

**JUDICIAL ACTIVISM TOWARDS ENVIRONMENTAL
CONCERNS**

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“Saving our planet, lifting people out of poverty, advancing economic growth... these are one and the same fight. We must connect the dots between climate change, water scarcity, energy shortages, global health, food security and women's empowerment. Solutions to one problem must be solutions for all”.

“Ban Ki-moon¹”

Introduction:

In developing countries like India, there has been an alarming issue of environmental degradation due to over exploitation and degradation of resources, industrialization, urbanization and population explosion. It is the man who is considered as the creator and moulder of the environment and therefore his conduct can be regulated through the instrument of law. In fact, India has always been in the fore-front of taking all possible steps for the protection and improvement of the environment and aiming at sustainable development. However, neither the law nor the environment is static. The changing pace of the environment is so fast that in order to keep the law on the same wave-length either laws have to be amended quite frequently to meet the new challenges or it has to be given new direction by the judicial interpretation. In recent years the

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¹ Ban Ki-moon, Former Secretary-General of United Nations General Assembly, 2006

Indian judiciary has occupied an important position in the nation's politics². The courts have made their mark on all the important issues, whether its politics, waste management, clean air, education policy or administrative matters. According to Mehta, the court has been recognized as one of the world's most powerful judicial bodies where judges play an unprecedented governing role³. Mehta has emphasized this fact by quoting the words of one of the leading Indian legal scholars Upendra Baxi.

"As chemotherapy is a treatment for a carcinogenic body, similarly judicial activism is a dire cure for a drastic disorder called politics." But there are other critics who opposed the judiciary's rise. Nevertheless, the power used by judiciary to ensure that the state rightly does its job is one of the means to make the government accountable.

1.what is environment ?

1.1 introduction:-

The word "environment" relates to surroundings. It includes virtually everything. It is defined as anything which may cover the physical surroundings that are common to all of us, including air, space, land, water, plants and wildlife⁴.According to the *Webster Dictionary*, it is defined as the "Aggregate of all the external condition and influences affecting the life and development of an organism."⁵

According to *The Environment (Protection) Act, 1986:-*

² Khosla M., Indian Supreme Court: Towards an Evolved Debate, Hastings Int'l and Comp. L. Rev., 32(55), 55-100 (2009)

³ Mehta P.B., The Rise of Judicial Sovereignty, J. Democracy, 18(2), 70-83 (2007)

⁴ Dr. Jai Jai Ram Upadhyay, ENVIRONMENTAL LAW, p.2, Allahabad: Central Law Agency, (2005).

⁵ . R.M. Lodha, ENVIRONMENTAL RUIN: THE CRISES OF SURVIVAL, P.364 .New Delhi: Indus Publishing Company,(1993).

Section 2(a) environment “includes water, air and land and the inter- relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property⁶.”

Thus, the essence of all the above definition is, ‘environment means the surroundings in which we live and is essential for our life’.

1.2 historical & religious background:-

Environmental ethics have formed an inherent part of Indian religious precepts and philosophy. Worship of Sun, Moon, Earth as god are being done from centuries, its not only a myth and not only found in various dharma shastras but they are worshipped by people as they give lot to us and the basic survival of human being depends upon these natural resources and it is proven also that if these resources are not treated well then they will turn into epidemic. Guru Nanak the Founder of the Sikh Religion, 1469-1539, said ‘Pawan Guru, Pani Pita , Dharti Mata , Khele Sagal Jagat’ (Air is like God, Water is father and Earth is the mother. It is through the harmonious interaction of all these three vital ingredients that the whole universe is being sustained). The ancient Greeks, on the same reasoning, revered the Earth as Gaia, the Earth Goddess. Ancient India texts(Purans and Upnishads) highlights that it is the dharma of each individual in the society to protect nature and the term ‘nature’ includes land, water, trees and animals which are of great importance to us. . In the ‘*Atharva Veda*’, the ancient Hindu Scepters stated “What of thee I dig out let that quickly grow over”⁷.

Thus, apart from scientifically, religiously also environment protection is very much necessary.

⁶ Available at envfor.nic.in/legis/env/env1.html

⁷ MC Mehta, GROWTH OF ENVIRONMENTAL JURISPRUDENCE IN INDIA, p.71, (1999)

There are five E's which are ecology, economics, energy, employment and equity among which ecology is most important as it deals with basic life supporting system.

