



CONSTITUTIONALISING THE PROBLEM OF ENVIRONMENT

THE MOST significant achievement of modern law in India is the constitutionalisation of environmental problems by the Supreme Court of India. Prior to the year 1980 there were legislations about control of pollution but little had been done to really make pollution control a priority item on the national agenda for none was willing to bell the cat. The courts have been successful in developing certain initiatives, which have cumulated in making environmental law problems the most significant problems arising before the courts in contemporary India. The efforts of the courts have been noticed in international fora and may be deservedly considered the precursor of modern environmental law in India. The major initiatives generated by the courts are as follows:

- Generation of a new fundamental right to wholesome environment.
- The merging of directive principles into fundamental rights.
- Importation of international norms of 3rd generation collective rights for sustainable development into Indian law.

The initiative may be discussed after looking at the root of the development.

I Root of the Development

The root of development can be traced to the opinion of Krishna Iyer J in *Municipal Council, Ratlam v. Vardhichand*.¹ The case arose out of simple circumstances. The Municipal Council of Ratlam failed to take steps to maintain roads in a particular locality in a safe and sanitary condition. The sole excuse of the municipal board was that it had no money to maintain the road. Krishna Iyer J stated that there was an urgent need to focus on the ordinary man. Quoting from a famous work *Access to Justice*,² Iyer J said ‘the recognition of this urgent need reflects a fundamental change in the concept of “procedural justice”... The new attitude to procedural justice reflects what Prof. Adolf Homburger has called “a radical change in the hierarchy of values served

1. (1980) 4 SCC 162.

2. M. Cappelletti & B. Garth, *Access to Justice* 68 (Vol. I, A World Survey ed.)



by civil procedure”; the paramount concern is increasingly with “social justice”, *i.e.*, with finding procedures which are conducive to the pursuit and protection of the rights of ordinary people’. The court noted that the matter had been pending for more than seven years. It specifically read into the situation a constitutional directive for the court and observed ‘Where directive principles have found statutory expression in Do’s and Dont’s the court will not sit idly by and allow municipal government to become a statutory mockery. The law will relentlessly be enforced and the plea of poor finance will be poor alibi when people in misery cry for justice’.

If the opinion in *Ratlam* is read critically, the opinion reveals a paradigm change in the role of the courts. Ordinarily and particularly before *Ratlam* the role of the courts was considered reactive. They were specifically to dispense justice where rights have been denied. Iyer J added a proactive dimension by stating that where the directive principles of the Constitution have spelled out the desired acts or omissions, the courts are under a duty to ‘relentlessly’ enforce the law. This formulation has emboldened the efforts at environmental protection. It reinforced the idea that judicial power can command obedience from reluctant bureaucracies.

As the result of the 42nd amendment to the Constitution the directive principles categorically asserted the need for a healthy environment and thus indicated the do’s and don’ts needed for a healthy environment. The necessary implication was that the courts have a duty to relentlessly enforce this law. This was an open invitation to constitutionalise the problems of management of the environment. This opened the doors of higher courts to intervene in enforcement of environmental legislation. A separate forum to force the state to take required measures for environmental protection was opened. The result of *Ratlam* is that in the following 25 years there has been a spate of judicial opinions from the higher courts that have formally put the environmental problems on a constitutional pedestal.

II Fundamental Right to a Wholesome Environment: The Rationality Deficit

The fundamental right to a wholesome environment is not expressly guaranteed by the Constitution. Part III of the Constitution does not specifically enumerate any such right. The right to wholesome environment has been *sub-silentio* recognised by the Supreme Court in a chain of cases. This *sub-silentio* approach exhibits a tendency to avoid raising any controversy on such a question. It can mean any of the two things. It can either mean that the right to wholesome environment is *ipso-facto* a part of the right to life and personal liberty too well



understood to require rationalisation. The other alternative reading may be to introduce this right without any rationalisation so as to avoid a debate on the issue. Be that as it may, the recognition by the court of a fundamental right to wholesome environment is a product of the process of widening the scope of article 21 of the Constitution which began with *Maneka Gandhi*.³

It is well known in constitutional jurisprudence that the last 55 years of constitutional adjudication have seen article 21 of the Constitution undergoing three phases of change. The first phase was of narrow textual interpretation followed by another stage of residual coverage. In the third phase article 21 emerged as an overarching fundamental right in the Constitution of India.⁴

In *Maneka Gandhi*,⁵ a liberal view of the scope of article 21 was taken, so that article 21 became the repository of all rights which are necessary for the enjoyment of life. The liberal reading of article 21 opened the way for incorporation of the right to a wholesome environment within the protection of the Constitution. Bhagwati J delivering the majority judgment in *Maneka Gandhi* observed:

It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression 'personal liberty' as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the Constitution conferring fundamental rights. The attempt of the Court should be to expand the reach and ambit of fundamental rights rather than attenuate their meaning and content by a process of judicial construction.

