

Environmental Law and Justice: The History and Future

‘Vasudhev Kutumakam’ (sanskrit) meaning: The world is one family.

Time is supposed to be the most abstract concept in the universe. Its definition is based on our perception and it will forever be the latest and the oldest conceptualization of human understanding till our last breath. Similar to time is the concept of environment. It precedes beings, plants and trees in our relative understanding and even the air we breathe, the land we walk on, the water we drink. Environment thus, can be said to be almost as broad a concept as time itself. However, one major difference between the two our archaic concepts is that human elements cannot influence the intangible time, the speed at which industrialization takes place, for instance, can not affect the concept of time. The tangible Environment, on the other hand, has had a history of being affected by organisms and other factors corroborating the multitude of events that are leading us to the impending calamity today.

Given the abstract nature and its comparative basis with time, how does one define the term environment? Certainly, various legislations in India, and instruments Internationally, have strived to give definitive meaning to the said term. The Environment (Protection) Act, 1986 defines the term environment as one including water, air and land and the inter- relationship which exists

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among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.

The Earth's average surface temperature has risen about 1.1 degrees Celsius since the late 19th century, a change driven largely by increased carbon dioxide and other anthropogenic emissions into the atmosphere. Most of the warming occurred in the past 35 years, with 16 of the 17 warmest years on record occurring since 2001. Not only was 2016 the warmest year on record, but eight of the 12 months that make up the year — from January through September, with the exception of June — were the warmest on record for those respective months. The oceans have absorbed much of this increased heat, with the top 700 meters of ocean showing warming of 0.302 degrees Fahrenheit since 1969. The Greenland and Antarctic ice sheets have decreased in mass. Data from NASA's Gravity Recovery and Climate Experiment show Greenland lost 150 to 250 cubic kilometers (36 to 60 cubic miles) of ice per year between 2002 and 2006, while Antarctica lost about 152 cubic kilometers (36 cubic miles) of ice between 2002 and 2005. Glaciers are retreating almost everywhere around the world — including in the Alps, Himalayas, Andes, Rockies, Alaska and Africa. Satellite observations reveal that the amount of spring snow cover in the Northern Hemisphere has decreased over the past five decades and that the snow is melting earlier. Global sea level rose about 8 inches in the last century. The rate in the last two decades, however, is nearly double that of the last century. Both the extent and thickness of Arctic sea ice has declined rapidly over the last several decades. The number of record high temperature

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events in the United States has been increasing, while the number of record low temperature events has been decreasing, since 1950. The amount of carbon dioxide absorbed by the upper layer of the oceans is increasing by about 2 billion tons per year.

The Constitution of India is one of the most iconic legal scriptures around the globe and, indeed, the most lengthy of the constitutions of the world. In light of this the Constitution of India provides for the golden triangle of Environmental Laws. Apart from the above, the Indian Constitution is perhaps the only constitution in the world which specifically attempts to protect the environment in no uncertain terms. Stockholm's conference of 1972 was in fact, the trigger that set the ball rolling in this regard, whereby, by way of the 42nd Amendment to the Constitution of India in 1976 Protection of Environment as a duty of the state and the citizens was added (Articles 51A (g) and 48A) to these two dots of Protection of Environment in the Constitution the Hon'ble Supreme Court of India added a further dot, that of including the Right to Clean and Decent Environment within the actionable Fundamental Right of Sustainable Development. It was also held that Environmental Pollution should be regarded as amounting to violation of Article 21 i.e. Fundamental Right to Life of the Constitution of India (*Damodar Rao v. S.O. Municipal Corporation AIR 1987 AP 171*). The culmination of these three dots gave to India the Constitution Protection of this golden triangle comprising of the citizens and states duty to protect the Environment and the Right of the Citizens to claim any violation in relation to Environment as a violation of its inherent Fundamental Right.

This golden triangle forms the foundation of the Constitutional Protections granted in favour of the Environment. However, this leads us to ponder over the statutory protection vested to Environment and how does the state using what kind of tools make such legislations specifically for environment possible.

To answer the above question one has to appreciate the legislative scheme involved in enacting the Environment (Protection) Act, 1986. The said Act in its preamble refers to the Stockholm Conference of 1972 and states that Environment of the said conference, natural obligation and the need to protect the Environment, the enactment was brought into force. Thus, the Indian legislation made use of the constitutional provision that allows the legislature to morefully use international instruments and imposed the same through legislating on them. Article 253 of the Constitution of India, unlike Article VI Section 2 of the Constitution of the United States of America, for instance, gives the Parliament of India the power to make any law for implementing any treaty agreement or convention or any decision made at any international conference, association or other body in contradistinction to this article enabling the parliament to legislate the corresponding provision of the Constitution of the United States of America simply makes the International instruments binding, simpliciter, without the need of legislating on the same. Therefore, a legislation is required for implementing the International conventions, unlike the possession in the United States of America where the rules of International Law are applied by the Municipal Courts on the theory of their implied adoption by the state, as a part of its own Municipal Law. It is

