

Judicial Attitude in Promoting Environment and Sustainable Development in South Asian Countries

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Abstract

The Judiciary in South Asian Countries has been played a pivotal role in the environmental protection and has applied the principles of sustainable development while deciding the cases. It will be necessary to study a few important cases in these Countries specially Nepal, India, Bangladesh, Pakistan and Shri-Lanka. It is also worthwhile to mention here that most of the environmental cases have come before the courts through "Public Interest Litigations" (PIL).

KEYWORDS: Environment, Judiciary, Sustainable

Introduction

In South Asian Countries like other Countries of the world, there have been environmental degradation due to over exploitation of resources, depletion of traditional resources, industrialization, urbanization and population explosion; However, South Asian Countries have never been oblivious of this fact. In fact, South Asian Countries have always been in the fore-front of taking all possible steps for the protection and improvement of the environment and aiming at sustainable development South Asian Countries have enacted various laws at almost regular intervals to deal with the problems of environmental degradation. At the same time the judiciary in South Asian Countries have played a pivotal role in interpreting the laws in such a manner which not only helped in protecting environment but also in promoting sustainable development. In fact, the judiciary in Counties of South Asia has created a new "environmental jurisprudence".¹ The Judiciary in Countries of South Asia has played a very important role in the environmental protection and has applied the principles of sustainable development while deciding the cases. There are number of cases on this point and, therefore, it will be necessary to study a few important cases in these Countries specially Nepal, India, Bangladesh, Pakistan and Shri-Lanka. It is also worthwhile to mention here that most of the environmental cases have come before the courts through "Public Interest Litigations" (PIL).

Nepal

In "*Surya Prasad Dhungel vs. Godawari Marble Industries*"² a full bench of the Supreme Court, however, accepted the *locus standi* to file a case under Article 26(4) of the Constitution of the Kingdom of Nepal 1990, or in case whether the matter of public

¹ See, Paramjit, S. Jaswal, Directive Principles Jurisprudence and Socio-Economic Justice in India, p. 543 (1996).

² NKP Golden Jubilee Special Issue, p, 169 (1995).

concern or interest in involved. In this landmark case, the court for the first time recognized the right to clean environment as a "right to life" and accepted environmental degradation as public problem and matter of public interest. The court also emphasized that it is necessary to enact the comprehensive Environment Protection Act and to implement it effectively.

In another PIL case concerning protection of environment and sustainable development Medial College Case³the Supreme Court sublimed the environmental jurisprudence and upheld its activist role defending the significance of Directive Principle enshrined in part III, Article 24 of the Constitution, 1990. It held that in spite of non-enforceability of the Directive Principles and State Policies enshrined in the constitution, the court can allude to any decision of the government made dis-respecting the directive principle and the policies.

In this case, the writ petitioners prayed for the annulment of the act of the government to provide about 42 bighas of land to the International Society for Medical Education to build a College of Medical Science in Devghat Area of Chitwan District. They argued that the land, provided to the Medical College, under a 49-year lease agreement, is culturally very rich and clearing of forests for the construction of the college could lead to deforestation and he dolphins in the Narayani river could become extinct by the clearing of forests.

The Supreme Court held that the petitioners had *locus standi* to file writ petition on the ground of public concern/interest and that the government appeared to have violated the provisions of the Forest Act which stipulate that the government may, for the purpose of launching any national priority project and in cases where there is no alternative, grant permission to utilize any forest on conditions that the project should not produce "significant effect" on the environment. However, in the instant case, there were other options left to the government. The court finally quashed the government 15 decision leasing land of Devghat which is surrounded by forests involving national religious and archaeological importance.⁴

In *Shree Distillery Case*,⁵ The Supreme Court not only widened the scope of the role of the court in protection of environment but also made responsible the local authority to protect environment.

The petition sought an order to stop discharging of pollutants in the Arun River and air as well as installation of treatment plant by the Shree Distillery Industry. The court pronounced that having license for operation of an industry does not alleviate the industry from its duty towards protection of environment and sustainable development. An industry cannot be permitted for its operation at the cost endangering environment. Industry must adopt the measures by which environment can be preserved and protected. Every industry has an obligation of sustainable development.