2.what is judicial activism?

2.1 historical background-:

The term "judicial activism" was coined for the first time by **Arthur Schlesinger Jr.** in his article "The Supreme Court:1947," which was published in Fortune magazine in 1947. Though the history of judicial activism can be traced back to 1803 when concept of Judicial review was first evolved by *chief justice Marshall* in celebrated case of *Mar bury v/s Madison*.

The emergence of judicial review gave birth to a new concept which is known as judicial activism. It is very difficult to trace the origin of judicial activism in India. However, in 1893, Justice Mahmood of the Allahabad High Court delivered a dissenting judgment which sowed the seed for judicial activism in India. Apart from this there were many cases and judicial pronouncements where judicial activism was stated but it is very difficult to find which is the main origin, there were only flashlight has been given of judicial activism.

2.2 Meaning -:

Surprisingly, it has to be stated that though the term 'judicial activism' was given light by various jurists and scholars but still there is no precise definition of judicial activism accepted by one and all. However, there is a widely accepted notion that it is related to problems and processes of political development of a country. The word 'activism' means "being active", 'doing things with decision' and activist is the 'one' who favours intensified activities. **Justice Krishna Iyer**

observed that 'every judge is an activist either on the forward gear or on the reverse'.

Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision making whereby judges allow their personal views about public policy among other factors to guide their decision".

An eminent Indian jurist defines judicial activism in the following words: (Judicial) Activism is that way of exercising judicial power which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by members of the ruling classes.⁸

In India the Supreme Court has treated even a letter as a writ petition and has passed appropriate orders. This concept has turned into an important means to enhance the applicability of a particular legislation for social betterment and also to bring improvement in the concerned state machinery.

We can say that judicial activism has turned a judge into a social activist, environmental activist, political activist etc. Basic purpose is, to bring the justice to the poor people at their doorstep.

3. post independence era

The post economic era witnessed a sea-change in the socio-economic landscape as the society was concerned with equity and growth and environmental concern was added only as a third dimension. The year of 1972 has marked a revolution in the history of environmental management in India. It was this year in which a Conference on Human Environment was held in Stockholm in response to the initiative of the United Nations. A decision has been taken and so as to implement the decision being taken at the conference, the Indian Parliament introduced a

⁸ Upendra Baxi, *COURAGE AND CRAFTS CONTENTION -The Indian Supreme Court in the Eighties* (Bombay : 1985) P.10

landmark change in the field of environmental management. It was in this decade that environmental protection was given a Constitutional status and thus, environment was made a Directive Principle of State Policy by the Forty Second Constitutional Amendment. Article 48A and 51A (g) were inserted, making State as well as the citizens, both under a constitutional obligation to conserve, perceive, protect and improve the environment. These provisions have been extensively used by the Courts to justify and develop a legally binding fundamental right to the environment as a part of Right to life and personal liberty as enshrined in Article 21 of Indian Constitution. Parliament therein enacted nationwide comprehensive laws; like The Wildlife Protection Act, 1972 and Water (Prevention and Control of pollution) Act, 1974.

Till 1980's not much contribution has been made by the Courts in preserving the environment but one of the early cases which came to the Supreme Court became the foundation of Judicial responses. Beginning with the *Ratlam Municipality v. Vardhich*⁹ where the Supreme Court directed a local body to make proper drainage provisions there have been numerous cases where such positive directions have been given¹⁰. This was the case which has emphasised on the need of environmental consciousness In this case the Hon'ble Supreme Court increased the range of section 133 of the Code of Criminal Procedure to uphold a magistrate's order directing the municipality to carry out its duty towards residents. The municipality has been ordered to curb the nuisance being caused to the residents of the locality by the mere existence of open drains and of public refuse from nearby slum dwellers. The court further observed that the non-availability of funds cannot be pleaded as ground

⁹ A.I.R. 1980 S.C. 1623

¹⁰ See generally: Harish Salve, 'Justice between generations: Environment and Social Justice', Chapter 18 in B.N. Kirpal et. al.(eds.), *Supreme but not infallible- Essays in Honour of the Supreme Court of India* (New Delhi: Oxford University Press, 2002) at pp. 360-380

For not performing municipality's statutory obligations. The case has further put forth the need of clean environment in every aspect.

