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ENVIRONMENTAL RIGHTS AS HUMAN RIGHTS: RETHINKING THE CONTOURS OF ENVIRONMENTAL LAW IN INDIA

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INTRODUCTION[1]

The water we drink, the cost of the air we breathe, the way roads in our cities cut across the landscape, what our windows reveal and hide: in many ways, our lives today are defined by the devastating effect that our actions have on our immediate natural environments. Many of these impacts have already been rendered irreversible, and it strikes as an understatement to say that this violence ought to be remedied with greater force and greater attention. Then the questions of how exactly we might define environmental rights, whether they should be considered human rights, how we might make this association, and the scope and limitations of such interpretations, are all important questions. This paper aims to critically analyse the procedural and substantive dimensions of the different redressal forums for environmental issues in India. The procedural dimension will analyse the inadequacies and inconsistency in the implementation, application and making of the law and judicial decisions. The substantive dimension will be examined by looking at the discourse surrounding the understanding of environmental rights as human rights. This will be achieved by discussing case law and jurisprudential perspectives.

THE FRAMEWORK: PIVOTS AND MAPS

Alan Boyle writes that "Environmental rights do not fit neatly into any single category or 'generation' of human rights."[2] In such a context, there seem to be three main perspectives to consider. First, the most familiar nd essentially anthropocentric: *individuals* may access environmental information, judicial remedies, and make claims against the State under already existing and enshrined civil and political rights.[3] According to the expansion theory, human rights are examined through the lens of an environmental exegesis.[4] Consequently, existing human rights such as the right to life, health and privacy[5] are given an environmental interpretation which amounts to a 'greening' of human rights.[6] The right to life is accorded with paramount importance and the *jus cogens* nature of the right makes it well established in many of the international and regional instruments.[7] Second: to envision environmental quality – decent, healthy, viable – as an economic or

[1] We would like to thank Kavya Palavalasa, a 5th year law student at O.P Jindal Global University, for her valuable contributions and suggestions.

[2] Alan Boyle, 'Environment and Human Rights' (April 2009) MPEPIL 1948 <http://opil.ouplaw.com> accessed 11 December 2020

[3] ibid.

[4] Linda H. Leib, 'Theorisation of the Various Human Rights Approaches to Environmental Issues', *Human Rights and the Environment* (Brill 2011) 71.

http://www.jstor.org/stable/10.1163/j.ctt1w8h1t2.7 (accessed 6 December 2020).

[5] Universal Declaration of Human Rights (United Nations [UN]) UN Doc A/RES/217(III) A, UN Doc A/810, 71, GAOR 3rd Session Part I, 71, Art.3

[6] Alan Boyle, 'HUMAN RIGHTS OR ENVIRONMENTAL RIGHTS? A REASSESSMENT.' (2007) 18 FELR 471, 472. http://www.jstor.org/stable/44175132 (accessed December 7, 2020).

[7] Leib (n 5) 72.

social right[8], and compelling States to 'ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'.[9] This might include notions such as *sustainable development*. Third: to give groups, instead of individuals, the right to determine the way their natural resources are used. A key development towards the linkage of environmental rights and human rights, was the Hague Declaration of 1989.[10] The Declaration linked the fundamental right to life, to a healthy environment.[11]

As we shift our focus to India, we must immediately note that in *Kesavananda Bharthi v State of Kerala*, Chief Justice Sikri observed that as per Article 51 of the Constitution, Courts must "interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India."[12] Article 48A reads: "The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country,"[13] and Article 51A (g) states that it is the duty of every citizen "to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures."[14] The legislative framework includes, amongst other, *The Water Act (1974), The Air Act, (1981), The Wildlife (Protection) Act (1972), The Forest (Conservation) Act (1980),* and *The Environment (Protection) Act (1986).* On defects in implementation, there are two available redressal and remedy mechanisms: one may either approach the Supreme Court as a '*litigant'* by filing a Public Interest Litigation (PIL) or might approach the National Green Tribunal as an '*aggrieved party*'.[15]

IN PRACTICE: ENVIRONMENTAL RIGHTS AS HUMAN RIGHTS

The Indian Supreme Court is an activist courts, and in what was an attempt to recast itself afte the tragedy that was *ADM Jabalpur*, hey introduced PIL initiatives to give citizens direct access to the Supreme Court. It is through the application of such a mechanism, and such a relaxation of *locus standi* allowing for the assertion of diffused and meta-individual rights,[16] that we see a shift in the way Articles 21, the right to life, has been interpreted.