³ Yogi Narhari Nath and Others v. RT. Hon. Prime Minister Girija Prasad Koirala and Others, NKP Vol. 30. No. 1. P. 33 (1966).

⁴ See, A.P. Pant, "Efforts of Nepalese Supreme Court in the Protection of Environment", BatabarnBisaisank, pp. 99-101 (1996).

⁵ Surendra Bhandari v. Shree Distillery and others, Writ No. 3259 of 1996, decided in July 1997.

In this case, the court commanded the District Administration Officer to supervise and execute the written obligation borne by Shree Distillery before the said officer for keeping environmental cleanliness in the affected area. At the pressure of the public at large the Shree Distillery had signed a paper to take all necessary steps and measures to preserve and protect the cleanliness and environment of the area as soon as possible. Although, the decision was never implemented and the suffering of the villagers remained scathing.

India

In *R.L. and E. Kendra, Dehradun vs. Union of India* (popularly known as Doon Valley Case) was the first case of its kind in India involving issues relating to environment and ecological balance which brought into sharp focus the conflict between development and conservation and the court emphasized the need for reconciling the two in the larger interest of the country. Mining which denuded the Mussorie Hills of trees and forest cover and accelerated soil erosion resulting in landslides and blockage of underground water which fed many rivers and springs in the river valley.

Following a public interest petition addressed to the Supreme Court by the Rural Litigation and Entitlement Kendra of Deharadun in the State of Uttar Pradesh, the Court directed that all fresh quarrying in the Himalayan region of the Dehradun District be stopped. Subsequently, acting on the basis of the reports of Badyopadhaya Committee and a three man expert committee, bout of which were appointed by the court, the court ordered the closure of several mines in the area. Thereafter, the lessees of mines submitted a scheme for limestone quarrying to the Bandyopadhaya Committee. The Committee rejected the scheme and the lessees challenged the decision of the committee in the Supreme Court.

The Court stated that this case brings into sharp focus the conflict between development and conservation and serves to emphasize the need for reconciling the two in the larger interests of the country. The environmental disturbance caused by limestone mining has to be weighed in the balance against the need of limestone quarrying for industrial purposes. Having given careful consideration to these aspects of the case, the court rejected the petition, expressing its approval of the decision of the Bandyopadhaya Committee.

However, in rejecting the Petition, the Court also stated that it was conscious of the fact that as a result of the closure of the mines workmen employed in the mines will be out of work and directed that immediate steps be taken for reclamation of the areas forming part of such quarries and that the affected workmen be as far as possible and in the shortest possible time, be provided employment in the reforestation and soil conservation programs to be undertaken in the area.

In *M.C. Mehta vs. Kamal Nath and others*,⁶ the Court took notice of an article which appeared in the Indian Express stating that a private company "Span Motels Pvt. Ltd." to which the family of Kamal Nath, a former Minister of Environment and Forests, had a

⁶ Supreme Court of India (1997) 1 SC Case 388.

direct link, had built a motel on the bank of the River Beas on land leased by the Indian government in 1981. Span Motels had also encroached upon an additional area of land adjoining this leasehold area, and this area was later leased out to span Motels when Kamal Nath was Minister in 1994. The Motel used earth movers and bulldozers to the turn the course of the River Beas, create a new channel and divert the river's flow. The course of the river was diverted to save the motel from future floods.

The Supreme Court of India held that prior approval for the additional leasehold land, given in 1994, is quashed and the government shall take over the area and restore it to its original condition. Span Motels will pay compensation to restore the environment, and the various constructions on the bank of the River Beas must be removed and reversed. Span Motels must show why a pollution fine should not be imposed, pursuant to the polluter pays principle. Regarding the land covered by the 1981 lease. Span Motels shall construct a boundary wall around the area covered by this lease, and Span Motels shall not encroach upon any part of the river basin. In addition, this Motel shall not discharge untreated effluents into the river.