Bhagwati J who was the principal architect of broadening the scope of article 21, himself had the opportunity to extend the protection of article 21 to the right to wholesome environment. In *Rural Litigation and Entitlement Kendra, Dehradun v. State of U.P.*,⁶ the issue was in respect of the closure of certain limestone quarries in and around the town of Mussoorie. The court itself noted that the case was the first of its kind in the country involving issues relating to environment and ecological balance and the questions arising for consideration were of grave moment and significance. The court also noted that the situation

3. *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 at 621.

4. See *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27; *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 and *R.C. Cooper v. Union of India*, AIR 1970 SC 564.

5. *Supra* note 3.

6. AIR 1985 SC 652.



involved the conflict between development and conservation. It emphasised the need for reconciling the two in the larger interest of the country. The court, however, avoided any discussion of the fundamental right to a wholesome environment or its emergence from the guarantee of personal liberty. There is only a small part of the single sentence which refers to the 'need of safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without hazard to them or their cattle, homes and agricultural land and undue affection of air, water and environment'.⁷

Bhagwati J obviously avoided a discussion of the basic question whether a right to wholesome environment was included under the umbrella of the right to life may be because the matter involved a large number of quarries with a large number of workers whose existence depended on these quarries. Yet another reason might be that Bhagwati J was already convinced of the overarching scope of personal liberty since he was the prime architect of the expansive concept in *Maneka Gandhi*. But all these reasons cannot really explain why the court, without any rationalisation, proceeded to issue a remedy on a writ under article 32 without first establishing that article 32 was available to the petitioners.

The same strategy of avoidance of the need to rationalise the inclusion of the right to wholesome environment among the fundamental rights was repeated in *M.C. Mehta v. Union of India*.⁸ In this case also the question was whether the Supreme Court can decree compensation for violation of the right to wholesome environment in a petition under article 32 of the Constitution. While discussing at length the power of the court to devise procedure appropriate for the enforcement of a fundamental right, not even a sentence was devoted to a declaration incorporating the right to wholesome environment within the guarantee of life and personal liberty. The same approach was reflected by another bench of the apex court in *Sachidanand Pandey v. State of W.B.*⁹ Chinnappa Reddy J referred to article 48A of the Constitution which enshrined the directive principle to protect and improve the environment. His lordship also referred to article 51A(g) which proclaims it to be the fundamental duty of every citizen of India to protect and improve the natural environment. After referring to these two provisions, the court should have considered whether the right to wholesome environment was a fundamental right but it avoided doing so. It held:

When the Court is called upon to give effect to the Directive Principle of State Policy and the Fundamental Duty, the Court

7. *Id.* at 656.

8. AIR 1987 SC 1086.

9. (1987) 2 SCC 295 at 298.



is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy making authority. The least that the Court may do is to examine whether appropriate considerations are borne in mind and irrelevant excluded.

The court in *Sachidanand Pandey* overlooked the basic problem that a remedy under article 32 could not be provided either for enforcement of the directive principle or for the enforcement of a fundamental duty. The basic sub-stratum, namely, violation of a fundamental right was not established in *Sachidanand Pandey*.

There can be two different explanations for what the court did. One can read *Sachidanand Pandey* to lay down the principle that article 32 remedies would also be available for enforcement of directive principle and fundamental duty. In the alternative, *Pandey* may be read as contributing to the same attitude of avoiding specific rationalization of the right to wholesome environment as a part of right to life.

Venkataramiah J followed the *Pandey* strategy in the *Ganga Pollution* case,¹⁰ and referred to the directive principle and the fundamental duty but not to the fundamental right. Finally in *M/s Shantistar Builders v. Narayan Khimalal Totaine*,¹¹ which was really a right to shelter case and did not involve an environmental issue, Ranganath Misra J observed as follows:¹²

Basic needs of man have traditionally been accepted to be three - food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to *decent environment* and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body; for a human being it has to be a suitable accommodation which would allow him to grow in every aspect - physical, mental and intellectual.

