Environmental Constitutionalism in India: Judicial Recognition and Application

ABSTRACT

The paper focuses on the manner and effectiveness of the Supreme Court of India in addressing the many environmental issues facing modern India. An account is presented of how the Indian senior judiciary adjudicates environmental constitutionalism through the 'environmental care' paradigm. It presents and analyses explicit and derivative environmental constitutionalism through judicial engagement with the directive principles of state policy, fundamental duty and right to a quality environment as a part of the fundamental right to life. The paper concludes by examining how the senior Indian judiciary has promoted environmental constitutionalism through the liberal use of Public Interest Litigation (PIL) and relaxed *locus standi* to access and achieve environmental justice and governance.

Introduction

Paradigmatic environmental constitutionalism is experiencing global recognition. Of 196 national constitutions 148 reflect a degree of environmental constitutionalism[1]. The discourse on environmental constitutionalism remains an important conversation within the swirl of the constantly changing geo-political climate, environmental priorities and ineffective environmental governance at both global and domestic levels. There is a growing recognition among scholars that environmental constitutionalism represents a new approach that focuses on both broader constitutional concepts and on the environmental governance movement[2]. For instance, Kotzé argues that 'Where environmental care is couched in constitutionalist language, it is termed environmental constitutionalism'.[3] Kotzé argues constitutionalising environmental care provides opportunities to reform environmental governance through constitutional features that include fundamental rights and duties and aspirational values of human dignity and equality. It improves participatory mechanisms that access environmental justice and remedies; dictating contents of law; establishes moral and ethical obligations with respect to the environment and requires proper performance of these obligations by state authorities.[4] May and Daly adopt a comparative approach and suggest that 'environmental constitutionalism is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights and environmental law. It embodies the recognition that the environment is a proper subject for protection in the

[1] Roderic O'GORMAN, *Environmental Constitutionalism: A Comparative Study*, Transnational Environmental Law, 2017, p. 435-462, p. 436.

[2] Brian J. GAREAU, *Global Environmental Constitutionalism,* B.C. Envtl. Aff. L. Rev, 2013, p. 403-404; Douglas A KYSAR, *Global Environmental Constitutionalism: Getting There from Here*, Transnational Environmental Law, 2012, p. 83-94.

[3] Louis J. KOTZE, *Arguing Global Environmental Constitutionalism* Transnational Environmental Law, 2012, p. 193-233, p. 208.

[4] Ibid.

constitutional texts and for vindication by constitutional courts worldwide.'[5]

Environmental constitutionalism continues to gain a global foothold through textual recognition and judicial receptivity. Studies provide insights into substantive and procedural rights, directive policies and duties that illustrate environmental constitutionalism.[6] About ninety-two constitutions explicitly recognise the right to a quality or healthy environment. Some ninety-seven constitutions include reciprocal duties on the state and fifty-six constitutions recognize the responsibility of the citizens to protect the environment[7]. Another study illustrates the categorisation of environmental constitutionalism based upon the historical inspection of the domestic situation at the time when environmental constitutionalism was first embraced.[8] It identifies three key categories - crisis change (moments of crisis, such as the creation of a newly independent state, are significant drivers of constitutional change); regime consolidation (promulgation of constitutions by non-democratic rulers to confer legitimacy on existing legal arrangements); non-crisis change (changes in the values that a nation holds, or in views on the effectiveness of institutional arrangements during non-crisis situation). These historical categories help in understanding the specific circumstances and factors that influence the chances of the successful adoption of environmental constitutionalism[9].

The active participation of a creative judiciary in environmental constitutionalism is critical. In most jurisdictions, the courts (general or specialised courts and tribunals) are achieving tangible environmental outcomes and providing enhanced environmental protection. May and Daly's exploratory work[10] analyses the extent of judicial receptivity to environmental constitutionalism. The national courts have increasingly been engaged in interpreting constitutional environmental rights as independent[11], dependent[12], derivative[13], or dormant[14] rights thereby developing, expanding and creating environmental obligations despite being formally absent in the constitution.

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[5] James R MAY and Erin DALY, *Judicial Handbook on Environmental Constitutionalism*, United Nations Environment Programme 2017, p. 1.

[6] Ibid.

[7] Klauss BOSSELMANN, Global Environmental Constitutionalism: Mapping the Terrain, Widener Law Review, 2015, pp. 171-185, p. 173.

[8] GORMAN, n.1, p. 441.

[9] Ibid, pp. 441-444.

