Journal of Peace Studies, Vol. 12, Issue 2, April-June, 2005

Judicial Activism and Environment: A Case Study of India

Deepender Kumar*

*[*Deepender Kumar is a Research Officer with the Institute of Public Administration, New Delhi, India. The views expressed in this article are his own.]*

Judicial activism has been defined by many scholars in different ways. According to P. D. Mathew, "Judicial activism is an assertion of judicial power in cases wherein the judiciary comes face to face with legislative inaction, arbitrariness or the abuse of power by the executive. So judicial activism is the remedy".[1]

Since the last decade it has been observed that the judiciary in India has been playing a very proactive role, which is sometimes referred to as judicial activism. The Judiciary primarily draws its authority from the Article 32 of the Indian Constitution which allows citizens to approach the judiciary for remedies in the event of the state encroaching upon the fundamental rights guaranteed to them under the constitution. The Judiciary in India has progressively interpreted the basic right to life and personal liberty guaranteed under Article 21 to include many unarticulated liberties.

Article 21 of the Indian Constitution states: 'No person shall be deprived of his life or personal liberty except according to procedures established by law.' The Indian Supreme Court expanded the scope of this negative right in two ways. Firstly, any law affecting personal liberty should be reasonable, fair and just and secondly, the apex Court recognised several unarticulated rights that were implied by article 21. The Supreme Court interpreted the right to life and personal liberty to include the right to a clean environment employing the second method. The Supreme Court of India was one of the first countries in fact to develop the concept of right to 'Healthy Environment' as part of the right to 'life'.[2] As environment itself connotes very wider meaning Supreme Court keeps on adding new entities under it.

Environmental Legislations

The 1972 United Nation Human Conference on Environment held at Stockholm led to enactment of scores of international and national environmental policies around the world. It led to constitution of Department of Environment, which was later converted into Ministry of Environment and Forest in India. In case of India it has been found that the ministry has passed the largest number of laws as far as water, green areas and air protection are concerned.

The environmental legislations have certain regulations that identify the violation as an offence which is liable to be punished. For example under section 16 of the Environment Protection Act 1986 (EPA), a company is punishable for an offence. The 'cognisance of offence' clause of the EPA (section 19), Air Act (amended 1987) and Water Act (amended 1988) allows any citizen to prosecute a polluting firm, provided a notice of at least 60 days is given to the polluter. The citizens have been also armed with rights like a right to information on polluters from pollution

control boards for the purpose of prosecution (section 43 of Air Act, amended 1987, and section 49 of Water Act, amended 1988). In order to make the companies or organisations liable for the compensation in case of any mishaps or accidents the Public Liability Insurance Act (1991) and Factories Act (1995) have provisions for compensation for the victims. For example the Bhopal Gas Tragedy of 1984.

In 1995, National Environment Tribunal Act was enacted to ensure judicial remedy. The Act provided strict liability for damages arising out of any accident occurring while handling any hazardous substance and for the establishment of a National Environment Tribunal for effective and expeditious disposal of cases arising from such accident, with a view to give relief and compensation for damages to persons, property and the environment and for the matters connected therewith or incidental thereto. In 1997, The National Environment Appellate Authority Act, was constituted for the establishment of a National Environment Appellate Authority to hear appeals with respect to restriction of areas in which any industry operation or process or class of industries, operations or processes could not carry out or would be allowed to carry out subject to certain safeguards under the Environment (Protection) Act, 1986.

Judicial Activism

India has number of environmental legislations but the levels of implementation are abysmally low and in most of the cases where action is taken, the failure rate of an action is quite high. Acknowledging the lackluster attitude of the enforcement machinery of the environmental policy the judiciary during late eighties began the role of tightening the noose of the enforcement agency. The result of it was petitioning of scores of Public Interest Litigation (PIL) by the people.