This ruling is based on the public trust doctrine, under which the government is the trustee of all-natural resources which are by nature meant for public use and enjoyment. The Court reviewed public trust cases from the United States and noted under English Common Law this doctrine extended only to traditional uses such as navigation, commerce and fishing, but how the doctrine is now being extended to all ecologically important lands, including freshwater, wetlands and riparian forests. The court relied on these cases to rule that the government committed patent breach of public trust by learning this ecologically fragile land to Span Motels when it was purely for commercial uses.

In *Vellore Citizens Welfare Forum vs. Union of India*,⁷ Petitioner, the Vellore Citizens Welfare Forum filed this action this action to stop tanneries in the State of Tamil Nadu from discharging untreated effluent into agricultural fields, waterways, open lands and waterways. Among other types of environmental pollution caused by these tanneries, it is estimated that nearly 35,000 hectares of agricultural level in this tanneries belt have become either partially or totally unfit for cultivation, and that the 170 types of chemicals used in the chrome tanning processes have severely polluted the local drinking water. The court has passed other orders relating to this case, and has monitored this petition for almost five years.

The Supreme Court noted that although the leather industry is a major foreign exchange earner for India and provided employment, it does not mean that this industry has the right to destroy the ecology, degrade the environment or create health hazards.

Sustainable development, and in particular the polluter pays principles and the precautionary principle, have become a part of customary International law. Even though section 3(3) of Indian Environment Protection Act, 1986, allows the central government to create an authority with powers to control pollution and protect the environment, it has

⁷ Supreme Court of India, AIR, 1996 SC 2715.

not done so. Thus, the court directed the central government to take immediate action under the provisions of this act.

The Court ordered the Central Government to establish an authority to deal with the situation created by the tanneries and other polluting industries in the State of Tamil Nadu.

Bangladesh

In *Dr. MahiuddinFaroogue vs. Bangladesh*, Represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and Other.⁸ The petitioner, the Secretary General of the Bangladesh Environmental Lawyers Association (BELA), appealed against an order of the High Court Division summarily dismissing a writ petition filed on behalf of a group of people in the district of Tangail whose life property, livelihood, vocation, and environmental security were being seriously threatened by the implementation of a flood control plan, the compartmentalization Pilot Project, FAP-20. The petition was dismissed by the High Court on the ground that BELA was not an "aggrieved person" within the meaning of Article 102 of the Constitution of Bangladesh. Article 31 and 32 of the Constitution protects the right to life as a fundamental right, but there is no express right to a healthy environment. The question before the court was whether the fundamental right to life included the protection and preservation of the environment, the ecological balance and an environment free from pollution essential for the enjoyment of the right to life.

The Appellate Division of the Supreme Court of Bangladesh allowed the appeal, granting the Petitioner *locus standi* to move the High Court Division under Article 102 of the Constitution, stating that the expression "any person aggrieved" in Article 102 of the Constitution is not confined to individual affected person only, but extends to the people in general, as a collective and consolidated personality. The court considered the submissions made by the Bangladesh Environmental Lawyers Association in the writ, and concluded that the Association should be given *locus-standi* to maintain the writ petition stating that in the case, the Association is a "person aggrieved" within the meaning of Article 102 of the constitution "because the cause it bona fide espouses, both in respect of fundamental rights and constitutional remedies, is a cause of an indeterminate number of people in respect of a subject matter of great public concern."

"The expression" any person aggrieved" approximates the test of or if the same is capsulated, amounts to, what is broadly called, "sufficient interest." Any person other than an officious intervener or a way farer without any interest in the cause beyond the interest of the general people of the country having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from a breach of some public duty or for violation of some provision of the constitution or the law and seek enforcement of such public duty and observance of such constitutional and legal provision. The real test of "sufficient interest" of course

⁸ 48 DLR 1996, Supreme Court of Bangladesh, Appellate Division (Civil)

essentially depends on the co-relation between the matter brought before the court and the person who is bringing it." (Hon. Mr. Justice A.T.M. Afzal, Chief Justice.)