[10] MAY and DALY, n. 5, pp. 166-178.

[11] Some courts recognize causes of action to enforce express constitutional rights to a quality environment and of nature (Central Europe and Latin America)

[12] Some courts recognize a right to a quality environment as an adjunct of constitutional provisions that direct the government to protect the environment as a matter of duty or policy (Philippines).

[13] Some courts recognize environmental rights as being implicitly incorporated into other substantive, enforceable constitutional rights, including a right to life (India, Pakistan).

[14] Courts in some countries have yet to engage environmental rights provisions (Turkey).

Contextualising within India, the constitutionalism narrative is based on notions of divided and checked powers, fundamental duties of the state to protect and enhance the interests and welfare of the people and the promotion of egalitarian social order. The function of trans-formatting the constitution rests primarily with the courts, particularly the Supreme Court of India[15]. The judicial role involves the expansive interpretation of the constitution. The ineffectiveness of both political leadership and administrative authorities in discharging their constitutional role and statutory duties, coupled with widespread corruption within the public sector has cast the Indian judiciary, particularly within the Supreme Court, in the role of protector of the interests of the disadvantaged in matters of public interest.[16]

India's environmental constitutionalism is a product of senior judicial decisions to interpret liberally key constitutional provisions and combine human rights and the environment to develop a new 'environmental care' jurisprudence. This judicial activity is a result of a collaborative process engaging innovative substantial and procedural approaches that depart from the traditional adversarial judicial process[17].

This chapter maps the way in which the Indian senior judiciary adjudicates environmental constitutionalism through the 'environmental care' paradigm[18]. It examines the role of the pro-active Supreme Court of India in creating strategies within a broader constitutional framework and environmental governance movement to uphold the rule of law, enforce fundamental rights of the citizens and constitutional propriety aimed at the protection and improvement of environment. Accordingly, the chapter is hereafter divided into three parts. Part 1 offers an account of explicit environmental constitutionalism in the form of directive principle of state policy and fundamental duty embracing environmental care and judicial interventions. Part 2 presents and analyses derivative environmental constitutionalism through judicial engagement with the right to a quality environment as a part of the fundamental right to life at the national level. Part 3 examines how the senior Indian judiciary has promoted environmental constitutionalism through the liberal use of Public Interest Litigation (PIL) to achieve environmental justice. The Court's self-created power and justiciable constitutional remedy is intended to make 'environmental care' both real and meaningful throughout India.

[15] Vikas Sankhala v Vikas Kumar (2017) 1 SCC 350, p. 354.

[16] South Asian Human Rights Documentation Centre, *Human Rights and Humanitarian Law: Developments in Indian and International Law*, OUP, 2008, p. 423.

[17] Gitanjali N GILL, *Environmental Justice in India: The National Green Tribunal*, Routledge UK, 2017, p. 44; Shyam DIVAN and Armin ROSENCRANZ, *Environmental Law and Policy in India*, OUP, 2001, p.133; P. LEELAKRISHNAN, *Environmental Law in India*, Butterworths, 2005; Lavanya RAJAMANI, *Public interest litigation in India: exploring issues of access, participation, equity, effectiveness and sustainability*, Journal of Environmental Law, 2007, p. 293; Geetonjoy SAHU*, Implications of Indian Supreme Courts' innovation for environmental jurisprudence*, Law, Environmental and Development Journal, 2008, pp. 377-387.

[18] This chapter does not address the National Green Tribunal (NGT) of India. The NGT is a specialised statutory tribunal having expertise in adjudicating environmental issues and building upon the environmental jurisprudence of the Supreme Court of India.

Explicit Environmental Constitutionalism- Directive Principles of State Policy and Fundamental Duties

The Indian Constitution of 1950 is a lengthy, elaborate, detailed document. Following the Stockholm Declaration in 1972, the Constitution was amended by the 42nd amendment in 1976 to explicitly incorporate environmental protection provisions within the directive principles of state policy[19] and fundamental duties.[20]

The directive principles of state policy though not enforceable in courts of law are accepted as fundamental moral principles and values in the governance of the country to secure social and economic freedoms. They constitute *fons-juris* in a welfare state and obligate the state to take positive action to promote the welfare of the people. They set forth the humanitarian socialist precepts that were the aims of the Indian social revolution[21].