Sometime later, Saghir Ahmad J in *M.C. Mehta v. Kamal Nath*,¹³ observed as follows:¹⁴

In order to protect “life”, in order to protect “environment” and in order to protect “air, water and soil” from pollution, this Court, through its various judgments has given effect to the rights available, to the citizens and persons alike, under Article 21 of the Constitution.

10. *M.C. Mehta v. Union of India*, AIR 1988 SC 1115.

11. AIR 1990 SC 630.

12. *Id.* at 633. Emphasis supplied.

13. (2000) 6 SCC 213.

14. *Id.* at 220.



Both Ranganath Misra J and Saghir Ahmad J have avoided any discussion of the question whether right to wholesome environment is included in the right to life under article 21 of the Constitution. It was perhaps taken for granted.

III Alternative Routes to Rationalization

While the Supreme Court was avoiding a rationalization exercise, the high courts took different routes. In *L.K. Koolwal v. State of Rajasthan*,¹⁵ the Rajasthan High Court drew a co-relation between the fundamental duty of the citizens incorporated in article 51A and the existence of a fundamental right to wholesome environment. Mehta J used the Salmondian relationship between right and duty to read the right out of the duty of the citizen in respect of environment. The opening sentence of the order emphasised the co-relation of right and duty. The court observed “right and duty co-exist. There cannot be any right without any duty and there cannot be any duty without any right”. From this premise, the court proceeded to argue that since citizens have a fundamental duty under article 51A, article 21 must be read to include the right to wholesome environment.

It may be noted that the initial premise of the court is shaky, since the concept of absolute duties is well established in jurisprudence. It is very difficult to assert that for every legal duty a co-relative right has to be mandatorily discovered within the legal system.

Perhaps the court itself was aware of the weakness of its initial premise and therefore it added that maintenance of environment falls within the ambit of article 21 as it affects the rights of citizens and ‘it amounts to slow poisoning and reducing the life of citizens because of the hazard created’.

The Himachal Pradesh High Court in *Kinkri Devi v. State of H.P.*¹⁶ preferred to strengthen the premise chosen by the Rajasthan High Court with the help of directive principle in article 48A. It argued that article 48A was a pointer to the state and when it is read together with the citizens’ duty under article 51A(g) ‘the neglect or failure to abide by the pointer or to perform the duty is nothing short of betrayal of fundamental law which the State was bound to uphold and maintain’.

The concept of a fundamental law underlying the text of the Constitution is as ephemeral as the judicial relationship between rights and duties. It is like an argument to the spirit of the Constitution which Dr. Ambedkar vehemently stressed before the Supreme Court in *State of*

15. AIR 1988 Raj 2.

16. AIR 1988 HP 4.



Bihar v. Maharajadhiraja Sir Kameshwar Singh.¹⁷ The court then had unanimously rejected it and the argument has never found favour as yet.

The Andhra Pradesh High Court in *T. Damodar Rao v. The Special Officer, Municipal Corporation of Hyderabad*¹⁸ advocated a third alternative. It began with the premise that the common law concept of ownership included the right to use, abuse and destroy. But the environmental law has succeeded in unleashing man's right to life and personal liberty from the clutches of common law theory of ownership. Article 51A(g) was a clear pointer to this trend and therefore it will be reasonable to hold that the enjoyment of life and its attainment and fulfilment, 'guaranteed by article 21 of the Constitution embraces the protection and conservation of nature's gift without (which) life cannot be enjoyed'. The court also followed the logic of *Kinkri Devi*¹⁹ to argue that if article 21 was a guarantee against violent extinguishment of life, there was no reason why article 21 might not be regarded as a guarantee against slow poisoning by pollution. This argument misses the central point. Article 21 is a guarantee against the state. The logic adopted by the court may be useful if the state is the polluter for it can be argued that what the state cannot do directly it cannot do indirectly. But to extend the same logic to read a positive duty on the part of the state to bring pollution by private parties to an end is to extend the logic beyond its confines.

The Kerala High Court realized the difficulties of reading a right to wholesome environment out of the directive principle in article 47 or the fundamental duty in article 51A(g). Instead in *Madhavi v. Tilakam*,²⁰ it preferred to rely on the wide meaning given to the right to life by the Supreme Court in *Francis Coralie*²¹ to argue that 'the right to enjoy life as a serene experience in quality far more than animal existence, is thus recognised'. The court went on to observe that 'personal autonomy free from intrusion and appropriation is thus a constitutional reality'. Therefore, the conduct of any business or trade injurious to health or physical comfort of the community could be regulated or prohibited under the Constitution.