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pertinent hereto also make a mention of Article 51(c) of the Constitution which states that the state shall endeavor to, inter-alia, foster respect for International Law and Treaty Obligations in the dealings of organized people with one another. Article 253 has thus been used to implement such treaties as are felt necessary for the betterment of the society, may it be in the countries role as a Welfare State or otherwise. It is in the same breath that the Country has become an active member of over 500 multinational agreements and has over 33 domestic statutes relating to environment, including the principles of the Kyoto Protocol, the Stockholm conference, the Rio Conference, and the Paris Agreement.

Structure of Constitutional Courts

Over the years the Indian Judiciary has come out as one of the most active and pragmatic judicial systems in the world with a keen eye on being creative to address the challenges being faced by the citizenry. The role of judicial activism was all the more important anent environment as, as afore referred, pre-1972 there were no concrete statutes in relation to environment. At the outset it is important to notice that the Supreme Court and the High Courts are provided with the power to review a state action under Articles 32 and 226 of the Constitution of India whereby they can issue various writs in order to remedy a wrong. In fact, it has been held by the Supreme Court that the right to a clean, decent and wholesome environment is a fundamental right and an inbuilt constituent of the Right to Life. Personal liberty means life in a pollution free

environment and if the State fails to ensure reasonable environment, it would amount to violation of the fundamental right to life and personal liberty under Article 21 of the Constitution of India. In addition thereto, right to life has been interpreted to be not merely the right to the continuance of the person's animal existence but, the right to livelihood and right to have living atmosphere congenial to human existence are a part of the right to life [(Kharak Singh v/s State of U.P (AIR 1963 SC 1295); T.Damodhar Rao v/s Special Officer MCH, (AIR 1987 A.P. 171)]. In exercise of its writ jurisdiction Supreme Court has dealt with a plethora of macro and micro environmental issues which have been held to affect the fundamental right to life of the citizens of the country. The issues range from establishment of illegal tanneries, handling the devastation of the River Ganges, maintenance of Forest cover, preservation of wildlife and specifically endangered species such as Tigers, and various other tangential environmental issues plaguing the world around us.

In *Virender Gaur v State of Haryana* (1995) 2 SCC 577, the court declared that a healthy environment is one free from environmental pollution, stating:

Article 21 protects the right to life as a fundamental right. Enjoyment of life including the right to live with human dignity encompasses within its ambit, the protection and preservation of the environment, ecological balance free from pollution of air and water, sanitation, without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air and water pollution, etc. should be regarded as

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amounting to a violation of Article 21. Therefore, a hygienic environment is an integral facer of the right to a healthy life and it would be impossible to live with human dignity without a human and healthy environment. There is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard a proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man made and the natural environment.

The Supreme Court endorsed the ratio of right to environment as a part of the fundamental right to life in *Municipal Corporation of Greater Mumbai v Kohinoor CTNL Infrastructure* (2014) 4 SCC 538, saying:

It must be noted that the right to a clean and healthy environment is within the ambit of Article 21, as has been note in *Court on its Own Motion v Union of India* reported in 2012 (12) SCALE 307 in the following words:- The scheme under the Indian Constitution unambiguously enshrines in itself the right of a citizen to life under Article 21 of the Constitution. The right to life is a right to live with dignity, safety and in a clean environment. The right to a clean and pollution free environment is also a right under our common-law jurisprudence, as has been held by the Supreme Court in *Vellore Citizen's Welfare Forum v Union of India*. Apart from the Supreme Court and the Hogh Courts, the District Courts and Subordinate Courts with imperative support from Tribunals and quasi-judicial bodies have paved way for development of environmental jurisprudence in India.

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Ultimately, under Article 142 of the Constitution of India, law declared by the Supreme Court is the law of the land. And the law so laid down by the Supreme Court, over the years, has had a global approach towards the developments in international law as well as international environmental jurisprudence. However, the judicial impetus must not be taken in vacuum and the push for environmental efforts must be backed by proper training both vocationally and that of mind sets to be more assimilative of environmentally friendly approaches and lifestyle choices. Ultimately, the said concepts relating to environment and environmental jurisprudence need to be simplified in contradistinction to being over-complicated in order to be rightfully imbibed by the populace. It must always be remembered that the project cost of an industry can be redeemed but more often than not, despite costs towards remediation, environmental costs are seldom redeemed.