Article 48 A, was added to the directive principles of state policy by the 42nd amendment to the Constitution. The article requires the state to 'endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.' Environmental constitutionalism recognises that 'environmental care' expressed through moral and ethical principles because of established cultural, social, and legal experiences and practices can help achieve such environmental protection necessary for human welfare[22]. Readings from ancient Indian law serve as a window on the varying interests and increasing demand on natural resources and the subsequent state policy responses[23]. For example, Kautilyan jurisprudence states that it is the *dharma* (duty) of the king not only to protect forests but also establish new forests. The dharma of protecting the environment was to sustain and ensure progress and welfare of all and balance the eco-system[24].

Today the responsibility for environmental protection rests with the Supreme Court of India. In *Ivory Traders and Manufactures Association v Union of India*[25], the court acknowledged that Article 48A is based on moral values and ethics. It draws heavily from religious Hindu scriptures to show compassion towards nature, animals and birds as all are considered to have come from the same source. To quote:
'Lord Krishna in the Bhagavad Gita declared that 'SARVE YONISU AHAM BIJA PRADAHPITAH' which means I am the father of all. The followers of the Gita are steeped in the belief that even the leaves of the trees, the petals and the flowers have life and God pervades in them. The state has a solemn

[19] Part 1V of the Constitution of India.
[20] Part 1V-A of the Constitution of India.
[21] *A.K. Thakur v Union of India* (2008) 6 SCC 1; *P. M.A. Shetty v State of Karnataka* 1989 Supp (1) SCC 696; *Shrilekha Vidyarthi v State of U.P* (1991) 1 SCC 212; *Kesvananda Bharati v State of Kerala* (1973) 4 SCC 225

[22] Louis J. KOTZE, *Global Environmental Constitutionalism in the Anthropocene*, Hart Publishing, 2016, p. 153
[23] V.K. GUPTA, *Kautilyan Jurisprudence*, B.D Gupta and Company Delhi, 1987, p.155.
[24] Ibid, p.155.
[25] (1997) 67 DLT 145 (FB).

duty to give effect to the Article 48 A …ensure that the survival of man co-exists with nature… to sub-serve the common good.'[26]

The ethical and moral prescription has assumed the legal status of imposing an obligation not only on government but also on courts to protect the environment. Thus, Article 48 A is not symbolic but rather creates a primary obligation directing environmental governance.

Article 51 A of the Constitution[27] lays down fundamental duties for the citizen concerning the value and preservation of the rich heritage of Indian composite culture, including the environment. Article 51 A (g), added by the 42nd amendment, mandates 'every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures'.

The judiciary has energised the environmental constitutionalism discourse by interpreting Article 51 A (g) to include 'environmental care' as a foundational norm in Indian society and in its law and governance system. This is reflected in two ways. Firstly, 'environmental care' is prioritized as a moral and ethical obligation of the citizen to act affirmatively to respect nature and protect the environment, as referred by Kotzé as 'the duties to respect, protect, promote and fulfil'[28]. Ancient Indian thought involves *Om Sarvesham Shantir bhavatu* (peace unto all living beings and entire environment) *or Ahimsa paramo tapah* (non-violence is the greatest duty and the greatest penance). In A*ssociation for Environment Protection and State of Kerala*[29] the Supreme Court observed:
'our [Indian] sages and saints always preached and taught the people to worship earth, sky, rivers, sea, plants, trees and every form of life. Majority of people still consider it as their sacred duty to protect the plants, trees, rivers, wells, etc., because it is believed that they belong to all living creatures'[30].
Secondly, Article 51 A (g) encourages and promotes people's participation in environmental protection and human welfare. Though couched in the language of 'duty', Article 51 A (g) confers a corresponding right on the citizen to move to the court to ensure the state performs its duties in accordance with the law[31]. Thus, the moral and ethical obligation under Article 51A(g) has broadened the scope of 'citizen' to permit public-spirited citizens, interested institutions and NGOs to approach the courts for environmental protection.

Together, Articles 48 A and 51 A (g) lay the foundation for a jurisprudence of 'environmental care' demonstrating shared moral and ethical obligations of a pluralistic society**.** Environmental constitutionalism thus creates a symbiotic relationship between the state and citizen by re-defining the boundaries to achieve better environmental care through accountability and participative governance.

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[26] Ibid, p. 165
[27] Article 51 A enlists ten duties that are in line with Article 29 (1) of the Universal Declaration of Human Rights.
[28] KOTZE, n. 3, p. 206.
[29] (2013) 7 SCC 226.
[30] Ibid, p. 229.
[31] *L.K. Koolwal v State* AIR 1988 Raj. 2.