In a later case, *Law Society of India v. Fertilizers and Chemicals Travancore Ltd.*,²² the Kerala High Court built upon the same premise referring to the decisions of the Supreme Court giving a broad meaning

17. AIR 1952 SC 252.

18. AIR 1987 AP 171.

19. *Supra* note 16.

20. (1988) 2 Ker LT 730.

21. *Francis Coralie Mullin v. Union Territory, Delhi Administrator*, AIR 1981 SC 746.

22. AIR 1994 Ker 308.



to right to life. The court held:²³

Deprivation of life under Article 21 of the Constitution of India comprehends certainly deprivations other than total deprivation. The guarantee to life is certainly more than immunity from annihilation of life. Right to environment is part of the right to life. Apart from the rights under Article 21 of the Constitution of India and its refined articulations in Article 51A(g), we have to remember that in 1984, United Nations adopted a resolution, reading: “All human beings have the fundamental right to an environment adequate for their health and well being”. A state of perpetual anxiety and fear of extermination of life is not an environment adequate for the health and well being of human race.

It, therefore, appears that both the Supreme Court and high courts agree that a right to wholesome environment is included within the right to life guaranteed by article 21 but there is no agreement on the rationale for the conclusion. Both the alternatives developed by the courts are not juridically satisfactory. The greatest difficulty is that article 21 is couched in a negative mood, to turn it around and read out from it positive duties does violence to the text of the Constitution. Of course, the alternative is to read the positive duties out of the directive principles and collapse the directive principles into fundamental rights. This development is taking place not only under environmental jurisprudence but also in other areas.

IV Merging of Directive Principles into Fundamental Rights

Another significant development was merging of the directive principles of state policy into the fundamental rights guaranteed by part III of the Constitution.²⁴ Mathew J describing the relationship in *Keshavananda Bharti v. State of Kerala*,²⁵ in terms which have become classical observed:

23. *Id.* at 370.

24. *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226; *Golaknath v. State of Punjab*, AIR 1967 SC 1643; *Deep Chand v. State of U.P.*, AIR 1959 SC 648; *Mohd. Hanif Qureshi v. State of Bihar*, AIR 1958 SC 731; *In re Kerala Education Bill, 1957*, AIR 1958 SC 956. *State of Bombay v. F.N. Balsara*, AIR 1951 SC 318; *State of Bihar v. Kameshwar Singh*, AIR 1952 SC 352; *Bijoy Cotton Mills v. State of Ajmer*, AIR 1955 SC 33; *Mohd. Hanif Qureshi v. State of Bihar*, AIR 1958 SC 731; *Orient Weaving Mills v. Union of India*, AIR 1963 SC 98; *M.M. Pathak v. Union of India*, AIR 1978 SC 803.

25. (1973) 4 SCC 225, 880-81.



I think there are rights which are inherent in human beings because they are human beings—whether you call them natural right or by some other appellation is immaterial. As the preamble indicates, it was to secure the basic human rights like liberty and equality that the people gave unto themselves the Constitution and these basic rights are an essential feature of the Constitution; the Constitution was also enacted by the people to secure justice, political, social and economic. Therefore, the moral rights embodied in Part IV of the Constitution are equally an essential feature of it, the only difference being that the moral rights embodied in Part IV are not specifically enforceable as against the State by citizen in a court of law in case the State fails to implement its duty but, nevertheless, they are fundamental in the governance of the country and all the organs of the State, including the judiciary, are bound to enforce those directives. The Fundamental Rights themselves have no fixed content; most of them are merely empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgment, curtailment, and even abrogation of these rights in circumstances not visualised by the Constitution-makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV.

In environmental matters, however, a new situation emerged. The facts were that no fundamental right textually ensured the right to wholesome environment. But as a result of the 42nd Amendment to the Constitution, article 48A was added to the directive principles providing for protection and improvement of environment and safeguarding of forests and wildlife. The same constitutional amendment also added part-IVA which enumerated ten fundamental duties of the citizen, including in clause (g) the duty to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.

The courts have used the provisions of article 48A and 51A(g) to spell out a fundamental right to wholesome environment as part of the right to life. On the face of it, it appears that this is nothing new but the very embodiment of the approach to interpret the fundamental rights in the light of directive principles. But it is not merely that. Most of the observers of the Constitution have been misled into giving importance to this development. In fact most of the courts themselves have avoided ratiocinating on the reasons for this conclusion. On the contrary it would be really a welcome advance to raise environmental concerns to the dignity of fundamental rights rather than always having to take the help



of directive principles—the *sub silentio* approach mentioned above. However, as noted in the preceding section, it is a job yet to be done. What has, therefore, happened is a process of merging of certain directive principles into fundamental rights.

