

D.P. Shrivastava Memorial Lecture -

‘The role of the judiciary in environmental protection’

by Hon’ble Mr. K.G. Balakrishnan, Chief Justice of India

Venue: High Court of Chattisgarh, Bilaspur – March 20, 2010

Esteemed colleagues,
Members of the bar,
and Ladies and Gentlemen,

I am grateful for the opportunity to deliver this lecture in the memory of Shri D.P. Srivastava. I would like to use this occasion to broadly highlight the role of the judiciary in protecting the environment.

There is of course a need for a comprehensive analysis of how law operates as an instrument of environmental protection. In recent years, there has been a sustained focus on the role played by the higher judiciary in devising and monitoring the implementation of measures for pollution control, conservation of forests and wildlife protection. Many of these judicial interventions have been triggered by the persistent incoherence in policy-making as well as the lack of capacity-building amongst the executive agencies. Devices such as Public Interest Litigation (PIL) have been prominently relied upon to tackle environmental problems, and this approach has its supporters as well as critics.

In our country, there are several vocal NGO's and public-spirited individuals who have moved the courts to seek relief against numerous problems such as those created by unchecked vehicular and industrial pollution,¹ negligence in management of solid waste,² construction of large projects and increasing deforestation³. In order to address these problems, there is a need to draw a balance between environmental concerns and competing developmental needs such as those of generating employment and wealth.

All of you are well aware of how the device of Public Interest Litigation (PIL) was devised by our Supreme Court. In order to improve access to justice for poor and disadvantaged sections, the traditional rules of 'locus standi' were diluted and a practice was initiated whereby public-spirited individuals could approach the court on behalf of such sections. Even though there has been considerable debate about the use and misuse of Public Interest Litigation, I must highlight the procedural flexibility and innovative remedies that have come to be associated with this form of litigation.

¹ See: *M.C. Mehta v. Union of India* (1998) 8 SCC 206; *M.C. Mehta v. Union of India* (1999) 6 SCC 12 – orders were given for the phasing out of old vehicles, permitting only those vehicles which conformed to Euro II norms at the time.

² *Almitra Patel v. Union of India*, W.P. No. 88 of 1996 (Continuing mandamus)

³ *T.N. Godavarman Thirumulkpad v. Union of India*, W.P. No. 202 of 1995 (Continuing mandamus)

Instead of an adversarial setting where the judge relies on the counsels to produce evidence and argue their cases, the PIL cases are characterised by a collaborative problem-solving approach. Acting either at the instance of petitioners or on their own, the Supreme Court has invoked Article 32 of the Constitution to grant interim remedies such as stay orders and injunctions to restrain harmful activities in many cases. Reliance has also been placed on the power to do complete justice under Article 142 to issue detailed guidelines to executive agencies and private parties for ensuring the implementation of the various environmental statutes⁴ and judicial directions. Beginning with the *Ratlam Municipality case (1980)*⁵ where the Supreme Court directed a local body to make proper drainage provisions there have been numerous cases where such positive directions have been given.⁶

The tool of a 'continuing mandamus' has been used to monitor the implementation of orders by seeking frequent reports from governmental agencies on the progress made in the same. The adjudication and monitoring of environmental

⁴ The principal environmental statutes are: The Wildlife Protection Act, 1972; The Forest Conservation Act, 1980; The Environmental Protection Act, 1986; Water (Prevention and Control of Pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981

⁵ *Municipal Council Ratlam v. Vardichan*, (1980) 4 SCC 162

⁶ See generally: Harish Salve, 'Justice between generations: Environment and Social Justice', Chapter 18 in B.N. Kirpal et. al.(eds.), *Supreme but not infallible- Essays in Honour of the Supreme Court of India* (New Delhi: Oxford University Press, 2002) at pp. 360-380

cases has also benefited from the inputs of fact-finding commissions and expert committees which are constituted to examine a particular environmental problem. In several cases, the Court also relies on the services of the leading members of the bar who render assistance in their capacity as ‘amicus curiae’. The involvement of expert committees and amicus curiae is needed to gain an accurate understanding of an environmental problem and to explore feasible solutions. For instance, court-appointed committees have conducted substantial empirical research and provided valuable insights in cases that have dealt with vehicular pollution, solid waste management and forest conservation.