"Although we do not have any provision like Article 48 A of the Indian Constitution for protection of environment, Article 31 and 32 of our Constitution protects right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological free from pollution of air and water, sanitation without which, life can hardly be enjoyed. Any act or omission contrary there will be violate of the said right to life" (Hon. Justice B.B. Roy Choudhary). The petitioner, Dr. Mohiuddin Farooque, Secretary General of the Bangladesh.

In *Dr. Mohiuddin Farooque vs. Secretary, Ministry of Communication Government of the Peoples of Bangladesh and 12 Others*.⁹ The petitioner, Mohiuddin Farooque, Secretary General of the Bangladesh Environmental Lawyers Association (BELA), filed this petition against the Secretaries of the Ministries of Communication, Environment, Health Affairs and industries and others including the Chairman of the Bangladesh Road Transport Authority and the Commissioner of Dhaka Metropolitan Police, to require them to perform their statutory duties and mitigate air and noise pollution caused by matter vehicles in the city of Dhaka.

Petitioner argued that vehicles on Dhaka's roads did not comply with the required fitness standards, and that they emitted smoke harmful to humans. He also argued that his use of prohibited horns and audible signaling devices was causing extreme noise pollution.

Petitioner argued that although the Constitution of Bangladesh contained no specific right to a safe and healthy environment, this right was inherent in the "right to life" enshrined in Article 32. The petitioner stated that this interpretation of Article 32 is supported by Article 31 which prohibits actions detrimental to life, body or property.

The Supreme Court of Bangladesh held that respondent no 2 (Chairman, Bangladesh Road Transport Authority) and respondent no. 4 (Commissioner, Dhaka Metropolitan Police) were required to show cause as to why they should not be directed to take effective measures, as provided in the Motor Vehicles Ordinance 1983, to check air pollution caused by motor vehicle emissions and noise pollution resulting from audible signaling devices.

Pakistan

In *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewra, Khelum vs. The Director, Industries and Mineral Development, Punjab Lahore*,¹⁰ petition was filed in the Supreme Court under Article 184(3) of the Constitution against the pollution of the water supply source to the residents and mine workers of Khewra. The spring Mitha Pattan was the only major source of drinking water in the area. Accordingly, a water catchment area was reserved and grant of mining leases in the area was prohibited prior to 1911. Notwithstanding the prohibition, the authorities concerned had granted mining

⁹ In *Dr. Mohiuddin Farooque vs. Secretary, Ministry of Communication, Government of the People's Republic of Bangladesh and 12 others*.

¹⁰ 996 SC MR 2061, Supreme Court of Pakistan.

leases in the catchment area. The petitioners' alleged that as a result, poisonous waste water discharged from the mines polluted the reservoir creating a health hazard, and that the allotment and grant of leases for mining in the catchment area was illegal and mala-fides, and prayed for cancellation of licenses.

The Supreme Court of Pakistan allowed the petition stating that persons exposed to such danger are entitled to claim that their fundamental right to life guaranteed to them by the constitution has been violated and that there is a case for enforcement of fundamental right by giving directions or passing orders to restrain the parties and authorities from committing such violation or to perform their duties.

Quoting Article 184(3) of the Constitution, the court observed that "it is well settled that in human rights cases/public interest litigation under Article 184(3), the procedural trappings and restrictions, precondition of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the court. This court has vast power under Article 184(3) to investigate into questions of fact as well, independently, by recording evidence or appointing commissions or any other reasonable and legal manner to ascertain the correct position Article 184(3) provides that this court has power to make order of the nature mentioned in Article 199. The fact that the order or direction should be in the nature mentioned in Article 199 enlarges the scope of granting relief and the relief so granted by this court can be molded according to the facts and circumstances of each case."