To strengthen the above-mentioned non-enforceable constitutional commitments, the Supreme Court has interpreted them as complementary and supplementary to the enforceable fundamental rights, particularly Article 21 (as discussed below). In *Intellectuals Forum, Tirupathi v State of AP*[32], the Supreme Court observed:

'. . . the environmental protection and conservation of natural resources has been given a status of a fundamental right and brought under Article 21 of the Constitution of India. This apart, Articles 48A and 51A(g) are fundamental in the governance of the country and require the state to apply these principles in making laws and further these two articles are to be kept in mind in understanding the scope and purport of the fundamental rights guaranteed by the Constitution including Article 21.' [33]

Thus, the courts have been guided by the language of Articles 48 A and 51 A (g) thereby providing a testimony to the fact that these are not merely 'moral and ethical obligations' but are being gainfully employed.

Derivative Environmental Constitutionalism- Fundamental Right to Life

In India, there is no direct articulation of the right to environment, neither in the Constitution of India nor in statute law. The Supreme Court has constructed environmental constitutionalism encapsulating 'environmental care' by adopting an expansionist approach to the substantive right to life under Article 21 of the Constitution of India. Article 21, a fundamental right,[34] reflects the US Justice William Brennan's vision of a living Constitution helping to understand and provide an expansive formulation of human dignity.[35] The normative focus is 'on the individual – in the dignity and worth of the human person'.[36] In *Francis Coralie v Delhi*[37] Justice Bhagwati stated: 'We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing, and expressing oneself in diverse forms.'[38]

However, the human dignity principle is illusionary in the absence of the right to environment. The court has used the 'linkage argument'[39] to defend the right to life and quality environment thereby

[32] (2006) 3 SCC 549.

[33] Ibid, p.576; also see *State of Uttaranchal v B.S. Chaufal* (2010) 3 SCC 402; *Virendra Gaur v State of Haryana* (1995) 2 SCC 571; *M.C. Mehta v Union of India* AIR 1988 SC 1037; Nagrik Chetna Manch v State of Maharashtra 2016 SCC OnLine Bom 30.

[34] Article 21 states that no person shall be deprived of his life or personal liberty except according to procedure established by law.

[35] W. J. BRENNAN, *The Constitution of United States: Contemporary Ratification*, Text and Teaching Symposium, Georgetown University, 12 October 1985.

[36] RAJAMANI, n. 16, p.414

[37] AIR 1981 SC 746

[38] Ibid, p.753

[39] H. SHUE, *Basic Rights,* Princeton University Press, 1996, p. 24–25. Shue initiated the use of the 'linkage

placing human rights within environmental discourse. In *Municipal Corporation of Greater Mumbai v Kohinoor* 34 *CTNL Infrastructure*[40] the court stated:

'. . . it must be noted that the right to a clean and healthy environment is within the ambit of Article 21, as has been noted in *Court on its Own Motion v Union of India* reported in 2012 (12) SCALE 307 in the following words: – The scheme under the Indian Constitution unambiguously enshrines in itself the right of a citizen to life under Article 21 of the Constitution. The right to life is a right to live with dignity, safety and in a clean environment.'[41]

Thus, in a catena of judicial decisions right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48 A and 51 A (g)[42]. It is the duty of the state and citizen to take adequate measures to promote, protect and improve both the man made and the natural environment.

Principles underpinning international environmental law have been absorbed into Article 21 thereby expanding the 'environmental care' paradigm to refine and improve environmental governance. In the *Intellectual Forum, Tirupathi v State of AP*,[43] the Supreme Court accepted that 'all human beings have a fundamental right to a healthy environment commensurate with their well- being ... ensuring that natural resources are conserved and preserved in such a way that present as well as the future generation are aware of them equally'.[44] This ruling strengthens the principle of inter- generational equity which is derivative from Article 21. Similarly, the precautionary and polluter pays principles are an essential part of the reach of Article 21.[45]

The Supreme Court created a link between life and a quality environment through a liberal interpretation of Article 21 from an anthropocentric position. However, identifying the right to a

argument' to defend the right to subsistence: 'no one can fully ... enjoy any right that is supposedly protected by society if he or she lacks the essentials for a reasonably healthy and active life'. Shue defined subsistence as meaning 'unpolluted air, unpolluted water, adequate food, clothing, adequate shelter and minimal preventive care.' (p. 80). See also, J.W. Nickel, *Making Sense of Human Rights,* Oxford Blackwell Publishing 2007, p. 139 and B. OREND, *Human Rights: Concept and Context* (Broadview Press 2001).