NATIONAL GREEN TRIBUNAL

India as a country for quite sometimes had been reeling under the load and backload of environmental litigation and the call for having specialized courts to deal with the subject matter had been noticed at various platforms. Even in Supreme Court called upon the Government of the country to analysis and implement the viability of having specialized environmental courts in the country. The 186 Law Commission of India had suggested having a special tribunal with expert and judicial members that would provide expeditious and

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efficacious disposal of environmental justice. In fact, a former environmental minister of the country in a parliamentary debate had noticed that there are 5,600 cases before the Indian judiciary relating to environment and that the said load was only going to increase. It was insisted that the country need a specialised environmental courts even by the Supreme Court and the Law Commission. The Hon'ble Minister was of the view that India will be one of the few countries which will have such an environmental court apart from Australia and New Zealand. The bill to establish the National Green Tribunal was passed by the Lok Sabha on 23.04.2010 and Rajya Sabha on 05.05.2010. The National Green Tribunal Act, 2010 received presidential assent on 02.06.2010 and formerly came into existence. The National Green Tribunal Act implements Indians commitments, made in the Stockholm declaration of 1972 and in the RIO Conference in 1992, to take appropriate steps for the protection and improvement of the human environment and provide effective access to judicial and administrative proceedings, including redress and remedies. The novel usage of Article 253 in contradistinction to Article 323A and 323B of the Constitution of India to establish a tribunal in order to implement the International Laws and legal regime that India is a party to its another facet of the pragmatism of the Indian Constitution. While Article 323A and 323B have been legislated with riders and restrictions creating statute under International obligations under Article 253 of the Constitution of India gives the Government wider powers to implement in the interest of justice a tribunal with a slow intend of remedying and issue it hand, in the present case deterioration of

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environment. The National Green Tribunal Act is a special legislation which envisages establishment of one principal and four zonal benches in relation to possible circuit benches at the helm of which are both expert and judicial members. The tribunal is headed by a former judge of the Supreme Court of India as its Chairpersons and other judicial members are former Judges of the High Court of India. Expert members are scientific experts in environment or related fields or former bureaucrats well verse with administrative decisions in such fields. The Act itself gives a very wide definition to environment adopting from the one given in the environment protection act, 1986. Ever since establishment National Green Tribunal has primarily been successful in increasing access to environmental justice and speedy disposal of cases. The Tribunal has sued creative judicial mechanisms to bring within its ambit 'any person aggrieved' raising a substantial question relating to environment and has provided effective remedies in relation to the scheduled Acts. Between 2012 and 2017 the National Green Tribunal had a disposal rate of 82% and by the end of such period had brought about a paradigm shift in the way people were dealing with and looking at environmental consciousness and conscious in relation to the disputes therein. While dealing with matters of national and international importance the tribunal successfully inculcated within its jurisprudence importance concepts of international environmental law such as the doctrine of non-regression and inter-generational equity adhering to the need of the hour. The spurious nature administrative decisions impending sustainable development were struck down and the country was lead on to a

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new path of environmentalism. Instilling in each citizen a sense of pride towards up keeping of environment.

Despite all the work done by the Tribunal it must be notice that due to the extremely strict limitation period provided and the restrictions of the jurisdiction beyond the 7th Schedule Acts, the effectiveness of the tribunal was inhibited. Statutes concerning wildlife and energy, insufficiency of expert and judicial members were some of the impediments that the Tribunal had to work with and make the best out of. Some of the important case laws and jurisprudential concepts innovated by the said tribunal are detailed below. Before concluding with discussion on the contributions of the Tribunal and important aspect of its jurisdiction must be detailed. Apart from having original appellate jurisdiction the Tribunal is also vested with the powers to pass directions in order to remediate and restore the environment on the basis of the principles of sustainable development polluter pace and precautionary as enshrined in Section 20 of the National Green Tribunal Act. The penumdra of the work done by the tribunal has shown pride not only in domestically but in the international environmental jurisprudence and one that the country is proud of.

Eventually, India as a country has progressed in the right direction in order to promote sustainable development. The journey, however, is neither fugacious nor country-centric. It requires a concerted effort on behalf of our planet as a whole to combat this problem. Environmental management, must become a

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part of good governance, a second nature to humanity for us to have a chance.

We are borrowers of this planet from our future generations and we must do them justice. It is thus, heartening to notice that over 1200 environmental courts have been established in over 40 countries. The laws are often reflections of the customs in one's society. And thus, to have laws in place to conserve and preserve the environment would mean that there is a legitimate effort on our part to reshape and reinvigorate a sense of environmentalism necessitated by our inheritance and indeed inherent in us. The Air Quality in Delhi might be execrable and the water quality of the Ganges might be deplorable.

There might be 269,000 tonnes of plastic in the oceans today, and Antarctica's sea-ice cover may have greatly reduced, measuring about 154,000 square miles (398,858 kilometres) smaller than it was in 1986. But we must have hope and we must have conscience and we must take action. As a family.

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