Accordingly, the court proceeded to deal with the facts relevant to the question whether the mining activity could pollute the water supply and made an order directing that PCC should shift within four months from the location of the mouth of mine 27 A to a safe distance from the stream and small reservoir. The court also appointed a commission with powers of inspection, recording evidence etc. to monitor the implementation of the orders. Additionally, all the mines operations adjacent to the catchment area were to take measure to the satisfaction of the commission which will prevent pollution of the reservoir, stream and catchment area.

The authorities concerned were also ordered not to grant new licenses in the catchment area or to renew old ones referred to in a schedule, without the prior approval of court.

In another case, RE: Human Rights case (Environment Pollution in Balochistan),¹¹ in this case a news item entitled "N-Waste to be dumped in Balochistan" was published in "Dawn", a daily newspaper in its issue dated 3rd July, 1992. In the report, concern was expressed that certain business men were making attempts to purchase coastal areas of Balochistan and convert it into dumping grounds for waste material.

The Supreme Court of Pakistan having taken note of the news item issued an order requiring Chief Secretary of Balochistan to provide the Court with full information on the allocation or the receipt of applications for allocation of coastal land in Balochistan or any area within the territorial waters of Pakistan.

¹¹ Human Rights Case No: 31-k/92(Q)

The reports revealed that land had been allotted in addition to the Pakistan Navy and Maritime Agency for defense purposes, for purposes such as ship breaking and agriculture.

The Supreme Court of Pakistan held that the Balochistan and Development Authority should submit to the Assistance Registrar, Supreme Court, Karachi a list of persons to whom land on the coastal area of Balochistan have been allotted giving their names and full addresses along with copies of the letters of allotment, lease or license which may have been issued in their favour. Furthermore, the Government of Balochistan and the Balochistan Development Authority are directed that if any application for allotment of coastal land is pending or in future any party applies for allotment of such land, then full particulars of such applicant shall be supplied to the Assistant Registrar, any such party.

The Court further said that the government functionaries, particularly the authorities which are charged with the duty to allot the land in coastal areas should insert a condition in the allotment letter/license/leave that the allotted tenant shall not use the land for dumping, treating, burying or destroying by any device, waste of any nature including industrial or nuclear waste in any form. The Balochistan Development Authority should also obtain similar undertaking from all those to whom allotments have been made for ship breaking, agriculture, or any other purpose.

Sir Lanka

In the *Environmental Foundation Limited and Others vs. The Attorney General and Others*,¹² in this case petitioners include residents Nawimana and Weragampita Villages in the South of Srilanka, as well as a company which is devoted to environmental protection. In 1987 the Southern Group took over a rock quarry near Petitioners villages. Petitioners allege that they have suffered serious injury to their physical and mental health, and serious damage to their property, as a result of large-scale blasting which commenced at the quarry in 1987.

Among others allegations, Petitioners state that pieces of rock 20 centimeters in diameter were projected into their village, that the blasting created unbearable noise, severe vibrations & thick smoke, destruction of homes, and harm to their health and livelihoods.

Petitioners argued that despite their complaints, the Government Agent, Matara, renewed the license of the quarry without the petitioners a hearing, that the Superintendent of Police, Matara did not exercise his powers to abate a public nuisance, that the Central Environmental Authority (CEA) did not exercise its powers under the National Environmental Act as the quarry's operator had not obtained a license from the CEA, that the Director of the Geological Survey Department and the Gramma Sevaka of the area failed to take action which they were empowered to take under the law despite petitioner's repeated complaints. These parties are all respondents in this action. Finally, petitioners argued that the quarry's owner and operator, the Southern Group, benefited from the executive action (and inaction) of the other respondents, and should pay to restore petitioner's physical quality of life. Petitioners claimed violations of their rights

¹²Supreme Court of Srilanka S.C. Application No. 128/91

under various Articles of the Constitution: Article 3 "Sovereignty is in the people and is inalienable and includes fundamental rights," Article 11 "no person shall be subjected to cruel, inhuman or degrading treatment," Article 14 (1) (g) "every citizen is entitled to freedom to engage in any lawful occupation," Article 14 (1) (h) "every citizen is entitled to freedom of movement and choosing his residence."

