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Environmental Jurisprudence and the Judiciary: Analysing the Activism of Judiciary

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The Judiciary in India has earned for itself the title of being an activist Judiciary, on one hand it has displayed extraordinary zeal to come to the rescue of the weakest and the most vulnerable section of the citizens while on the other hand it has had played a sort of messiah as far as the protection of the environment is concerned. Not only has the Judiciary been hailed as a custodian of the environmental protection program but also it has been hailed as the last hope for the environment. So much so that people have given it fanciful names like "Green Court" , "Environmental Missionary" etc. which gives an impression that the Judiciary is extremely sensitive towards preservation and protection of environment. Strangely, the Judiciary in India has hardly been consistent as far as the protection if environment is concerned and has no uniform parameters which it follows in all cases, rather the response of the Judiciary in most cases is shaped by the type of the parties before it and the particular response is guided mostly by the position of the parties, powerful actors like government almost always being given preference over the concern of marginal groups. This approach of the Court whereas it has pushed the rules to their limit in order to accommodate the concern of powerful groups sets a worrying precedent .In this paper the author has primarily pointed out cases where the Judiciary has leaned towards powerful or state actors rather than protecting environment or livelihood of marginal sections of societies and its effect on the overall environmental protection regime

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1. Introduction

The Indian Constitution has the unique distinction of being one of the few Constitutions of the world which makes provision for the preservation and protection of the Environment. Even though the original constitution did not contain any specific provision for the protection of environment but after the 42nd Amendment to the constitution in 1976 the two provisions were added to the Constitution for the protection of environment which were:

- Article 48-A &
- Article 51A(g)

It needs to be kept in mind that these provisions were added after the Stockholm declaration which has often been described as the magna carta of the human environment. Even after the addition of these provisions in the Constitution of India it was observed that the overall legal framework as well as general attitude towards the subject of environmental protection was lackluster to say the least. That perhaps explains one of the worst environmental disaster in the form of Bhopal Gas leakage in India which acted as a sort of rude shock to the authorities, the death , destruction and mayhem caused by the tragedy firmly pushed the opinion of not only the general public but even the judiciary towards stronger steps.

Thereafter the Courts have become much active in the field of environmental jurisprudence or at least they are perceived to have become activist . It is no wonder then that the Court relied in no less measures on the expanding concept of right to life for giving wider application to the environmental protection program.

2. Environmental Protection under Article 21 of the Constitution: An innovative approach of the Court

Artilce 21 of The Indian Constitution which reads as: "No person shall be deprived of his life or personal liberty except according to procedure established by Law". The right to life as guaranteed by Article 21 of the Constitution is basic human right and the concept of right to life and personal liberty have been transformed into positive rights by active judicial interpretation. A new era ushered in the post *Maneka**[1]* period the concept of right to life witnessed new developments and new dimensions were added to the interpretation of fundamental rights embodied in Article 21. Prior to this all the fundamental rights guaranteed in Part III of the Constitution were considered to negative in nature and imposing only negative obligation on the State[2]. For the first time, thus Supreme Court transformed these rights into positive rights and imposed an affirmative duty on the State to enforce it. This view of the Supreme Court was also reflected in *Francis **Carolie Mulhin v. Administrator Union Territory of Delhi**[3]* where Justice Bhagawati observed that *"the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something more than just physical survival*". Further he added: *"Right to life includes the right to life with human dignity and that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for writing and expressing oneself in diverse forms with fellow human beings. Of course, the magnitude and contents of the components of this right would depend upon the extent of the economic development of the country but it must, in any view of the matter include the right to basic necessities of life".* This humane approach of the Court was a recurring theme in so many of the decisions of the Apex Court for example in ***Chameli Singh v. State of U.P** **[4]***it held that *"the need for a decent and civilized life includes the right to food, water and a decent environment. In the same sentiment the Court was of the opinion that: "In any organized society, the right to live as human being is not ensured by meeting only the animal need of men. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this subject. The right to live guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilized society. All civil, political, social and cultural rights enshrined in the Universal Declaration on Human Rights or Convention or under the Constitution of India cannot be exercised without these human rights".* Observing the stand taken by the Apex Court and considering the relation between fundamental rights and environmental protection, Divan and Rosencranz have observed that: *"Encouraged by an atmosphere of freedom and articulation in the after math of the emergency, Supreme Court entered one of its most creative periods. Specially, the court fortified and expanded the fundamental rights enshrined in Part III of the Constitution. In the process, the boundaries of the Fundamental right to life and personal liberty guaranteed in Article 21 were expanded to include environmental protection"**[5]*