PIL is a “strategic arm” of the legal aid movement and is intended to bring justice within the reach of the poor masses. It is a device to provide justice to those who individually are not in a position to have access to the courts. According to Prashant Bhushan, PIL was essentially meant to protect basic human rights of the weak and the disadvantaged and was a procedure which was evolved where a public spirited person filed a petition in effect on behalf of such persons who on account of poverty, helplessness or economic and social disabilities could not approach the court for relief.

PIL has helped in the growth of environmental jurisprudence in a tremendous fashion. The range of environmental issues sorted out in PIL has been very broad. It extends from the privileges of tribal people and fishermen, to the eco-sysytem of the Himalayas and forests, eco-tourism, land-use patterns, compassion to animals and vindication of an eco-malady of a village.[3]

Constitutional Provisions

The idea of environment had not been in the minds of the founding fathers when the original provisions of the Indian constitution were debated and approved. However, with the passage of time and growing sensitivity for the environment centre and the states government made law in the field of environment. The first provision to “protect the environment” by law was made by

the Forty-Second Amendment to the Indian Constitution. Passed in 1977, the Forty-Second Amendment responded to the Stockholm Declaration adopted by the International Conference on Human Environment in 1972.

The Forty-Second Amendment inserted Article 48-A into the Directive Principles of State Policy in Chapter IV of the Constitution. This declared the State's responsibility to protect and improve the environment and safeguard the forests and wildlife of the country. Another provision, inserted in Article 51-A(g), stipulated the duty of every citizen to "protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures." Both imposed an obligation on the Government and the courts to protect the environment for the people and the nation. Apart from the above stated Articles the Article 253 of the Constitution provides the central government with sweeping powers to implement laws for any part of India with regard to treaties made with another country or decisions made by an international body. Furthermore, the 42nd amendment act brought forest, wildlife and population control from the state list to the concurrent list. This enabled both the state and the centre to make laws on these areas.

It is true that most of the environmental provisions are dealt under Directive Principles of State Policy, however, during late 80s the increase in PIL and environmental movements countrywide provided an opportunity to the judiciary to read between the lines of the constitutional provisions and interpret it. The court interpreted that a good environment is a constitutional right of the Indian citizen under the Right to Life (Article 21), and the protection of the environment is a fundamental duty of each citizen (Article 51A). These provisions have been used especially by the Supreme Court in dealing with environmental cases, and considering environmental, ecological, air, water pollution, as amounting to violation of Article 21. This interpretation of the fundamental right to life entitles citizens to invoke the writ jurisdiction of the Supreme Court and high courts.

Important Judgements

The rise of environmental PIL (Public Interest Litigation) and judicial activism in the last 20 years has encouraged development of new and stricter environmental legislation. It is also to be remembered that most of the environmental cases have come before the court through PIL either under Article 32 or under 226 of the constitution.

The first case on which the apex court had applied the doctrine of 'Sustainable Development' was Vellore Citizen Welfare Forum v Union of India. In the instant case, dispute arose over some tanneries in the state of Tamil Nadu. These tanneries were discharging effluents in the river Palar, which was the main source of drinking water in the state. The Hon'ble Supreme Court held that: "We have no hesitation in holding that the precautionary principle and polluter pays principle are part of the environmental law of India" The court also held that: "Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology."[4]

In Sachidanand Pandey v State of West Bengal, the Court clearly recognised Directive Principles role in deciding environmental cases in light of Articles 48A and 51A(g). Similarly in T.Damodar Rao v The Special Officer, Municipal Corporation of Hyderabad[5], Article 48A has been interpreted as imposing 'an obligation' on the government, including the courts, to protect the environment.[6] The Supreme Court explained the basis of this jurisdiction in the later case of Subhash Kumar v State of Bihar[7] where the court held that "the right to life is a fundamental right under Article 21 of the Constitution and it includes right of enjoyment of pollution free water, air for full enjoyment of life" and that "if anything endangers or impairs the quality of life, in derogation of laws, a citizen has a right to have a recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life."[8] The case in discussion was a different than others because it was observed by the court that the petitioner filed a petition not to serve any public interest instead it was in self interest. After going through all the documents produced by both the parties the court found that the petitioner filed a case because the respondent company prevented the petitioner from collecting slurry from its land and as it further refused to sell any additional quantity of slurry to him, he entertained grudge against the respondent company. In a final judgement the petitioner was directed to pay Rs 5000 as costs.[9]