Essentially, the courts have provided for an expansive reading of the right to life, that the right to a clean environment is implicit in Article 21 – it is a fundamental human right in accordance with international and statutory obligations.[17] This was the biggest expansion to right to life. In *Indian*

[8] International Covenant on Economic, Social and Cultural Rights (1966)

[9] Committee on Economic, Social and Cultural Rights General Comment No.3 - The Nature of States Parties' Obligations (Art. 2, para. 1) [UN Doc E/1991/23, 83, UN Doc E/C.12/1990/8, 83, [1991] ESCOR Supp 3, 83, UN Doc HRI/GEN/1/Rev.3, 61], para.10

[10] Hague Declaration on the Environment 1989

[11] Leib (n 5) 73

[12] *Kesavananda Bharthi v State of Kerala* (1973) 4 SCC 225, 333

[13] The Constitution of India 1950, art 48A.

[14] The Constitution of India 1950, art 51A (g).

[15] Gill GN, "Access to Environmental Justice in India: Innovation and Change" in Jerzy Jendroska and Magdalena Bar (eds), *Procedural Environmental Rights: Principle X in Theory and Practice*, vol 4 (Intersentia 2018)

[16] Geetanjoy Sahu, 'Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence.' (2008) 4 LEAD 1.

[17] Anup Surendranath, 'Life and Personal Liberty' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016)

Council for Enviro-Legal Action v Union of India [18], a case where a grassroots organisation file a PIL against industrial pollution and its effect upon peasant farmers and the local community, it was held that it is a *violation of the right to life* of person when the state fails to regulate pollution of soil and underground water. Justice Singh in *Subhash Kumar v. State of Bihar* held that the right to live, under Article 21, includes a right to pollution-free water and air for the maximum satisfaction of life.[19] He further stated that anything in derogation to the laws which endangers this right of a citizen; the citizen would have a right to recourse under Article 32 of the Constitution.[20] Further, Justice Pasayat, upon an interpretation of Article 21, stated that enjoyment of life and its attainment, along with the human right to dignity, posits within its gamut, "the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed."[21] The general form of Article 21 largely connotes a negative obligation. A comprehensive environmental framework would necessarily have to entail a combination of both, negative and positive obligations. To achieve this balancing act of obligations, a right to a healthy environment is enforced through a collective understanding of Article 21 with 48A and 51A.[22] Although the Directive Principles of State Policy are not enforceable by themselves, according to Article 37, these are "nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."[23]

The much needed impetus towards the recognition and importance of environmental rights, came about after the Bhopal Gas Tragedy in 1985.[24] Pursuant to this event and also keeping in line with its obligations under the Stockholm Declaration, the government enacted the Environmental (Protection) Act of 1986.[25] It was a legislation that was envisaged to harmonize and balance the concepts of development and environment.[26] In this regard, the case of *Vellore Citizens' Welfare Forum v. Union of India* is of notable importance. In this case, Justice Kuldip Singh rejected the traditional model in which development and ecology are opposing each other.[27] He emphasised on the concept of 'Sustainable Development' – towards achieving a balance of development and ecology and considered it a part of "customary international law".[28] Laying down the 'Precautionary Principle' along with the 'Polluter Pays Principle', are only attempts at reinforcing the Sustainable Development model.[29] Further, in *MC Mehta*

[18] *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212

[19] *Subhash Kumar v. State of Bihar*, AIR 1991 SC 420(1991), para 7

[20] ibid.

[21] *T.N. Godavarman Thirumalpad v. Union of India and Others*, 10 SCC 606(2002), para 17

[22] Leib (n 5) 74

[23] The Constitution of India 1950, art 37.

[24] Sanjeev Saraf and Mukund Karanjikar, 'Literary and Economic Impact of The Bhopal Gas Tragedy' (2005) 18 Journal of Loss Prevention in the Process Industries 274, 274 https://www.sciencedirect.com/science/article/abs/pii/S0950423005000811 (accessed 7 December 2020).

[25] T.N Subramanian and R. Vakil, 'The Mechanisms of the National Green Tribunal' (2018) 30 NLS Ind Rev 74, 75-76. https://www.jstor.org/stable/26743934 (accessed 8 December 2020).

[26] ibid 76.