[40] (2014) 4 SCC 538.

[41] Ibid, p.556.

[42] *Subhash Kumar* v *State of Bihar* AIR 1991 SC 420; *MC Mehta* v *Kamal Nath (*2000)6 SCC 213; *In re Noise Pollution* v AIR 2005 SC 3136; *Delhi Jal Board* v *National Campaign for Dignity and Rights of Sewerage and Allied Workers* 2011 8 SCC 574.

[43] AIR 2006 SC 1350.

[44] Ibid, para 84.

[45] *Vellore Citizen Welfare Forum* v *Union of India* AIR 1996 SC 2715; *AP Pollution Control Board* v *Prof M.V. Nayudu* AIR 1999 SC 812.

quality environment is not without its problems. It is complicated both in terms of content and justiciability. Descriptors used by the judiciary including safe, decent, clean, healthy, unpolluted, wholesome, resource rich and preserved environment are unrealistic, vague and indeterminate. This terminological uncertainty raises the issue of the establishment of constitutional environmental standards. What are the appropriate levels of environmental standards? Should these levels be based upon relative experience or absolute targets? Should the figures reflect those of western, industrial societies or prevailing Indian situations? If the standards are based upon the relative experience of other countries can the pervasive use of 'legal transplants'[46] in a globalized world help improve the content and design of national environmental standards of the receiving nations? If so, can the courts ensure that legal transplants are not a 'copy-paste', 'cross-pollination' or a simple 'mimicry' exercise?[47]

Beyond the problem of quantification is the thorny issue of implementation. Effective state implementation of the right to a quality environment remains disappointingly low. For example, there is no such thing as 'clean and fresh air' in India's capital, Delhi[48]. In November 2017, doctors in Delhi declared a public health emergency as air quality plunged to levels likened to smoking at least 50 cigarettes in one day.[49] The Chief Minister of Delhi, Arvind Kejriwal described Delhi as 'gas chamber' prompting his government to close 4,000 schools for a week. [50] According to the World Health Organisation, ten of the world's 20 most polluted cities are in India and it has among the highest proportion of deaths related to air pollution.[51] The 2017 Global Burden of Disease estimated that early deaths related to PM2.5 in India are the second highest in the world and ozone-related deaths, though lower than PM2.5, are the highest in the world. Not only the tiny particulates but also the toxic gases that come from combustion sources pose a very serious health risk.[52]

The ground level environmental reality reveals considerable shortcomings and continuing challenges. It is acknowledged that the inaction of the state or failures of state agencies to perform their statutory duties result in endangering or impairing people's quality of life as guaranteed by the

[46] The academic discourse on legal transplantation reveals fundamental differences over transplant existence and its feasibility. See A. WATSON, *Legal Transplant*, University of Georgia Press, 1993; P. LEGRAND, *The Impossibility of 'Legal Transplants*', Maastricht Journal of European and Comparative Law, 1997, p. 111; O. KAHN-FREUND, *On Uses and Misuses of Comparative Law*, Modern Law Review, 1974, p. 1.

[47] L. KOTZE and C. SOYAPI, *Transnational environmental law: the birth of a contemporary analytical perspective*, in D. FISHER, *Research Handbook on Fundamental Concepts of Environmental Law,* Edward Elgar 2016, p. 94.

[48] Another example of implementation failure is portable water. India has the highest number of people globally without safe water. Nearly 76 million people have no access to a safe water supply. Approximately 140,000 Indian children die annually from diarrhoea. Water-Aid, 'Water: at What Cost? The State of the World's Water' (2016) http://www.wateraid.org/news/news/water- at-what- cost-our- latest-report- reveals-the- state-of- the worlds- water.