If one examines the judicial approach in cases involving environment-related objections against the construction of infrastructural projects, there have of course been different approaches taken by different courts in the past. One can broadly conceptualise these judicial approaches under three categories. The first of these can be described as a ‘pro-project’ approach wherein judges tend to emphasize the potential benefits of a particular project or commercial activity. The second approach can be described as that of ‘judicial restraint’ wherein judges defer to the determinations made by executive agencies and experts with regard to the environmental feasibility of a project. The third approach is that of rigorous ‘judicial review’ wherein judges tend to scrutinize the

environmental impact of particular activities. It is in this form of judicial interventions that the services rendered by expert committees, amicus curiae and public-spirited NGOs prove to be a valuable asset. The different judicial approaches that have been outlined above have of course evolved over the last three decades or so and it would be instructive to refer to some examples.

An example of 'judicial restraint' would be the Kerala High Court judgment in the *Silent Valley case (1980)*⁷ where the Court refused to second-guess the State government's position relating to the environmental impact of a hydel-power project. The judgment mentions that the project was unanimously supported by the legislature of Kerala and it would be improper for the judiciary to interfere. However, this led to an agitation and subsequently there was a re-think on the viability of the project.

A relatively robust standard of 'judicial review' is discernible from the litigation related to the *Tehri Dam (1992)*⁸ and the

⁷ *Society for Protection of Silent Valley v. Union of India and others*, 1980 Kerala HC; Excerpts of judgment by V.P. Gopalan Nambiar, J. have been cited in Shyam Divan and Armin Rosencranz, *Environmental law and policy in India - Cases, materials and statutes*, 2nd edn. (New Delhi: Oxford University Press, 2001) at pp. 428-430

⁸ See: *Tehri Bandh Virodhi Sangharsh Samiti v. State of Uttar Pradesh*, (1992) Supp 1 SCR 44.

*Dahanu thermal power plant (1991)*⁹, both of which had reached the Supreme Court. Even though the eventual decisions were in favour of the project proponents, the Court did inquire into diligence of the government in ascertaining the environmental impact of the proposed projects. Even though it is argued in some quarters that the Courts lack the technical expertise needed to gauge the relevant reports and data, I must say that judges are well-equipped to assess whether the concerned agencies have taken all necessary steps to study and ascertain the potential environmental costs. An example of the Supreme Court adopting a rigorous standard of judicial review is in the *Calcutta Taj Hotel Case (1987)*¹⁰ where the Court inquired extensively into the government permission granted for the construction of a medium-rise hotel against objections that the building would interfere with the flight path of migratory birds.

In the ensuing years, there appears to be a growing consensus amongst the media and in academic circles that the general approach of the higher judiciary in environmental litigation can be described as ‘activist’ in nature. A prominent example of such activism in evaluating the environmental impact of commercial activities justified in the name of development is

⁹ Refer: *Dahanu Taluka Environment Protection Group v. Bombay Suburban Electricity Supply Company*, (1991) 2 SCC 539

¹⁰ AIR 1987 SC 1109; See DIVAN & ROSENCRANZ (2001) at p. 430

the decision given in the *Dehradun Valley case (1985)*.¹¹ In that case, the court itself appointed a committee to look into the adverse effects of the illegal and indiscriminate mining activities being carried out in the Uttarakhand region. The respondent government was also asked to show the national importance of the lime-stone procured from those quarries so as to determine whether the demand could be satisfied by mining in other areas. A similar approach was adopted in *Tarun Bharat Sangh, Alwar v. Union of India (1992)*¹² where the court adopted a firm stand against the owners of mines that were being operated inside the reserve forest areas. In both the cases mentioned above, the court appointed independent committees of experts to ascertain the environmental impact of the commercial activities that were being undertaken.

Coming to issues relating to pollution control, I must reiterate that the aftermath of the Bhopal Gas Leak tragedy was perhaps the most important trigger for the evolution of environmental jurisprudence in India. Noted academic Upendra Baxi has observed that the Bhopal Gas Leak involved two disasters, one being the huge loss of life and secondly the absence of a clear legal framework to bring relief to those affected by the same. It was in this setting, that the Supreme

¹¹ *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh and others*, AIR 1985 SC 652.

¹² AIR 1992 SC 514

Court evolved the doctrine of ‘absolute liability’¹³ which marked a clear departure from the reliance on traditional tort law concepts such as ‘public nuisance’ and ‘strict liability’ (rule developed in *Rylands v. Fletcher*). It was ruled that the occupiers of premises where hazardous activities were undertaken, would be liable to third parties for damage caused as a result of such activities, irrespective of any fault being shown on their part. The articulation of the ‘absolute liability’ doctrine was soon followed by the recognition of the ‘polluter-pays principle’ which had gained importance at international discussions.

