QUEST FOR ENVIRONMENTAL JUSTICE

It is sad but true that the growth of environmental jurisprudence in India is a very recent phenomenon. And even now this is a movement confined to a few activist judges, lawyers, law academics, and active citizens. Out of the many reasons which might help us understand this tardy growth of judicial oversight of environmental degradation and destruction, a major reason, of course, is that our Constitution is itself environment-blind. The fundamental rights do not explicitly entail even the component rights to, for example, immunity from pollution of air and water, survival of forests and wildlife or any right to habitats. Although Indian traditions heavily emphasised the value and respect for nature, the Constitution, as originally adopted, had no use for it whatsoever. Even the directive principles of state policy were until 1976 devoid of such recognition and concern.

Surely, India did not require a rigorous imposition of emergency for her Constitution to recognise certain environmental concerns. It was only the much maligned forty-second amendment which introduced Article 48-A requiring the state to endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. In addition, the amendment invoked by Article 51-A the fundamental duties of citizens which now include the duty “to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures”.

The introduction of these provisions has undoubtedly given an impetus to environmental litigation in India, setting at naught the easy minded cynicism about the usefulness of constitutional exhortations so fashionable among some progressive people. Had these provisions been present in the Constitution when it was adopted in 1950, undoubtedly, India would have set a very worthwhile model of environmental protection not just for herself but for many decolonized nations of the third world which emulated the Indian constitutional model. But the Constitution of 1950 was obsessed with the dream of development which has turned out for full forty years to be a nightmare for India and Indians.
In the period 1950-80 there was not much concern on the part of the state or society about systematic degradation and destruction of environment which was "safely" undertaken in the search of industrial development and maximisation of the gross national product. The original Constitution sought to achieve this by almost unbridled assurance of right to private property which also now, by the forty-fourth amendment stands denoted to an emasculated constitutional right as Article 300-A.

Judicial activism in the eighties has assisted the struggle against the states' continuing disregard of environmental protection. This has been accomplished primarily by allowing citizens the standing to appear before courts to contest anti-environmental measures in the state. In the Roorkee Municipal Corporation case, Justice Krishna Iyer recognised that the constitution is "a remedial weapon of versatile use" which must be made available to citizens in their struggle to achieve "social justice" which includes environmental justice. This was a significant achievement, more so when we recognise that as late as 1979 the Kerala High Court had implicitly held that the Kerala Sastra Sahitya Parishad had no standing to challenge the Silent Valley project.

The conferment of standing has led to some successful individual interventions. For example, in 1986 Ms. Sarla Tripathi was able to obtain an order for removal of a polluting factory from a residential area in Indore; a resident of Hyderabad was able in 1987 to prevent the destruction of a recreation park for housing complex construction; and an Ahmedabad resident was able to obtain judicial help in 1986 to remedy the hazardous absence of underground drainage. A large number of concerned citizens and lawyers have thus been able, all throughout India, to seek judicial intervention against the environmental wanton policies of the state. Activist organizations have also deployed the new jurisdiction, most notably in the case of Rural Litigation Entitlement Kendra, Dabhado against quarrying operations in Mussoorie. Justice Ranganath Mishra in that case emphatically stated that the "preservation of environment and keeping ecological balance unaffected" is a task which "every citizen must undertake" as a social obligation and as a part of fundamental duty under Article 51-A of the Constitution.

Today, the dockets of every single High Court and of the Supreme Court are replete with petitions seeking environmental protection. This is indeed a happy achievement of an enlightened judicial process, made possible by the liberalisation of the rules regarding standing. Successful litigation has also generated creative extensions of legal principles having far-reaching importance. For example, Shri Ram Fertilizer's case generated the idea of absolute liability of the manufacturer of inherently dangerous or ultra-hazardous processes of product. And similarly, in the Bhopal litigation both the District Judge Deo and Justice Seth of Madhya Pradesh High Court have ruled that there exists absolute liability (permitting no defence whatsoever) for those who produce hazardous substances. The principle "polluters must pay" is now on its way to becoming the motto of the new environmental jurisprudence in India, in keeping with similar trends in most industrialized societies.