V Importation of International Norms of 3rd Generation Collective Rights for Sustainable Development

The most remarkable contribution of the Supreme Court has been the adoption of the right to sustainable development as a hard core principle of environmental law in India. The concept of sustainable development itself is comparatively young. It first appeared in the International Union for Conservation of Nature and Natural Resources (IUCN) Report of 1980 in respect of world conservation strategy. From there, it was picked up by the Report of the World Commission on Environment and Development in 1987, popularly called the Brundtland Report. The report itself was the product of 900 days of deliberations by an international group of politicians, civil servants and experts on environment.²⁶

The concept of sustainable development is in its infancy. Holmberg and Sandbrook identified some 70 definitions of sustainable development.²⁷ However, a commonly accepted definition has been proposed by Mrs. G.H. Brundtland in her 1987 report. According to her, sustainable development is the development that ‘meets the needs of the present without compromising the ability of future generations to meet their own needs’. This definition has a strong ethical orientation focussing upon the satisfaction of human needs rather than wants. It does not lay emphasis on the protection of environment in general. Many contemporary environmentalists are very critical of the concept of sustainable development because it licences economic growth.²⁸ But the concept of sustainable development has a mass appeal precisely because it is a catch phrase capable of repetition in ‘a parrot like fashion by environmental policy makers’.²⁹ The Supreme Court has, however, been careful to distinguish between the concept of sustainable development and its definition by Brundtland preferring not to fall for any given content for the concept and thus open the way for an active

26. For a history of the emergence of the concept of sustainable development, see, W.M.Adams, *Green Development: Environment and Sustainability in the Third World* (1990).

27. J. Holmberg & R. Sandbrook, “Sustainable Development: What is to be done?” in J. Holmberg (ed.), *Policies for a Small Planet* (1992).

28. *Ibid.*

29. W. Beckerman, *Small is Stupid: Blowing the Whistle on the Greens* 1(1995).



definition of sustainable development with a varying content. At least at the moment, it has chosen to avoid the need to go for any precision. In a few leading cases sustainable development has been adopted as the principle of environmental law.

In a series of cases which may not be large in number but which have much economic significance, the Supreme Court had to consider the application of the principle of sustainable development. All these cases involved industries generating sizeable revenues and significantly contributing to the industrial development of the country. However, these cases also show that the industries hardly cared for the environment and which were not only significant polluters but were also persistent. Repeatedly the environmental agencies implored upon them to rectify their pollutant emissions and effluents but the industries hardly cared. Even directions issued by the high courts and the Supreme Court were ignored. In a sense, the behavioural pattern of the industry was irresponsible. The situation seemed to be destined for doom for the industry hardly cared and the environmental agencies could not really bring their weight to bear upon the industries. The industries classically represent the case of too powerful defendants who continue to flex their muscles totally ignoring the degradation of environment caused by the industries. Such muscle flexing is common in soft states where the majesty of law is often compromised by considerations of status and wealth.

The first case involving claims to sustainable development was the *Bichhri Village* case³⁰ wherein a big public sector concern was producing chemicals. Its sister concern, started producing 'H' acid in the same complex. The chemical was meant exclusively for exports. The acid was highly toxic and the effluents from it posed grave danger to land in the surrounding areas. The effluents poisoned the earth, the water and everything else. The industries produced 25 hundred metric tons of highly toxic sludge. The waste waters were allowed to flow out in the open and the toxic sludge was thrown in the open in and around the complex. The toxic substances percolated deep into the earth polluting the subterranean supply of water. The water in the wells and the streams became unsuitable for human consumption as well as irrigation. The people revolted and a serious law and order situation was created forcing the district magistrate to close the industries in January 1989. Yet nothing was done to remove the sludge. The long lasting damage to earth and to underground water continued to exist.