[49] https://www.theguardian.com/world/2017/nov/07/delhi-india-declares-pollution-emergency-as-smog-chokes-city

[50] https://www.nytimes.com/2017/11/08/world/asia/india-air-pollution.html

[51] https://mg.co.za/article/2017-12-25-delhi-should-follow-beijings-example-in-tackling-air-pollution/

[52] Environmental Pollution (Prevention and Control) Authority (EPCA), *Report 71*, 2017, p. 8.

constitution. A damning report commissioned by the Ministry of Environment, Forest and Climate Change[53] condemns its own regulatory agencies dealing with environmental matters by stating: '. . . the Executive has not covered itself with glory – indeed it has invited the attention of the judicial branch through lack of basic care… The institutional failures include lack of enforcement, flawed regulatory regime, poor management of resources, inadequate use of technology; absence of a credible, effective enforcement machinery; governance constraints in management; policy gaps; disincentives to environmental conservation, and so on.'[54]

However, the Supreme Court through its recently established Social Justice Bench (SJB)[55] is advancing environmental constitutionalism and care by framing and mobilising responses to environmental protection, human rights and social justice issues. The SJB is adopting a novel, creative problem solving and accountability approach allowing adjudication within a social context. Social and environmental justice is at the heart of the Indian Constitution, which in turn, places a duty on the judiciary to protect the rights of every citizen so that they might live a life of dignity and well-being.

For example, an on-going issue before the SJB is ensuring that the right to a 'clean and fresh air' is effectively implemented rather than remaining an 'aspirational goal'. The court (SJB) in 2017 directed all the concerned regulatory authorities to develop a time-bound Comprehensive Action Plan (CAP) to clear the toxic air of Delhi and neighbouring states because of vehicular and industrial sources[56]. The CAP lists a combination of short, medium and long-term actions for each source of pollution and indicates regulatory agencies responsible for its implementation. The Supreme Court was informed of the actions taken up to 2018 that included a network of extensive and robust monitoring air quality stations, the Graded Response Action Plan for emergency action and during high pollution periods and stringent fuel and exhaust emission standards[57].

Further, the implementation of international environmental principles has also met with limited success. For example, polluters abuse the court system by repeatedly filing applications to avoid compliance with the court's order or judgment. In the *Indian Council for Enviro-Legal Action v Union of India*[58], the litigation continued for 23 years before the court empowered the state government to recover the cost of remedial measures and compensation from 'rogue industries' that caused serious harm to the land and ground water level. Delay became a prohibitive feature of the legal route for those seeking environmental and social justice. The words of Justice Frankfurter capture both the expectation and frustration 'there is nothing judicially more unseemly nor more self-defeating than for the Court to make *in terrorem* pronouncements, to indulge in merely empty

[53] High Level Committee on Forest and Environment Related Laws Report (MoEF&CC) (2014) http://envfor.nic.in/sites/default/files/press- releases/Final_Report_of_ HLC.pdf

[54] Ibid, p. 8, 22

[55] Gitanjali N. GILL, *The Social Justice Bench of the Supreme Court of India: A New Development*, Public Law 2016, pp. 392-401.

[56] *M.C. Mehta v Union of India*, Order dated 6th February 2017.

[57] EPCA and CSE, *Air Pollution Report Card 2017-18*, (submitted to the SJB), pp. 22-24.

[58] AIR 1996 SC 1446.

rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope'[59].

Despite the above-mentioned shortcomings, the proactive judiciary acting as 'amicus environment' has innovatively created and expanded environmental obligations to recognise 'environmental care' as constitutional virtues and rights in environmental governance in a normative sense. The expansionist approach has brought new dimensions not only in the environmental constitutionalism but also in the discourse on human rights in India.

Justiciable Environmental Constitutionalism: Standing and Access to Justice

The Indian judiciary promotes the justiciability of environmental rights and obligations thus bringing 'environmental care' under the constitutional aegis. Broad and diffused standing or *locus standi* opens constitutional remedies to 'environmental care' to enforce environmental rights and secure environmental justice. The use of Public Interest Litigation (PIL) since 1980's as a broad-based, people-oriented approach envisioned access to justice as a 'wheel of transformation' through judge-fashioned processes and remedies in a wide variety of socio-economic cases[60]. PIL has emerged as a procedural tool 'redressing public injury, enforcing public duty, protecting social, collective, "diffused" rights and interests or vindicating public interest'[61].

Environmental PIL is a product of the higher judiciary's response to the inaction of the state or failures of state agencies to perform their statutory duties resulting in endangering or impairing people's quality of life as guaranteed by the constitution. This has prompted environmentalists, NGOs and affected citizens to approach the courts, particularly the higher judiciary, for remedial action[62]. In this context, environmental constitutionalism embodies PIL as a transformative approach to provide access to justice to victims of environmental degradation. The use of Article 32 as a 'constitutional remedy' for the enforcement of fundamental rights, in particular Article 21, in environmental PIL constitutionalises 'environmental care' to forge new remedies and fashion new strategies for environmental protection. 'A right without a remedy is a legal conundrum of a most grotesque kind. Article 32 confers one of the highly- cherished rights'[63]

The Supreme Court has relaxed the traditional standing or *locus standi* rule in environmental PILs to provide access to environmental justice to people who otherwise would be denied it. Procedural technicalities take a back seat in environmental PILs when a matter of grave public importance is considered by the court. Strict rules of pleading may not apply to the PIL. Pleadings prepared by a layman are construed generously as he lacks the standards of accuracy and precision particularly

[59] *Baker v Carr* 369 U.S. 186 (dissenting opinion).