If one has to examine the judicial approach in cases involving environment-related concerns raising objections against the construction of infrastructural projects, different courts in the past has taken different approaches. The Judicial approach has been classified under three categories. The first of such approach can be described as a 'pro-project' approach wherein judges tend to emphasize the potential benefits of a particular project or commercial activity. The second approach is that of 'judicial restraint' wherein judges defer from the determination made by the executive agencies and experts with respect to the environmental feasibility of a project. The third approach can be described as that of rigorous 'judicial review' wherein judges tend to scrutinize the environmental impact of particular activities. It is in this form of judicial interventions wherein the services rendered by expert committees, amicus curiae and public-spirited NGOs prove to be a valuable asset. The different judicial approaches evolved over the last three decades or so and it would be instructive to refer to some examples.

Judicial restraint an example of it would be the Kerala High Court judgment in the *Silent Valley case (1980)*¹¹. It was in this case where the Court refused to second-guess the State government's position relating to the environmental impact of a hydro-power project. The judgment clearly emphasises on the fact that the project was unanimously supported by the legislature of Kerala and it would not be proper for the judiciary to interfere. However, this judgement has

¹¹ Society for Protection of Silent Valley v. Union of India and others, 1980 Kerala HC; Excerpts of judgment by V.P. Gopalan Nambiar, J. have been cited in Shyam Divan and Armin Rosencranz, *Environmental law and policy in India - Cases, materials and statutes*, 2nd edn. (New Delhi: Oxford University Press, 2001) at pp. 428-430

led to an agitation and subsequently one has to re-think on the viability of the project.

An example of Judicial Review where the Supreme Court adopted strict standard of Judicial Review is the *Calcutta Taj Hotel Case (1987)*¹² wherein an enquiry committee has been set up to inquire into the permission being granted by the government for constructing medium rise hotel against the objection that such construction would interfere with flying path of migratory birds .

In the concomitant years, there has been a growing consensus amongst the media and in academic circles that the general approach of the higher judiciary in environmental litigation can be described as ‘activist’ in nature. A prominent example of such activism in evaluating the environmental impact of commercial activities justified in the name of development is

the decision given in the *Dehradun Valley case*¹³. In that case, the court itself appointed a committee to look into the adverse effects of the illegal and indiscriminate mining activities being carried out in the Uttarakhand region. A similar approach has been adopted in *Tarun Bharat Sangh, Alwar v. Union of India*¹⁴ where the court adopted a firm stand against the owners of mines that were being operated inside the reserve forest areas.

Various remedies are provided by the Indian Judiciary which can be Tortuous as well as statutory law remedies.

Statutory remedy includes -:

- 1) Activities under sec. 19 of the Environment Protection Act, 1986.
- 2) Activities under sec. 133 of the Code of Criminal Procedure, 1973.

¹² AIR 1987 SC 1109; See DIVAN & ROSENCRANZ (2001) at p. 430

¹³ Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh and others, AIR 1985 SC 652.

¹⁴ AIR 1992 SC 514

3) Art. 32 and Art. 226 are also included to file writ petition in the Supreme Court or in the High Court.

Tortuous remedy includes-:

1) Damage-: In the recent case of *Shriram Gas Leak*¹⁵, involving a leakage of Oleum gas which resulted in substantial environmental harm to the citizens of Delhi, the Apex court held that the quantum of damages awarded must be proportionate to the capacity and magnitude of the polluter to pay.

2) Injunction-: The purpose of injunction is to prevent continuous wrong. The grant of perpetual injunction is governed by Sec.37 to 42 of the Specific Relief Act, 1963.

3) Nuisance-: Nuisance can be divided into two categories:

Private Nuisance – It is a substantial and unreasonable interference with the use and enjoyment of one’s land.

Public Nuisance – It is an unreasonable interference with a general right of the public.

4) Trespass-: The two important requirements for trespass are:

a) There must be an intentional or negligent interference with personal or proprietary rights.

b) The interference with the personal or proprietary rights must be direct rather than consequential.

5) Negligence-: It connotes failure to exercise the care that a reasonably prudent person would exercise in like circumstances.