The facts revealed that the units were established without obtaining no objection certificate from the pollution control board for production

30. *Indian Council for Enviro Legal Action v. Union of India*, (1996) 3 SCC 212.



of 'H' acid. They also revealed that the Supreme Court had issued a direction as early as 11 December 1989 for supply of drinking water to the affected villages and on 5 March 1990 the court directed that appropriate steps be taken for transportation, treatment and safe storage of the sludge. Again on 4 April 1990, the court directed removal of the sludge from open spaces and required that the sludge be stored in a safe place. But nothing happened. In the succeeding year, the industry tried to camouflage the sludge. Yet, they did nothing to remove it. Again, on 17 February 1992, the court directed an assessment by experts who were also to suggest a package of remedies for its transportation and safe storage. But still nothing happened. In 1994, the National Environmental Engineering Research Institute (NEERI) submitted a report which showed that only 720 metric tons of sludge was entombed while the rest of the waste was just spread over the open fields. The NEERI report concluded that the indiscriminate and wilful disposal activity by the industry was further aggravating the contamination problem.

These facts highlight the non cooperative attitude of the industry to the danger which it had itself created to the detriment of the environment in Bichhri. Appalled by the state of affairs, the Supreme Court quickly reacted to the situation. It resurrected the principle laid down in the famous *Shri Ram* case,³¹ which was threatened with oblivion because of the casual observation of Ranganath Misra J in *Union Carbide Corporation v. Union of India*.³² Misra J had felt that the principle laid down in *Shri Ram* was an *obiter*. The court held that it was not so and the rule in the *Shri Ram* case was the most appropriate one because it suited the conditions obtaining in this country. There was also a veiled reference to the problem of intransigent rich defendant whose pursuit of private profit blinded all claims of poor people. The court held that once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact that he took reasonable care while carrying on his activity. The court did not refer in terms to the ideals of sustainable development. Nevertheless the situation in this particular case classically represents the conflict between the claims of development and the claims of sustainable environment. In fact Jeevan Reddi J portrayed the conflict in the opening words of his opinion which are worth reproducing:³³

It highlights the disregard, nay, contempt for law and lawful authorities on the part of some among the emerging breed of

31. *M.C. Mehta v. Union of India*, (1987) 1 SCC 395.

32. (1991) 4 SCC 584.

33. *Supra* note 30 at 217.



entrepreneurs, taking advantage, as they do, of the country's need for industrialisation and export earnings. Pursuit of profit has absolutely drained them of any feeling for fellow human beings - for that matter, for anything else. And the law seems to have been helpless. Systemic defects? It is such instances which have led many people in this country to believe that disregard of law pays and that the consequences of such disregard will never be visited upon them - particularly, if they are men with means.

The next case involving the same kind of problem related to tanneries in Tamil Nadu.³⁴ The tannery industry is a significant foreign exchange earner but its effluents are released on the lands, the rivulets and the rivers polluting the sub-soil water and arable lands. Facts indicated that the industries were reluctant to provide for treatment of effluents. The court felt that even though the industry was earning foreign exchange and providing employment, contributing to development, 'it has no right to destroy the ecology, degrade the environment and pose a health hazard'.

The court held that sustainable development is the answer to the problem of conflict between development and ecology. Without much discussion of the content of sustainable development the court held that sustainable development is a balancing concept and has been accepted as part of the customary international law. The court even went one step further to declare that the precautionary principle and the polluter pays principle have been accepted as part of the law of the land in India.

In *A.P. Pollution Control Board II v. Prof. M.V. Nayudu (Retd.)*,³⁵ the Supreme Court took the question for indepth consideration. The matter involved the question of permission for establishment of industry within 10 km. of the two big water reservoirs, the Himayat Sagar and the Osman Sagar, serving the twin cities of Hyderabad and Secunderabad. Jagannadha Rao J, speaking for the court, adopted the principle of sustainable development. It was asserted that in today's emerging jurisprudence, environmental rights are described as 3rd generation rights. The United Nation's General Assembly has declared the right to sustainable development as an inalienable human right. Rio Conference was also referred to which adopted as principle 1 the principle that every human being is entitled to a healthy and productive life in harmony with nature. The judge went on to refer to the Earth Summit Meeting of 1997 which reflected this principle. He also referred to a decision of the

34. *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715.

35. (2001) 2 SCC 62.