After this action was instituted, CEA officials inspected the quarry, and met with petitioners' representatives. In December 1992, the parties informed the Supreme Court that a settlement had been reached.

The Supreme Court of Sri Lanka held that the court listed the terms of the settlement. The number of blasting was limited to three days a week (Monday, Wednesday and Friday), and if there is necessity to increase the number, the Monitoring Committee (two persons nominated by Petitioners and two persons from the Southern Group, the Gamma Niladhari of the villages fNowimana and Weragampita, and the Government Agent, Matara) must approve the change. If the blasting cannot be done on one of three days, it can be done on an alternative day suitable to the Southern Group if 24 hours written notice is given to the Gamma Niladhari. Contingencies preventing a scheduled blasting include bad weather and inability of the police to be present.

Blasting will take place between 10:00 am and 5:00 pm. There should be at least a 20 second time lapse between each blasting, and electronic detonation and the safety fuse method must be used. The depth of a bore hole cannot exceed 8 feet. The number of blasting per day is not stipulated.

The police must maintain a monthly report detailing the total quantity of explosives used, the depth of bore holes, the dates on which blasting occurred, the commencement and close of blasting, the methods used for blasting, the number of bore holes on each day, and any complaints petitioners make. This report is maintained on the premises of the quarry, and certified by the site manager.

The settlement also discussed secondary blasting, maximum noise and vibrations, as well as the operation of the crusher. The crusher operation should be a continuous wet process, and the CEA shall include in the environmental protection license a condition requiring the construction of a sound barrier around the crusher. Finally, a siren should be sounded three times before blasting commences and after blasting is completed.

Another important case, *S.C. Amara Singh and three Others vs. the Attorney General and three Others*,¹³ the petitioner sought to quash an order of the President of Sri Lanka dated 21.10.1992 made under section 2 of the Urban Development Projects (Special Provisions) Act no. 2 of 1980 declaring that upon the recommendation of the Minister in charge of Urban Development he was of opinion that the lands described in the schedule to the order were urgently required for an Urban Development Project. The Attorney General and the Road Development Authority were made respondents. He was of common ground that the lands in question were to be acquired in connection with the construction of an express way from Colombo to Katunayake. The petitioners contended in the Supreme

¹³ S.C. (SPL) No. 6/92, Supreme Court of Sri Lanka.

Court that there had been a failure of natural justice as there had been no hearing prior to making the order, despite the fact that under section 2 of the Act the Urban Development Project had to be one "which would meet the just requirements' of the general welfare of the people."

The Supreme Court of Sri-Lanka held:

- i. As the order under section 2 of the Urban Development Projects (Special Provisions) Act has of itself no adverse impact on a citizen's property, liberty or livelihood and does not deprive him of or affect little to or possession of property. Public hearing was not required at that stage.
- ii. The available material did not indicate that the decision to build the expressway was unreasonable and therefore the court would not interfere.
- iii. Section 3 of the Urban Development Projects (Special Provisions) Act, did not take away the powers of the Superior Courts which were enshrined in the Constitution.
- iv. Section 7 of that Act, did not empower the state to take over privately owned land under the State Lands (Recovery of Possession) Act without first acquiring the land under the Land Acquisition Act.
- v. The provisions of Sections 23 AA and 23 BB of the National Environmental Act as amended were not applicable, as no orders had yet been made listing any "prescribed projects". However, the Central Environmental Authority had power to call for an EIA in respect of any new project under section 10(h) of the Act and the Court took note that the Respondents had given and undertaking that an EIA would be prepared and made available for public scrutiny for 30 days, which would be the appropriate stage at which to consider public representations on environmental factors.

Conclusion

South Asian countries have been entertaining environmental cases under extra-ordinary jurisdiction, more specially, on the ground of public interest litigation under their Constitutions. In this context, South Asian countries have played a very important role in the field of promoting environment and sustainable development. Thus, it is evident that the role of judiciary in promoting environment and sustainable development in South Asian countries are significance when deciding cases, it is based on the principles of sustainable development.