[60] Gitanjali N GILL, *Human Rights and the Environment in India: Access through Public Interest Litigation*, Environmental Law Review, 2012, p. 201.

[61] S.P. SATHE, *Judicial Activism in India Transgressing Borders and Enforcing Limits,* OUP New Delhi, 2002, 217.

[62] GILL, N.17, p.42.

[63] Justice R. PAL and Justice S. PAL, (2011) *Indian Constitutional Law,* Butterworths, 2011, p. 1429.

when a wrong is committed to a determinate class[64]. Thus, the relaxation of the rule of *locus standi* has resulted in a major procedural innovation. Justice Krishna Iyer, one of the most socially aware and concerned judges in independent India, stated:

. . . the truth is that a few profound issues of processional jurisprudence of great strategic significance to our legal system face us. We must zero in on them as they involve problems of access to justice for the people beyond the blinkered rules of 'standing' of the British-India vintage. If the centre of gravity of justice is to shift, as the Preamble of the Constitution mandates, from the traditional individualism of *locus standi* to the community orientation of public interest litigation, these interests must be considered[65].

Traditional *locus standi* has been changed in two ways through representative standing and citizen standing. Representative standing means any member of the public acting bona fide, may advance claims against violations of the human and environmental rights of victims who, because of their poverty, disability or socially or economically disadvantaged position, cannot approach the court for judicial enforcement of their fundamental rights. NGOs and environmental activists working, for example, on behalf of poor and tribal people enter the courts through this procedure[66]. Citizen standing provides access to seek redress for a public grievance affecting society rather than an individual. Where public duties are to be enforced and social collective 'diffused' environmental rights need protection, the court allows public-spirited citizens and organizations to act for a general or group interests even though they may not be directly injured regarding their own rights[67].

Thus, the new and relaxed meaning of *locus standi* in environmental PIL has introduced a transformative environmental constitutionalism approach being polycentric, participatory and democratic. This ensures commitment and adherence to environmental rule of law that employs a rights-based approach to augment 'environmental care' intricately inter-linked with fundamental values including human dignity, equality, fairness and justice.

However, for several reasons environmental PIL is not without its critics. First, the question whether environmental PIL provides effective or merely symbolic justice remains undecided? For instance, Singh argues 'a judge may talk of right to life as including right to food, education, environment and a horde of social rights without exactly determining who has the duty and how such duty to provide

[64] *State of M.P. v Narmada Bachao Andolan* (2011) 7 SCC 639; *Rural Litigation and Entitlement Kendra v State of U.P.* 1989 Supp (1) SCC 504; *D.N. Jeevaraj v State of Karnataka* (2016) 2 SCC 563. In *Mumbai Kamgar Sabha v Abdulbhai Faizullabhai* (1976) 3 SCC 832 at p.837, the court, observed 'procedural prescriptions are handmaidens, not mistresses, of justice and failure of fair play is the spirit in which courts must view (procession) deviances'.

[65] *Municipal Council Ratlam v Vardhichan* (1980) 4 SCC 162, p. 163.

[66] *State of Uttaranchal v B.S. Chaufal* (2010) 3 SCC 402; *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664; *Centre for environment Law WWF-I v Union of India* 2013 SCC OnLine SC 345.