3.Balancing the Right to Livelihood viz a viz the Right to Environment:

While initially the Courts were limiting their environmental protection program within the outlines set by Article 48-A and 51A(g) of the Constitution but they had an inherent limitation viz the fact they were not clearly enforceable and only made it a duty upon the state and citizens for working for protection and preservation of environment. The ***Doon valley**[6]* case was perhaps the first time that the Supreme Court referred to Right to life and healthy environment under Article 21 of the Constitution. However, there was another dilemma facing the Court that while ordering the closure of the limestone quarries it will take away the livelihood of workers of the quarry. But the court justified its decision by accepting 'it is a price that has to be paid for protecting and safeguarding the right of people to live in a healthy environment'. Thus the Court set the tone for future decisions and has clearly stated that anything endangers or impairs that quality of life, in derogation of the laws, a citizen has a right to take recourse to Article 32 of the Constitution.

It is indeed ironical that the Court has held the Right to life as including the Right to Livelihood as well but at the same time there is no clear answer to the question that what happens when there is clear conflict between Right to Livelihood on one hand and the Right to healthy environment.

While in cases like ***Sushila Saw mills vs. State of Orissa**[7]* the Court held that the right to carry on trade and businessnwas subject to regulations under Article 19(6) which may sometimes include total prohibition of the

trade or business , in another case of ***Abhilash Textile Mills vs. Rajkot Municipal corporation[8]*** Gujarat High Court decided that the right of textile industry to carry on business with the danger to public health by discharge of dirty water could be subjected to regulations in the interest of the general public under Article 19(6).

Similarly, the court totally overlooked the relocation of the workers of the polluting factories which were ordered to be shifted in case of ***M.C. Mehta vs. Union of India[9]*** where the factories were to be relocated for creating "green lung spaces" inside the National Capital Territory of Delhi. Workers who were settled and working in Delhi had to suddenly face a situation where the distance between their homes which usually took half to one hour of commuting time increased overnight to 6 to 8 hours which practically forced them either to leave their jobs or their home.

In yet another case of ***Almitra Patel vs. Union of India[10]***, the Apex Court had ruled against the informal sector labourers from public land as they were held as urban enroachers. The observations of the Court in this case however left e a lot to be desired and reveal extreme class bias whereas the Court compared the 'rewarding' of an enroacher upon public land with free alternate sites with giving reward to a pickpocket. The Court perhaps totally overlooked the fact that it has itself held the Right to shelter as coming within the purview of Right to life and hence covered by Article 21 of the Constitution. Labourers, Vendors, hawkers etc. belong to the vulnerable sections of the society and even though they are part of informal economy yet their contribution is significant, apart from the fact that they are citizens and hence entitled to all the protections provided by welfare state.

An important common point between all the decisions cited above has been the emphasis placed by the judiciary on the interests of the community which has been given preference over the interests of individuals. Thus, in effect the Courts have given more importance to the Directive Principles over fundamental rights in many of these cases. In an important decision delivered in ***Ambica Quarry Works vs. Union of India[11]***, the court ordered the closure of the mining units and at the same time it observed that the obligation to the society must take precedence over the obligation to the individuals.

These decisions of the court along with many others have actually brought misery and mayhem to the poorest and most vulnerable sections of the society and in many cases to maintain the aesthetic grandeur of public places and to make them "liveable" has in fact denied a large chunk of population right to livelihood. Even in cases of mega Dam projects like ***Sardar Sarovar*** the beneficiaries have been surpassed by the victims.

4.The Paradox of Judicial "Inactivity" in cases involving Mega Infrastructure Projects

While the Courts in India have been hailed for their activist zeal and have been toasted as the "eco-warriors" by activists, academics etc but at the same time a closer look at the decisions of the Court paints an odd picture. The judiciary in India which has so often acted in the strictest possible manner in the issues related to environmental pollution they have displayed a surprising lack of activism which sometimes borders on the pusillanimity and unusual restraint when it comes to mega infrastructural projects. The Court has adopted a defensive approach towards the protection of environment and has thereby deviated from its own principles and precedents.

