A Broadcast by Nehru to the USA, April 4, 1948" *Mainstream Weekly*, Volume XLVI No 48, <<http://www.mainstreamweekly.net/article1043.html>> accessed 3 March, 2014.