[27] *Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 SCC 647, para 10

[28] ibid

[29] *Vellore* (n 18) para 11

v Kamal Nath[30], the Court expanded the principle of sustainable development to include the 'public trust doctrine' according to which the "public has a right to expect that certain lands and natural areas will retain their natural characteristics".[31]

A substantial problem that the courts faced while dealing with such issues was that of excess litigation, with Fridays being specifically reserved for environment related matters.[32] The Supreme Court, time and again, stressed on the need for a permanent Tribunal to deal with questions relating to the environment.[33] This ultimately led to the enactment of the National Green Tribunal Act, 2010, which gave for the establishment of Tribunals (NGT) solely for dealing with vital questions relating to the environment.[34] The NGT has a particularly participatory mechanism which, again, has liberally defined 'aggrieved person' as "any person whether he is a resident of that particular area or not, whether aggrieved or not".[35] This low cost, extremely accessible system, in allowing for grievances and community experiences even in vernacular languages, is then quite radical in its reach.

IMPERFECTIONS, LIMITATIONS AND VIOLENCE

One might then conclude that: yes, environmental rights might be considered human rights. In form, applicability and accessibility. Or one might rephrase and conclude that: what is guaranteed is an *individual* right *to* a safe environment. It is such a rephrasing that discloses the imperfections, limitations, and the violence that the law as it exists today embodies.

In the case of *Kyrtatos v Greece* involving the illegal draining of wetlands, the European Court of Human Rights held that "[n]either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such"[36] A similar approach is taken by the Inter-American Commission on Human Rights in *Metropolitan Nature Reserve v Panama* when they dismiss a claim to protect from the competing objective of 'development'.[37] Does this mean that a claim would not stand in international courts if the individual is not sufficiently affected by environmental loss? It would seem so.

In India however, while claims might make it to court given the diffused and meta-individual rights to access, dilutions take the form of terrible uncertainties. Firstly, this expansion of Article 21 does not see any recognition in statutory provisions or in environmental policy programmes.[38] The remedial and payment measures allocated in *Enviro-Legal* case have still not been complied with.[39] Geetanjoy Sahu writes that the courts are inconsistent in entertaining and

[30] *MC Mehta v Union of India* (1987) 1 SCC 395.
[31] Bharat H. Desai, Balraj K. Sidhu, Part I, Country Studies, India in Jorge E. Viñuales, Emma Lees (eds), *The Oxford Handbook of Comparative Environmental Law* (OUP 2019)
[32] Subramanian and Vakil (n 15) 76
[33] *M.C Mehta v. Union of India*, (1986) 2 SCC 176, para 21.; *A.P. Pollution Control Board v. M.V. Nayudu*, (1999) 2 SCC 718, para 57.
[34] Subramanian and Vakil (n 15) 77
[35] *Jan Chetna v MoEF*, Judgement 9 February 2012, paras 21 and 22
[36] Boyle (n 3)
[37] *Metropolitan Nature Reserve v Panama*, Inadmissibility, Case No 11.533, Report No 88/03, OEA/Ser.L/V/II.118 Doc.70 rev.2, 524, 22nd October 2003, Inter-American Commission on Human Rights [IACommHR]
[38] Sahu (n 17) 7
[39] ibid 11

rejecting PILs. While these inconsistencies do not emerge in cases such as *Vedanta*, they do when it is faced with the question of development. In cases like that of *Narmada Bachao Andolan v Union of India*,[40] it is clear that as soon as the case enters the gates the ecological stakes are already diminished by the development rhetoric that has gripped the imagination of the courts. Here, the courts did not even allow the *NBA* to make any submissions on the pros and cons of large dams. In such cases, the courts suddenly remember the ideals of separation of power, restrict themselves almost immediately to matters of rehabilitation, and utterly forget about comprehensive and scientific Environmental Impact Assessments that are mandated by the governments very own rules and notifications. Human rights? International obligations? It is an incomplete and incoherent system. As the "Courts create the logic of the dam, scrutinise its categories.", and the "Contractors then create(d) it in concrete",[41] generations of identity, ecology, land, memory and ancestry were lost in the "amoeboid" and illusory understandings of sustainable development.

The NGT system too is opaque, with no uniformity, efficiency, sufficient expertise or independence. There is also no real finality to its decisions. Also, can we expect such post-retirement holiday institutions to deliver justice? Enforce human rights? Enforce environmental right? Despite the Intelligence Bureau reporting AK Goel – a former secretary of the lawyer's wing of the RSS – as a "corrupt person", the findings were dismissed by the BJP government, and he was appointed[42]. He headed a Supreme Court bench that diluted the SC/ST Act. Ultimately, the Modi government appointed AK Goel as the head of the NGT – a position that he still holds.

FROM A RIGHT *TO* ENVIRONMENT TO RIGHT *OF* ENVIRONMENT

There are largely two schools of thought against the understanding of a *right to a safe environment*, or any other reading of environmental rights into human rights law.