Chief Justice Bhagwati in *M.C Mehta v. Union of India*¹⁶ has declared the need to evolve new principles and norms for the protection of environment, and these doctrines and principles formed ‘as a part of law of this country’. These are-:

¹⁵ 1987 AIR 965, 1986 SCR (1) 312

¹⁶ AIR 1987 SC 1086 at p. 1089

1) Doctrine of Absolute liability:- This doctrine was developed in the case of *Bhopal Gas Tragedy*¹⁷ wherein the court held that, where an enterprise is occupied with an inherently dangerous or a hazardous activity and harm results to anybody by virtue of a mishap in the operation of such dangerous or naturally unsafe movement coming about, for instance, in getaway of poisonous gas, the enterprise is strictly and completely obligated to repay every one of the individuals who are influenced by the accident and such risk is not subject to any exemptions. Accordingly, Supreme Court created another trend of Absolute Liability without any exemption. The Supreme Court of India in *M.C v. Union of India*¹⁸, which is also known as '*Oleum Gas Leak Case*' has evolved a more stringent rule of strict liability. The Supreme Court re-examined the doctrine in the case of *Indian Council for Enviro-Legal Action v. Union of India*¹⁹, which is popularly known as the '*Sludges Case*' and it was held that the Industries are absolutely responsible not only for the remedial action of safely disposing of the sludge, but also for the loss and suffering, sustained by villages.

2) Polluter Pays Principle:- "*If anyone intentionally spoils the water of another ... let him not only pay damages, but purify the stream or cistern which contains the water...*" – Plato

Polluter Pays Principle has become a very popular concept lately. 'If you make a mess, it's your duty to clean it up' - this is the fundamental basis of this slogan. It should be mentioned that in environment law, the 'polluter pays principle' does not allude to "fault." Instead, it supports a remedial methodology which is concerned with repairing natural harm. It's a rule in international environmental law where the polluting party pays for the harm or damage done to the natural

¹⁷ 1990 AIR 273, 1989 SCC (2) 540

¹⁸ AIR 1987 SC 965, 982

¹⁹ J.T (1996)2 196

environment. In *Indian Council for Enviro-legal action v. Union of India*²⁰ the “polluter pays principle” was to be first time considered as a sound principle by the Supreme Court. In *Vellore Citizen’s Welfare Forum v. Union of India*²¹, the Supreme Court has declared that polluter pays principle is an essential feature of sustainable development.

3) Precautionary Principle:- The Supreme Court of India, in *Vellore Citizens Forum Case*,²² developed the following three concepts for the precautionary principle:

- a) Environmental measures must anticipate, prevent and attack the causes of environmental degradation.
- b) Lack of scientific certainty should not be used as a reason for postponing measures.
- c) Onus of proof is on the actor to show that his action is benign.

In *Vellore Citizen’s Welfare Forum v. Union of India* the Supreme Court has declared that the polluter pays principle is an essential feature of the sustainable development. In *A.P control board v. proof M.V Naydu*²³ the Supreme Court has reiterated its earlier stand on the precautionary principle and demanded that the burden of proof should rest with the person/entity proposing the activities.

4) Public Trust Doctrine:- The Public Trust Doctrine primarily rests on the principle that certain resources like air, water, sea and the forests have such a great importance to people as a whole that it would be wholly unjustified to make them a subject of private ownership.

²⁰ J.T (1996)2 196

²¹ (1996) 5 SCC 647 at p. 658, *M.C Mehta v. Union Of India*, AIR 1997 SC 734, *S. Jagannath v. Union of India*, AIR 1997 SC 811, *M.C M ehta v. Kamalnath*, (1997) 1 SCC 388.

²² (1996) 5 SCC 647

²³ (1999) 2 SCC 718

In *M.C.Mehta v. Kamal Nath and Others*²⁴ the public trust doctrine, as discussed by court in this judgment is a part of the law of the land. In the case *MI Builders Ltd. v. Radhey Shyam Sahu*²⁵, it was held that the doctrine will be applicable also in the absence of any statute which nullifies the act of the Municipal Corporation. Although, Supreme Court and High Court did not refer to the doctrine directly but implicitly, now the doctrine is used as a legal tool to play the Sovereign's role for the protection of environment for future generations.