In 1986, then Chief Justice of Supreme Court Bhagwati in M.C. Mehta v. Union of India and Shriram Foods and Fertilisers Case, 1986(2) SCC 175 observed : "We would also suggest to the Government of India that since cases involving issues of environmental pollution, ecological destructions and conflicts over national resources are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, it might be desirable to set up Environmental Courts on the regional basis with one professional Judge and two experts drawn from the Ecological Sciences Research Group keeping in view the nature of the case and the expertise required for its adjudication. There would of course be a right of appeal to this Court from the decision of the Environment Court."[10] The setting of environment court was also made in Vellore case. The bench asked the government to constitute an environment court, headed by a retired judge of the High court and it may have other members preferably with expertise in the field of pollution control and environmental protection.

Inorder to make the environmental issues for all and to inculcate the green ethos among the people in 1991 the Supreme Court of India, in response to a petitioner's request for issuing a court directive on the importance of public information in environmental matters, called on cinemas and video parlours to project environmental messages and films about environmental issues and requested that radio companies make programs on environment and pollution. (MC. Mehta V.: Union of India and others, Supreme Court Of India, Writ Petition (Civil) No. 860 of 1991) [11]. The court also directed the University Grants Commission to prescribe a course on environment in the graduation and post-graduation level and consider feasibility of making this a compulsory subject at every level in college education. Regarding the education upto college level it directed every education board connected with education upto the matriculation or even intermediate colleges to immediately take steps to enforce compulsory education on environment in a graded way for year 1992-93. [12]

However, most of the states failed to comply with the directives and as a result ten states were fined for the defiance. And on December 18, 2003 the Supreme Court directed all the states and

educational agencies in the country to introduce environment as a compulsory subject in all classes in schools up to the higher secondary level from the academic year 2004-05 [13]. In view of the directive of the Supreme Court a two day National Consultation Meeting on Environmental Education was convened in New Delhi from 13-14 February, 2004 to prepare a model syllabus for all stages of school education. Mr. D.N.Tiwari, the member of the Planning Commission, on behalf of the government of India while speaking drew attention to the fact that degradation in respect of all major resources like land, water, and air had reached unprecedented levels. He also emphasised that the major cause for this dismal scenario is lack of awareness, consciousness and action on the part of the people. [14]

Acknowledging the global concern for the pollution in March 2002, the Supreme Court clarified: Pollution as a civil wrong... a tort committed against the community as a whole. A person, therefore, guilty of causing pollution has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner.[15] The vehicles propelled by cleaner fuel like CNG is the result of the Supreme Court directive. The original petition to reduce the urban pollution was filed in 1985 (M C Mehta vs. Union of India WP 13029/1985 [16]). Some of the most significant rulings of the Supreme Court in vehicular pollution cases during 1990 to 2001 resulted in mandatory measures to reduce pollution in city road transport. The court while delivering its verdict followed adhered to 'Precautionary Principle', and made it clear that measures for the abatement should not be postponed because of scientific uncertainty.

In a similar vein in the Narmada Bachao Andolan v Union of India, the Court explained: "When there is a state of uncertainty due to the lack of data or material about the extent of damage or pollution likely to be caused, then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution.[17] The court pronouncement on the Narmada Bachao Andolan Case was on line with the international environmental convention of the United Nation Framework Convention on Climate Change that states the scientific uncertainty should not be used as an excuse for non-implementation of environmental policies and for further postponement of the remedy.