Standing does not always mean justiciability. Thus, the Kerala High Court in the Silent Valley case declared itself unable to substitute its own judgment for that of the Government on the cost-benefit aspects of the project. The anti-dam petitions have also shown that while courts are even willing to go as far as to interpret Article 21 right to life to include a right to environmentally meaningful life, they are reluctant to issue orders even stay orders to prevent the development projects. The most conspicuous example of this tendency is offered by the Tehri Dam petitions, now almost 3 years old, before the Supreme Court. The world's largest rock-filled dam located in a fault area in the Tehri region has been considered unsafe in major respects by Indians and world's leading seismologists; the petition (the formulation of which I had the privilege of initiating) also raises hard legal questions. Surprisingly, the Court has recently dismissed it without fully listening to arguments on merits. This is a setback to environmental jurisprudence. What is striking is the fact that a two-judge Bench, headed by Justice Kuldip Singh, did not even think it fit to refer the matter to a Constitution Bench, despite the magnitude of Article 14 and 21 rights issues so artfully raised by the petitions.

Undoubtedly, Justices everywhere seem to have great difficulties in addressing themselves to the task of adjudicating complex technical issues presented to them by such litigations. Expert opinions vary. The cost benefit analysis diverge. And even eminent lawyers are not able to resolve difficulties of cogent articulation. And yet when issues of human rights are frontally posed it remains the duty of Court to face them and resolve them. It is well to remember that in modern society, complex questions of science and technology increasingly come before the Court; for example, every major patent litigation involves difficult questions of originality of the invention in fields as diverse as engineering, metallurgy, chemistry and genetic engineering, manifesting the same order of difficulties. And yet the Courts have accustomed themselves to be handling all these issues. There is no reason why in
environmental cases, the courts may plead a special inability; indent, courts elsewhere have handled (as in the United States or France) very tricky issues concerned the safety of privately owned nuclear plants or of other equally hazardous industries. In India, too, in the case of the import of contaminated, post-Chernobyl, butter Supreme Court had to apply its mind to a whole range of expert technological data. And the review petitions on the Bhopal settlement (which will now to be re-heard all over again) will require judicial investigation of the short and long term impact of the MIC, on the toxicity and epidemiology of which both sides have marshalled available scientific literature.

I had suggested to the Chief Justice of India in 1986 the need to establish a special cell on Science and Technology in the Supreme Court itself, where brained scientists would be available to the Court as research experts who would be in a position to communicate the details of scientific evidence in languages that the judges can understand and use for resolution of the disputes. I had also suggested a refresher course for at least the appellate judges on problems of science and technology which frequently appear on the judicial agenda. Unfortunately, these two programmes have still to receive the attention so eminently merit.

If the court craft is not thus modernised, all post-Bhopal legislative initiative will ultimately flounder on traditional ways of adjudication which had no potential to deal with environmental problems. Judicial capabilities to creatively assist the implementation of the Environment protection Act 1986 will not be realised without proper scientific inputs to the Courts. Nor will the proposed environmental courts mooted by Justice Bhagwati realise their potential if the appellate judicial capabilities to deal with issues and appeals are not enhanced.

In addition, there is, of course, the problem of effective enforcement. For example, the elaborate directions given by Justice Venkataramiah in the Ganges Tanneries case, have not so far been implemented. An important question bedevils the effectiveness of judicial orders pertaining to closure of industries which are the worst polluters. Courts are here confronted with the prospects of depriving workers of job opportunities and exposing them and the community to grave hazards if such industrial operations were allowed to continue. Courts can direct the government concerned to exercise its power of closure under the new environmental legislation and in ordering this they may also provide for appropriate work opportunities to the labour thus displaced. But private industries and state bureaucracy have to cooperate with the judicial process. Of this there is very little sign. This makes the emerging environmental jurisprudence at worst rhetorical and at best symbolic. All of us will need to consider ways and means to strengthen judicial power and process. This is a major challenge to environmental jurisprudence as it completes its inaugural first, and chequered decade.

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