5) Doctrine of Sustainable Development:- The World commission on Environment and Development (WCED) in its report prominently known as the 'Brundtland Report' named after the Chairman of the Commission Ms. GH Brundtland highlights the concept of sustainable development. As per Brundtland Report, Sustainable development signifies "development that meets the needs of the present without compromising the ability of the future generations to meet their own needs"²⁶. There is a need for the courts to strike a balance between development and environment. In *Rural Litigation and Entitlement Kendra v. State of UP*²⁷ the court for the first time dealt with the issue relating to the environment and development; and held that, it is always to be remembered that these are the permanent assets of mankind and or not intended to be exhausted in one generation. In *Vellore Citizen's Welfare Forum*, the Supreme Court observed that sustainable development has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco- system.

²⁴ (1997)1 SCC 388

²⁵ (1999) 6 SCC 464

²⁶ S .Shanthakumar, ENVIRONMENTAL LAW AN INTRODUCTION, pp. 122, 123, Chennai: Surya Publication, 2001

²⁷ AIR 1985 SC 652

6) Doctrine of Intergenerational Equity:- The idea behind formulating this doctrine is that “every generation should leave water, air and soil resources as pure and unpolluted as and when it came to earth²⁸. The Supreme Court in *Consumer Education and Research Society v. Union of India*²⁹, it was held that it is proper and safer to apply “the principle of protection” and “the principle of polluter pays” keeping in mind “ principle of sustainable development” and the principle of intergeneration equity.

Pil(public interest litigation):-

Prior to 1980’s only aggrieved party could seek justice from the judiciary, but in around 1980 the Indian legal system underwent a change and PIL came into picture. Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest. PIL is considered as the most inexpensive remedy available to citizens, although it increases the number of frivolous cases in the court. At present most environment actions in India are brought under Art. 32 and 226 of the Constitution of India, 1950. In the *Bhopal Gas Case*³⁰ the Supreme Court formulated the doctrine of absolute liability by interpreting the scope of power under art. 32 to issue directions or orders whichever may be appropriate in the appropriate proceedings.

In *Rural Litigation and Entitlement Kendra v. State of U.P*³¹ the Supreme Court Prohibited the continuance of mining operations as it is adversely affecting the environment. In *M.C Mehta v. Union of India*³² the S

²⁸ State of Tamil Nadu v. Hind Stone, AIR 1981 SC 711

²⁹ (2002) 2 SC 599 (605)

³⁰ 1990 AIR 273, 1989 SCC (2) 540

³¹ AIR 1985 SC 652

³² AIR 1996 SC 1446

Supreme Court held that the air pollution in Delhi caused by vehicular emissions violates right to life under Art. 21 and directed all commercial vehicles operating in Delhi to switch to CNG fuel mode for safeguarding health of the people.

The liberal use of PILs against assaults on the environment does not mean that the court will entertain every allegation. When the primary purpose for filing a PIL is not of public interest, the court will not interfere in it. In *Subhash Kumar v. State of Bihar*³³, the Supreme Court upheld that affected persons or even group of social workers or journalists, but not at the instance of the person or persons, who had the bias or personal differences could initiate PIL for environmental rights.

The Central and State Government has taken some active steps to curb judicial and community pressure. However, these were the consequences of various Supreme Court and High Court orders in public interest environment cases. The new legal opportunities, pressure on government institutions to enforce legislation, the emergence of NGOs and informed citizens that watch over government agencies and industries, have all helped in creating a greater public awareness on environmental issues, made industries vigilant about their environmental performance and this has led to the development of new governmental policies such as CNG Policy in Delhi, Municipal Solid Waste (Management and Handling Rules) and Karnataka Municipal (Amendment) Act.

Conclusion

It is very much evident that there is ample number of constitutional and legislative provisions on environment protection in India. But despite of these

³³ (1991) 1 SCC 598



legislations, rules and regulations, protection and preservation of the environment is still a pressing and prevalent issue. Hence

there is a need for an effective and efficient enforcement of the constitutional mandate and the other environmental legislations. However effectiveness of judicial activism was always in question. Nevertheless Judiciary has actively played its role and in addition to it the role of citizens and NGO's is commendable.

Despite all the very urgent need is for further environmental Activism by Judiciary alongside the support of other branches of government.