Analysis

The discussion so far demonstrates that judiciary has become an active player for the promotion of sustainable environment development. However, it has also been noticed that the rate of the implementation of decision is abysmally low and in some cases it has taken many years to get the decision implemented. One of the reasons for the delay is the concomitant relationship between environment and development.

It is a pity that in a country like India where most of the populations depend on environment for their livelihood, there is no long term policy regarding environment. As a consequence of this there has been wanton the degradation of the environment. Development in any field is likely to cause adverse affects on environment and erode the livelihood of many people.

Judiciary to some extent has been advocating for the same but in some of the cases judiciary too has given priority to the developmental works. For example in the Dehradun Mine's case, 'the court elaborated at length by saying that development has to go on and it was not for judiciary but for the legislature and the executive to reconcile the claims of environment and development'.

Lastly one could say that the interest the judiciary has shown in environment has provided an impetus to environmental law in a country like where still the civil society is still grappling with the concept of 'right to safe environment'. Another aspect of this has been the debate it has given rise to in the country on development versus security keeping environment as the focus. However, in some of the cases the judiciary has left its decision on the mercy of executive and legislature. In order to strengthen the current demand for the good environment there is a need for a continued debate on the subject.

Endnotes

1. P. D. Mathew, "Judicial Activism", *Social Action*, vol.47, No.3, Oct-Dec 1997, p.397.

2. P Leelakrishnan, *Environment Case Law Book*, LexisNexis, New Delhi, p.259.

3. Ibid, p.241.

4. Sourabh Subha Ghosh, Sustainable Development and Indian Judiciary, http://www.legalserviceindia.com/articles/jud.htm

5. AIR 1987 AP 171.

6. Sukanya Pani, Comparative Analysis of Environmental Activism through Constitutional Rights: Two Case Studies: India and Hong Kong National Academy of Legal Studies and Research (NALSAR), University of Law, Hyderabad, India December 2002, http://www.civic-exchange.org/publications/Intern/sukanya.doc

7. AIR 1991 SC420.

8. Comparative Analysis of Environmental Activism through Constitutional Rights:

   Two Case Studies: India and Hong Kong *Sukanya Pani* National Academy of Legal Studies and Research (NALSAR), University of Law, Hyderabad, India December 2002, http://www.civic-exchange.org/publications/Intern/sukanya.doc

9. Op.Cit. P.Leelakrishnan, pp. 245-46.

10.http://www.auburn.edu/~alleykd/envirolitigators/ legaltermsconcepts.htm

11. Cited in Lal Kurukulasuriya, *The Role of the Judiciary in Promoting Environmental Governance Prepared for Global Environmental Governance: The Post-Johannesburg*

Agenda, 23rd-25th October 2003, Yale Center for Environmental Law and Policy, New Haven, http://www.brass.cf.ac.uk/Kurukulasuriya_paper.pdf

12. Quoted in *The Hindu*, New Delhi, September 23, 2003, in the context of fines slapped on 10 states for not adhering to the directives of 1991.

13. J. Venkatesan, "Supreme Court Directs States to Include Environment in Syllabus", *The Hindu*, December 19, 2003.

14. Stress on Environmental Education, *The Hindu*, New Delhi, 15 February 2004.

15. Ruling dated March 15, 2002, in Beas River Case of Mehta vs Kamal Nath WP182/1996.

16. The precautionary principle, for the first time was used by the Supreme court. The opinion of the court was that the delay in changeover to CNG buses affected the health of the children while it helped private operators. The court also stated that far greater tragedies than those of Bhopal lie dormant in the governmental neglect over CNG. The continuing air pollution does have a more devastating effect on the people.

17. Sukanya Pani, Comparative Analysis of Environmental Activism through Constitutional Rights: Two Case Studies, India and Hong Kong, National Academy of Legal Studies and Research (NALSAR), University of Law, Hyderabad, India December 2002. http://www.civic-exchange.org/publications/Intern/sukanya.doc