European Court of Justice in *Portugal v. F.C. Council*,³⁶ which emphasised the need to promote sustainable development while taking account of the environment. The judge further referred to four recent decisions, one from Brazil, the other from Philippines, another from Columbia and the fourth from Union of South Africa. In *Yanomani Indians v. Brazil*,³⁷ the Inter-American Commission on Human Rights held that the Government of Brazil violated the right to life of Yanomani by not taking measures to prevent environmental damage. In *Minors' Opasa v. Deptt. of Environment and Natural Resources*,³⁸ the Philippine Supreme Court refused to continue deforestation licences because it violated the right to a balanced and healthful ecology for future generations. In *Fundepublico v. Mayor of Bugalagrande*, the Constitution Court of Columbia (17-6-1992) treated the right to healthy environment as part of customary international law. In *Wildlife Society of Southern Africa v. Minister of Environmental Affairs and Tourism of the Republic of South Africa*,³⁹ the right to healthy environment was further recognised. Lee has reported at the end of the last century that since 1990 some 60 nations have specifically recognised in their constitution the right to healthy environment.⁴⁰

The reference to all these international sources clearly indicated the willingness of the Supreme Court to adopt the principle of sustainable development from the international domain as a basic principle of environmental law in India. Rao J categorically stated: 'There is building up, in various countries, a concept that a right to healthy environment and to sustainable development are fundamental human rights implicit in the right to "life".'

The facts of the *Nayudu* case⁴¹ clearly bring out the tensions generated by the principle of sustainable development. The affected industries had spent valuable resources in setting up the plants and their claim was that they should be allowed to function otherwise all the resources would go waste. The state government had recommended their application. Even though the central government refused the permission, the industry went on with the construction of its plants. The court was not swayed by these claims. Instead, it took into account expert reports from three different sources and after considering these reports felt that the court could not rely upon a bare assurance that care will be taken in the storage of hazardous material. The court preferred to proceed on the

36. 3 CMLR 331 (1997).

37. 33 ILM 173 (1994).

38. 7615 OEA/SCRLV/2/66 (1985).

39. (1996) 9 BCLR 1221 (TK).

40. 25 *Col J Env'l L* 283 (2000).

41. *Supra* note 35.



precautionary principle rather than a mere promise of the industries, holding that a chance of accident in such a close proximity of reservoir cannot be ruled out.

The Supreme Court in the *Nayudu* case⁴² weighed the claims of development against the claims of sustainability of the supply of pure water for drinking purposes. It gave precedence to the human need for drinking water over and above the possible economic advantage which could be generated by the industry for the state.

In the next case, the same conflict arose again but with contrary results. In *Goa Foundation v. Diksha Holdings Pvt. Ltd.*,⁴³ another division bench of the Supreme Court again faced a contest in the claims of sustainability and development. Diksha Holdings sought permission to build a hotel in Goa which it claimed would contribute to business of tourism which was the main resource earner for the State of Goa. The Goa Foundation contended that the hotel was located in an area which fell in the Coastal Regulation Zone-1 (CRZ-1) where no building was allowed. It also contended that the construction of the hotel will destroy the ecology of coastal areas. The Supreme Court restated the principle that there should be a proper balance between the protection of environment and the development process. The society shall have to prosper but not at the cost of environment and the environment shall have to be protected but not at the cost of the development of the society. The court held that the land in question on which the hotel was being built was not in the CRZ-1 area. The court even refused to be persuaded by an expert of the National Institute of Oceanography because two of the scientists who had signed the report had earlier signed another report which favoured the builders. Banerjee J laid down the following principle:

While it is true that nature will not tolerate after a certain degree of its destruction and it will have its tone definitely, though, may not be felt in present and the present day society has a responsibility towards posterity so as to allow normal breathing and living in cleaner environment but that does not by itself mean and imply stoppage of all projects.

While the court upheld the claims of the builders, it was more for the reason that the nature of the land in question could not be proved beyond doubt. Faced with uncertainties, the court preferred to favour development even at the cost of some risk to the environment. However, in *Diksha Holdings* as well as in the *Nayudu*, the court never formulated a scheme of balancing. In *Nayudu*, the court preferred to decide on the

42. *Ibid.*

43. (2001) 2 SCC 97 at 108.



basis of precautionary principle but why it did not do so in *Diksha Holdings* can perhaps only be explained by the fact that in *Nayudu*, the right to drinking water was involved which is undoubtedly a pressing human need while in *Diksha Holding*, there was no material to show the value of sand dunes to the environment save in terms of aesthetics which the court was willing to sacrifice to ensure development.

While both the *Nayudu* and *Diksha Holding* cases surely established the presence of sustainable development as a fundamental principle of environmental law, they yield little material guidance to ensure proper balancing. *Nayudu* can be used as a precedent holding for primacy of human needs while *Diksha Holding* is for giving weight to claims of development where the societal interests have no primacy. The two together can mean that where basic human needs are threatened, development takes a second place while if such needs are not threatened, development must be allowed to proceed. These cases also show that objective scientific evidence is of relevance only when it is unblemished. The court is not willing to act as a slave to the opinion of the cognoscenti. The weight to be given to expert evidence is to be determined by the court using the traditional rules of evidence. Where the court is convinced of its veracity, expert opinion becomes indispensable. But where doubts arise about the integrity or quality of the experts, the court will ignore it.