This development proved to be a precursor for subsequent decisions which recognised principles such as ‘sustainable development’ and ‘inter-generational equity’. In comparison to other jurisdictions, the relatively early absorption of these ideas has shaped the pro-active stand of our judiciary with respect to environmental problems. The right to life and liberty under Article 21 was creatively interpreted to include a ‘right to clean air and water’ as well as the ‘right to a clean environment’. Some of the most-cited cases from this phase are those which resulted in the relocation of hazardous industries from the National Capital

¹³ The concept of ‘absolute liability’ was articulated in the *Oleum Gas Leak Case*, reported as *M.C. Mehta v. Union of India*, (1987) 1 SCC 395

Territory (NCT) and the closure of foundries in the proximity of the Taj Mahal in Agra.

Most of you would be familiar with the developments that followed the Supreme Court's order in 1998 which required all buses in Delhi to convert to Compressed Natural Gas (CNG). At the time, there was significant criticism of this order on the ground that it would be too costly for both the Delhi Transport Corporation (DTC) and private-operators to buy CNG vehicles, thereby affecting the large number of people who depend on public transport. As the deadline for implementation drew close in 2002, there was some inconvenience caused to the general public on account of limited CNG supplies – but in the long-run the measure has succeeded in reducing the air-pollution levels. This only goes to show that sometimes judges must make unpopular decisions in order to pursue the long-term objective of protecting the right to a clean environment.¹⁴

However, the judicial approach needs to be a little more nuanced when it comes to developmental projects that may lead to displacement of tribal communities from their traditional lands. While the media has focused on the controversial Sardar Sarovar Dam Project, we must remember that the judiciary has consistently invoked the 'precautionary

¹⁴ See generally: Armin Rosencranz and Michael Jackson, 'The Delhi Pollution case: The Supreme Court of India and the limits of judicial power', 28 *Columbia Journal of Environmental Law* (2003) at pp. 223-249

principle' in respect of developmental activities that may harm the environment and the local communities. While policy-making in this regard has also evolved with the requirement of Environmental Impact Assessment (EIA) before the commencement of construction activities, judicial oversight is still needed to ensure that the same is conducted in a transparent and consultative manner. It has been clearly laid down that the onus is on the developers to take preventive steps for minimising the environmental damage that may result from the construction of projects and buildings. The impact on the local communities can only be accurately assessed if their concerns are effectively heard through methods such as 'Public hearings'. However, several independent studies have demonstrated the lack of transparency and inclusiveness in such hearings. In some cases, the 'Public hearings' are not adequately notified and even held in remote locations, where the concerned stakeholders do not get a say. This picture is further complicated when business interests lobby with local officials to ensure that genuine concerns are not voiced. In such situations, the courts are again called on to protect the interests of the local communities who are displaced or adversely affected by developmental projects. In the past, judicial directions for the payment of compensation and rehabilitation have often been the right antidote for governmental apathy.

There have also been some theoretical criticisms of the growing environmental jurisprudence in our country. Many commentators have argued that frequent judicial interventions in this area have reduced the incentive for executive agencies to improve their functioning. It has also been urged that there seems to be a certain clique of individuals who have come to specialise in filing frivolous PILs. It is further alleged that the decisions given in these cases depend too much on the personal sensibilities of the judges who hear them and hence result in a lack of consistency in the long-run. Furthermore, the frequent reliance on writ jurisdiction reduces the importance of ordinary remedies such as those of filing 'representative suits' (under the Code of Civil Procedure) and claiming damages for torts such as 'public nuisance'.¹⁵

While all of these criticisms merit a meaningful debate, my short response for now is based on a simple understanding of the judicial role. We must realise that the traditional notion of legal rights in the common-law tradition was mostly oriented around the idea of private property. This is so because individuals are especially vigilant about protecting their property rights and litigation is an effective means of securing them. However, this rationale cannot be applied in

¹⁵ See: Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring issues of access, participation, equity, effectiveness and sustainability', 19 *Journal of Environmental Law* (2007) at pp. 293-321

the context of environmental protection – since the ‘right to a clean environment’ is a public good. Since individuals are less inclined to mobilize themselves to protect such public goods, the onus is placed on the government and the legal system to do the same. This philosophy of ‘public trust’ finds place in our constitutional commitments and our judiciary is committed to upholding the same. This is precisely why judges are frequently called on to weigh individual interests on the scales of social justice. The conservation of forests and wildlife, as well as the reduction of pollution-levels are vital components of such considerations of social justice. It is on account of these considerations that the higher judiciary must continue to play a vigorous role in the domain of environmental protection. There is of course a lot of room for debate on each of the issues that I have touched on today. With these words, I would like to thank all of you for being a patient audience.

Thank You!