The first school of thought works within the legal framework and uses the language of rights in their own unique way to establish environmental rights as a discourse distinct from human rights. It believes that strictly following an environmental rights discourse is the correct way of dealing with environmental issues. Environmental rights in this context should not be confused with the general interpretation of the expression as an extension of human rights in line with substantive environmental norms.[43] This is a more radical approach that attempts to break away from the naturally anthropocentric framework of human rights law and directly uses it to address a multitude of issues like "biotic rights, rights of species and animal rights."[44] It seeks to award *enforceable rights* to the environment, and effectively treat the environment as a *subject* instead of an *object*. So, the right is not a right of a human, but a "*right of the environment.*"[45] This

[40] *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664.

[41] Shiv Visvanathan, 'Supreme Court Constructs a Dam' (2000) EPW

[42] Atul Dev, *In Sua Casa: What the judiciary has done to itself* (The Caravan 2018)

[43] Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 Stan J Int'l L 103, 117

[44] James W Nickel, 'The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification' (1993) 18 Yale J Int'l L 281. 282

[45] Shelton (n 45) 117.

understanding of environmental rights is not something that should be disregarded as prima facie bizarre, as it falls in line with literature and scientific discovery like the Gaia Hypothesis. The Gaia Hypothesis by James Lovelock establishes and proves the Earth to be a self-perpetuating complex system that can continue to function in the absence of human beings.[46] This implies that the centrality that has always been attached to human beings can be dismissed as it has been proven that the Earth can survive without humans. As a result, there would be a shift in the understanding of *who is a subject*. An example of this discourse would be to constitutionalize the environment as a subject and make the fundamental rights in our Constitution enforceable by the environment.[47] This would allow us to use the legal framework in a more expansive manner and go beyond the usual surface level environmental degradation and solve the deeper ecological issues.

The arguments against this school of thought are that it tends to be "excessively metaphorical and rhetorical."[48] And, it denies the possibility of using an already established and recognized human rights framework to push for environment justice. By denying this possibility, it is denying serious human conditions like higher rates of miscarriage, birth defects, allergies, respiratory problems, skin diseases and cancer, which are a consequence of the degradation of the environment.[49]

CONSCIOUSNESS OVER COERCION

The second school of thought disagrees with the use of language of rights while dealing with environmental issues. They believe that "rights should not be the dominant normative concept of environmentalism."[50] They argue that the correct approach is to develop an *ecological or environmental consciousness*, instead of perpetuating the status quo which is premised on violence against the environment, under the garb of environmental rights or environmental justice.[51] They believe that this is a more comprehensive strategy to deal with issues such as biodiversity, conservation, and sustainabil ty since it corrects the root of the issue, which is the mindset and behaviour of the people.

The arguments against this school of thought are simply that it underestimates the extent to which we depend on hazardous industrial and technological processes, and it fails to recognize the necessity of many countries to continue these practices because of various reasons like conventional ideas of development and financial investment that has already gone into these practises.[52] Hence, for imposing any positive duty on individuals to correct the structural and ingrained behaviour towards the environment, an obligatory authority and a "valuable normative asset"[53] like the legal framework and the usage of rights can be extremely useful.

CONCLUSION

[46] James Lovelock, *The Revenge of Gaia: Why the Earth is Fighting Back and How We Can Still Save Humanity* (Penguin UK 2007)

[47] Here we have referred to an idea previously worked by our friend Vishal Vinod.

[48] Nickel (n 46) 282.

[49] Nickel (n 46) 289.

[50] Nickel (n 46) 282.

[51] Cynthia Giagnocavo and Howard Goldstein, 'Law Reform or World Re-form: The Problem of Environmental Rights' (1990) 35 MCGiLL L.J. 345, 373-74

[52] Nickel (n 46) 291.

[53] Nickel (n 46) 283.

To allow the human rights framework to subsume the environmental discourse would mean to dismiss the multiple dynamics of the environmental discourse and reduce it to only the intersection between both. And, to dismiss any intersection between both, would mean dismissing the severe human consequences of environmental degradation, the recognition of the human rights framework and denying the fact that part of respecting biodiversity, is also accepting that humans are also a part of the same ecology and biodiversity. In this paper, our proposition is to have a more harmonious reading and understanding of these approaches. We should elevate the importance and recognition given to the environmental rights discourse and aim to place it at the same level as the human rights discourse. We should also allow for a few intersections of both discourses like the *right to a safe environment*, as the realities of the times reflect these intersections.

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