The adoption of sustainable development as the basic principle of environmental law in India received its maximum acceptability in *M.C. Mehta v. Union of India*.⁴⁴ In this case, a three judge bench of the Supreme Court was considering the question of issuing directions to substitute diesel vehicles on the roads of city of Delhi with vehicles driven by compressed natural gas (CNG). The matter had been in the court for as long as 16 years. As early as 23 September 1986, the court had directed the Delhi Administration to file an affidavit specifying the steps to be taken for controlling pollution caused by emission of smoke etc. from vehicles plying in Delhi. A committee called the Bhure Lal Committee was established under section 3 of the EPA, 1986 and its report was accepted by the court on 28 July 1998. A time limit was fixed for switching over diesel vehicles to CNG vehicles. The government had been dragging its feet and sought to dilute the directions of the Bhure Lal Committee by constituting another committee called the Mashelkar Committee which recommended that emission norms must be laid down but the choice of fuels must be left with the user.

The Supreme Court categorically rejected the suggestion of the Mashelkar Committee on the ground that nothing concrete had resulted

44. AIR 2002 SC 1696 at 1698.



from adopting the process of fixing emission norms and directed that a time bound programme of replacing diesel buses with CNG buses be implemented.

The opinion of the court is particularly noticeable for pronouncing the fundamental nature of sustainable development as an underlying principle. The court observed:

One of the principles underlying environmental law is that of sustainable development. This principle requires such development to take place which is ecologically sustainable. The two essential features of sustainable development are - (a) the precautionary principle, and (b) the polluter pays principle.

It is really difficult to find a comparable categorical statement from any other court. The practical result of the hard attitude adopted by the court is that the environment of Delhi city is much more clean and free of smoke now in comparison to what it was few years earlier.

VI Conclusion

To sum up, the courts have not been sufficiently successful in establishing the right to wholesome environment as a fundamental right. Had it been so, the efforts would have been far more impact making. Fundamental rights have a supervening character. Any man can approach the highest court for their enforcement. Writ petitions can lie in every high court. Any act, legislative or executive, which seeks to abridge or take away any fundamental right can be challenged. Greater vigour is, therefore, required to ensure that right to wholesome environment is treated as a fundamental right. One option to establish it firmly as a fundamental right is to try the remedy of constitutional tort. In *D.K. Basu v. State of W.B.*⁴⁵ the Supreme Court has recognized that violation of fundamental right may give rise to a constitutional tort for which compensation may be awarded. This claim for compensation in public law is based on strict liability and is in addition to the claim available in private law for damages. 'This is in addition to the traditional remedies and not in derogation of them'. The court pointed out that this remedy available in public law assures that citizens live under a legal system wherein their rights and interests shall be protected and preserved. The court held:⁴⁶

It is now a well-accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable

45. (1997) 1 SCC 416.

46. *Id.* at 443.



remedy for redressal of the established infringement of the fundamental right to life of a citizen.

The action in public law is maintainable in the highest courts of the land. When this remedy becomes available, one may witness spate of litigation seeking constitutional tort remedies for infraction of fundamental right to wholesome environment. However, that possibility is still in the womb of the future. There are many hurdles on the way. One amongst them is insufficient strengthening of case for treating right to wholesome environment as a fundamental right. The development, therefore, is not yet complete. The future may witness unfolding of mysteries of the new fundamental right. When this happens, we may expect to see interesting developments in the domain of constitutional jurisprudence.

Similarly, the implications of the adoption of international norms of 3rd generation's collective rights for sustainable development are yet to be clearly understood and accepted. These implications, even at international level, are gradually worked out. Moreover, there has yet not been any sustained attempt at reasoned elaboration of implications of such international norms and their interrelation with the statutory rules as they exist in India. We are all too aware of the formal rigidities of the statutory process in India. Thus, when this interrelation is sought to be established, certain amount of tension may be inevitable. It is quite likely that international norms may suggest movement in one direction while the statutory requirement in India may sail us in different direction. India might then find itself in troubled waters when European ships come laden with asbestos residues. Should we be helpless spectators watching them unload hazardous substances on the coast of Gujarat?

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