[67] *Almrita Patel* v *Union of India* Writ Petition No. 888 of 1996; *M C Mehta* v *Union of India* AIR 1997 SC 734; *Judges' Transfer Case* AIR 1982 SC 149.

positive social benefits could be enforced'[68]. Second, a climate of inconsistency and uncertainty exists regarding entertaining and rejecting environmental PILs. This has become a serious concern among public-spirited citizens who see the court as the last resort for protecting the environment and citizens' rights. Prashant Bhushan has rightly argued that:

'the right to environmental protection has thus been whimsically applied by individual judges according to their own subjective preferences usually without clear principles guiding them about the circumstances in which the court could issue a mandamus for environmental protection. It appears that when socio-economic rights of the poor come into conflict with environmental protection the court has often subordinated those rights to environmental protection. On the other hand, when environmental protection comes into conflict with what is perceived by the court to be 'development issues' or powerful commercial, vested interests, environmental protection is often sacrificed at the altar of 'development' or similar powerful interests.'[69]

Third, critics also accuse the Supreme Court through its environmental PIL hearings of being a hyper active law-making body. Judges on occasions have ignored the doctrine of separation of powers by trespassing upon areas traditionally within the domain of the executive and the legislature[70]. It has been suggested that the court is guilty of populism as well as adventurism, thereby in violation of the doctrine of separation of powers. The court, however, has denied any such usurpation. In its pronouncements, it has justified its actions either under a statutory provision or as an aspect of its inherent powers[71].

Despite these criticisms, environmental PIL has produced a major change to India's environmental constitutionalism landscape. Environmental PIL is transformative and promotes 'environment care' through 'collaborative approach, procedural flexibility, judicially supervised interim orders and

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[68] M.P. SINGH, *Protecting the Rights of the Disadvantaged Groups through Public Interest Litigation* in SINGH, GOERLICH and Von HAUFF (eds), *Human Rights and Basic Need*, Universal Law Publishing, 2008, p.322.

[69] Prashant BHUSHAN, *Misplaced priorities and class bias of the judiciary*, Economic and Political Weekly, 2009, pp. 32–37, p. 35. See also, Geetonjoy SAHU, *Why the underdogs came out ahead: an analysis of the Supreme Court's environmental judgments, 1980–2010,* Economic and Political Weekly, 2014, pp. 52–57, p. 55; Gitanjali N. GILL, Gill, Environmental protection and development interests: a case study of the River Yamuna and the Commonwealth Games, Delhi 2010, *International Journal of Law in the Built Environment* Special Issue, 2014, pp. 69–90; *T N Godavarman Thirumulpad v Union of India* and *In the matter of Vedanta Aluminium Limited (*2008) 2 SCC 222 ;*Orissa Mining Corporation v MoEF* (2013) 6 SCC 476; *DDA v Rajendra Singh* AIR 2010 SC 2516.

[70] Upendra BAXI, *How not to judge the judges: notes towards evaluation of the judicial role*, Journal of the Indian Law Institute, 1983, p. 211; S. DAM, *Law-making beyond lawmakers: understanding the little right and the great wrong (analysing the legitimacy of the nature of judicial law-making in India's constitutional dynamic),* Tulane Journal of International and Comparative Law, 2005, p. 109.

[71] SAHU, n. 17, p. 389.

forward-looking relief'[72]. It is a 'testament to Indian democracy'[73] to improve environmental governance through constitutional attributes including fundamental rights and duties, rule of law and separation of powers.

Conclusion

India a nation of 1.3 billion people continues to experience environmental challenges that are both significant and numerous. Within this context environmental constitutionalism helps augment environmental care through a transformative approach involving broader constitutional, environmental law and governance responses. The legitimacy of the environmental constitutionalism paradigm depends on the creativity of those working on the problem. In the Indian context, the role of the judiciary is critical as it shapes the normative interpretation of the constitutional and regulatory framework. The Indian Supreme Court, a bedrock institution, has earned public respect and increased credibility through innovative and creative judicial craftsmanship.

To promote environmental constitutionalism, the Supreme Court expanded the constitutional provisions and combined human rights and environment to achieve better 'environmental care' and environmental governance. The court's willingness to expand its jurisdictional boundaries by introducing substantive and procedural changes has strengthened the constitutionalisation of environmental care. Substantive changes include the growth of fundamental rights, particularly the right to life (Article 21), the derivative application of principles of international environmental law and broadening the scope of unenforceable constitutional moral and ethical commitments (Articles 48 A and 51 A (g). Associated procedural expansion has provided a platform for the implementation of these substantive rights through a broader understanding of *locus standi* under environmental PIL. The failure in India of the inherited Westminster model of democratic governance which allocates individual and separate functions to parliament, the executive and the judiciary has resulted in the judiciary being promoted to be *primus inter pares*. This primary role concerning the protection of the environment is supported through the adoption and application of environmental constitutionalism involving broad, plural and inclusive constructs for an effective environmental governance.

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[72] RAJAMANI, n. 17, p. 1.

[73] Ibid, p.12.

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