In the ***Tehri dam case[12]***, for example, in spite of the differences among the expert members regarding the safety aspect of the Tehri Dam which is located in a highly sensitive seismic zone was disappointing to say the least. The Court, while relying upon the government appointed committee allowed the government to build the bridge, the Court failed to consider the international covenant regarding the precautionary principle which is an important facet of environmental law. Also, the Courts should have taken the report of the expert committee which was appointed by the government itself and therefore could not be expected to act in an impartial manner.

Similarly, the Court did not follow the recommendations of the Appraisal committee in the case against construction of thermal power plant at ***Dahanu Taluka[13]***, the appraisal committee had categorically stated that Dahanu was not a suitable place for setting up a thermal power plant. The judgment has been criticized strongly as it allowed blatant violation of the guidelines issued by the Government of India.

The ruling of the Apex Court in case of ***Narmada Bachao Andolan case[14]*** was perhaps the most disappointing moment in the history of Indian environmental Jurisprudence. Especially disturbing aspect of this case was that the Court despite being aware of the fact that one of the states in the dispute was extremely careless in this respect directed the completion of the project as per the tribunal's award. To make matters worse for the victims the Court did not issue any time bound direction to the state regarding the completion of its relief and rehabilitation program.

It is indeed quite strange that the Court on one hand seeks to protect the environment with missionary zeal, however, on the other hand the Court totally negates the agenda of environmental protection by giving a blank cheque to the development projects. It seems that the Court tends to favour the development of one section of the society at the cost of another section of the society as well as the environment.

It is indeed sad as well as strange that Court has not always displayed consistency in its zeal while deciding mega projects where the state was involved like in case of Narmada and unfortunately allowed the development of Sardar Sarovar Dam which took away not only the home of thousands of people but at the same time displaced them without any proper rehabilitation and was a cruel twist of fate which denied them not only livelihood but almost everything which they possessed. In the opinion of the Honourable Court the dam would lead to much more benefit for all, whereas anti Dam activists like Medha Patkar had estimated that over 200 villages would be submerged and over million people would be rendered homeless as the human cost of the Dam.

The Environmental Activism of the Supreme Court of India has been criticized as a classic case of display of class bias, whereas, the concerns of the middle class Indians have been largely accepted and propagated as reflecting the true concern for the environment. An unfortunate aspect of this approach is that it neglects the strong bond between environment protection and livelihood in India the adivasi population being a testament to the success of this program .That is why while ordering the closure of the industrial units, the Courts have not been as sensitive to the plight of the workers as it has been towards the concern of public health and ecology.As a result it has sometimes given decisions to the effect that environment must be protected even at the cost of unemployment and loss of revenue for the state[15].

It is apparent that the Court has failed to pay adequate attention to the multidimensional aspects of these developmental activities. In these cases the Courts have, ironically, disregarder the guidelines, directions which itself has issued in previous cases on the ground that these development activities involve technical and policy matters.

5.Judiciary & Environmental protection in cases relating to Religious events

Another area where the Judiciary has failed to take proactive steps is the cases related to the Religious structures and Religious programs. It has become a pattern that the Courts which are generally quite vigilante when it comes to protection of the environment otherwise usually develops cold feet when it comes to the issues related to the religious issues and programs etc. In some of the cases Courts have tended to look the other way while the environment was being destroyed by the construction etc related to religious structures, while in some other cases it has failed miserably when the person/organizations concerned have practically shown their clear contempt for the Courts. A few notable instances of the Court's conspicuous inaction are being discussed here for illustration purposes.

5.1Construction of Akshardham Temple on the Yamuna Floodplains without Environmental clearance: The Akshardham temple situated in New Delhi on the banks of Yamuna River is a clear case where the environmental protection laws have been flouted with the active support of the government. What makes it even worse is that despite there being no environmental clearance taken for the construction of the grand temple despite that a senior Minister of the then government was perceived to have fully backed the construction of the temple, despite the fact that the environment minister acknowledged the fact that there was no clearance taken for the construction of the temple it was indeed shocking to see the minister express his inability to do anything as in his opinion whatever had happened in the past cannot be done away[16].

To make the matters even worse when the temple compound was being expanded even then the National Green Tribunal treated the issue with kid gloves by fining them a pittance of 5% of the total cost of the expansion, whereas in the first place the expansion should not have been allowed under any circumstances as it posed a clear and present danger to the floodplains of Yamuna[17]. Rather then treating the matter with the strictness it deserved the NGT displayed an abject lack of will power in the case. We would do well to remember that India is a Secular Country where Religious parochialism should never be allowed to come in the way of law enforcement otherwise it would lead to the collapse of law enforcement mechanism.

5.2NGT's clearance provided to 'Art of Living' program : The Art of Living which is a famous organization headed by the controversial Guru Sri Sri Ravi Shanker held a three day World Cultural Fest in March 2016 on the Yamuna floodplains. The event was to be attended by strong and influential people including the President of India and many senior ministers of the central Government, former Chief Justice of the Supreme Court and many other distinguished personalities. The event was mired in controversies from the beginning as no environmental clearance was taken for erecting structures on the banks of Yamuna[18]. This was not the only problem with the event as the event was totally embroiled in illegalities from the word go, Cultural Ministry had in an unprecedented move granted over 2.5 crores to the Art of Living for organizing the fest which was extremely strange as AOL itself had got sufficient resources and also it is unprecedented for the Cultural Ministry to grant such a big amount for a single event. Throwing all established precedent to air the Indian Army which is the pride of nation and is called upon in civilian operations only in emergencies like floods, riots etc. was summoned to construct pontoon bridges over the Yamuna. The event was challenged before the Delhi High Court as well as NGT by concerned environmental activists as it was clear that the event posed a danger to the Yamuna Floodplains; however the NGT in a widely criticized move allowed the event to go ahead citing delays and latches on the part of the petitioners in approaching the Court. Indeed the whole episode displayed the NGT in very poor light as there was no doubt whatsoever that the NGT was affected by the fact that the event had blessings of the Government in power and other people in strong position that is why it dragged its feet over the entire issue making much noise but indulging in very little activity and in the process damaged its own credibility[19]. An even more shocking aspect of the whole episode was that the AOL people later on openly ridiculed and even blamed the NGT for the damage caused to Yamuna floodplains as it was the NGT which had allowed the event to take place after all. The expert panel which was constituted by the NGT after the event had found the AOL of having totally destroyed the floodplain which would take at least 10 years and 42 crore rupees to restore.

The whole episode was one of the worst disaster in environmental issues and totally negated the rule of law, it showed that if any person has got right connections to the powerful sections in the government then it can virtually twist every rule, every institution and every norm to get the desired result.

6. Conclusion & Suggestions:

The Judiciary in India has no fixed principles as far as the protection and preservation of the environment is concerned. As discussed above the rules made by the Judiciary are hardly uniform and more often than not they are guided by the philosophy, ideology and temperament of the particular judge concerned and there is no clear precedent which is being followed uniformly by the Courts. Of particular concern is the fact that on many occasions the Courts have displayed shocking apathy as far as the balancing of the right to livelihood

with right to pollution free environment is concerned and has given the impression that the livelihood of vulnerable sections of the society are a price which has to be paid for protection of the environment. Surprisingly, the same Court has almost always gave the benefit of doubt to mega projects involving the state and there the zeal for protection and preservation of environment is never ever treated as an impediment to these mega projects. Another pattern which has emerged from the cases decided by the Court is that it has taken a pusillanimous approach towards environmental protection when the matter has involved the religious institutions and organizations particularly those belonging to the majority community which is highly unfortunate.

One wishes that the Judiciary would do course correction and would evolve a uniform policy to protect and preserve the environment which is not the case at present and thus the environmental protection "activism" of the Courts is reduced to being a lottery where the issue at hand is certain to be decided in an uncertain manner.

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[7] AIR1995SC2484
[8] AIR1988GUJ57
[9] AIR2001SC1846
[10] 2000(1)SCALE568
[11] AIR1987SC1073
[12] 1990Supp(1)SCC44
[13] Dahanu Taluka Environment Protection Group vs. BombaySuburban Electricity Supply Company Limited. Along with Bombay Environmental Action Group vs State of Maharashtra and Others 1991(2)SCC 539
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