

ENVIRONMENTAL SUSTAINABILITY AND ECONOMIC GOVERNANCE IN AN ERA OF LEGAL REALISM UNDERSTANDING THE TRAJECTORIES FROM JUDICIAL PERSPECTIVES

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ABSTRACT

Environmental sustainability Goals are emerging as a jus cogens norm binding all the nations around the world. There exists robust relation between environmental sustainability and Economic growth of the Nation. The research paper discourses the cutting-edge developments of climate change litigation in India, bringing to prominence the flukes of the Indian legal system that gives it the legitimacy and authority to incorporate new ideas into the Nation's legal framework as it is highly related to Nation's economic development. The concept of Rule of Law in modern era includes Environmental Justice as well because it acts as a precondition to attain sustainable development. Especially the neoliberalism in contemporary era hinders the evolution of norms around environmental sustainability and there exists tensions in policy making by the state that requires judicial adjudication. Amidst these tensions how far the judiciary in India acts as a protector to balance Environmental protection, Climate change and sustainable developmental goals is the focus of this article.

Moreover, the research paper examines, how far the climate change governance assumes both international as well as national concern for future and the conceptualistic approach that highlights recent advancements in the nation's climate change Environmental jurisprudence. The main theme of the work concentrates on two different philosophical approach i.e, Legal formalism and Legal Realism and explores the phenomenal discourse between a dynamic legal system that applies international environmental principles domestically and the recent obstacles to Environmental sustainability especially the climate litigation by highlighting a growing and pervasive trend towards the incorporation of these principles of global international law into domestic law. To put it in modest, whether pragmatic agency decision making is more effective than judicial textualism? The research methodology adopted is Descriptive, analytical, philosophical and explorative as well.

Key words: Formalism and Legal Realism – Environmental Sustainability - Climate Change – Economic Growth - Role of Indian Judiciary – Balancing approach.

INTRODUCTION

Sustainable Development as defined by the Brundtland Commission (United Nations, 1987) states that it should meet the needs of the present without compromising the ability of future generations to meet their own needs.¹ Climate Change is a concept of global concern and had become part of international debate and political change in 1988 as global warming felt through

depletion of ozone layer.² However, the prediction about the changes in atmospheric carbon dioxide levels (Green House Effect) and its effect on earth's surface was explored in a seminal paper by Svante Arrhenius, a Swedish scientist by 1896 that was much ignored at that point of time.³ Guy Callender⁴ portrayed the increase in Carbon dioxide that results in global warming in 1938. The preliminary juristic works proved to be realistic and today the protection of Environment is basically considered to be a basic Constitutional value for every nation and an 'erga omnes' obligation on the part of community of nations in an era of Liberal Transnationalism. The dangers of climate change has been realized from 1970's and 80's that resulted in Stockholm Conference 1982.

The next decade 1992 marked the birth of United Nations Framework Convention on Climate Change (UNFCCC). Certainly climate change raises tension between law and politics. As Economic Wealth being the criterion for human development Index of the countries the executive organ of the State finds it to be very difficult to make adequate policies as the industrial growth promotes prosperity of the country. Under this pretext comes the role of judiciary as one of the responsible organs of the state, so that it balances the sustainable developmental goals of 2030 regarding Environmental Protection. As the Nation progresses on one side and Protection of the Environment on the other, judiciary under the aegis of judicial accountability must adopt a balanced approach so that it does not violate one of the basic structures of the Indian Constitution i.e., Separation of Powers.

In Environmental governance the National Green Tribunal,⁵ Supreme court of India and High Courts play a pivotal role for the past few decades. In an era of transformative Constitutionalism, the individual has become a subject of its own significance under Article 21 of the Indian Constitution. To live a life with human dignity it is important that the social welfare State provides an Environment free from pollution and adequate policies are framed and properly implemented. With the advent of Public Interest Litigation the courts in India indeed strongly laid the milestone for growth of Environmental jurisprudence. On international level as well climate change is emerging as a discipline of study by itself as the world is defied with the large number of environmental conflicts. It is indeed a fact that the topographical and demographical position of India exhibits its vulnerability to climate change.

With this prologue this research article focusses on the role played by the Supreme Court of India in consonance with the international obligations assumed by the State under different Environmental Treaties.⁶ The study is based on the legal realism approach as dominating the Indian legal system in the aftermath of Emergencies declared by the executive and guides the building of Environmental jurisprudence along with other prioritized economic goals.

Approach towards the Legal system - A Jurisprudential analysis.

In the elongated history of Legal thought 'Legal Formalism' and 'Legal Realism' are the prominent jurisprudential thoughts that had generated several interpretative meanings and valences.⁷ Formalism and Realism are considered to be thesis and antithesis and prophesied with clatters. Actual adjudication i.e., the concrete way the judges decide the case is formalistic approach and as known to be 'Theory of judging' the judge could reach the requisite decision without resorting to non-legal normative reflections of mores or dogmatic philosophy.⁸ As opposed to this the Legal Realism considered being the most captivating development after World War II, it was a jurisprudential movement started during 1920's admonished for the

importance of incorporation's approach of social science to understand the manoeuvre of courts and improve their decision making.

Legal Realism, as it originated from American legal system emphasises upon rather sparring on to black letter law and syllogistic or deductive reasoning a judge may deviate from established norms of interpretation or decision making. Oliver Wendell Holmes, Jr, one of the most protuberant proponents of this philosophy,⁹ writes:

"The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

Legal Realism certainly meets with criticism, being involved the subjective considerations of the judges as their decisions may rely upon choices and the law might be manipulated and influenced by their personal, political and moral views.¹⁰ The textualist approach has been able to bring viable solution in USA¹¹ despite the vigorous debate among the legal fraternities with respect to applicability of the approach to environmental related issues. The climate change arises due to several influencing factors, it is quite impossible for the judicial system to adopt a rigid approach where the judicial system is accountable under the Suprema Lex, it is required to give sustainable and balanced solution to the global human life issues are concerned.

Understanding Legal Realism in Indian Legal system

India is a crucial component in the conundrum of the world climate. It is home to about twenty percent of the world's population, 2.4% of its land area, and 7-8% of all known species, which include 91,000 animal species and over 45,000 plant species.¹² Even though Legal realism is applauded for its pragmatism and sociological approach, under Indian legal context much criticism is based on the importation of extrajudicial tools for the interpretation and the inculcation of their own philosophical values so that it may result in fragmentation with judicial decisions governing same subject matter.

Realism as per Ronald Dworkin,¹³

"Judges actually decide cases according to their own political or moral tastes, and then choose an appropriate legal rule as a rationalization."

Jon Newman, Judge of the second circuit emphasises that

"The judge simply selects the result that best comports with personal values and then enlists, sometimes brutally, whatever doctrines arguably support the result."¹⁴

This part of discussion would like to analyse the contemporary trend of the Indian courts espousing the Legal Realism approach and crossing the traditional role of interpreting the law as such and strewing a new path of using extra-legal tools for new legal constructivism.

The graphic thesis apropos judicial decision-making

encompasses the Staple Claim of Legal Realism, that adjudicators "respond primarily to the stimulus of facts." The fundamental claim of Realism is to put it in a less formal way but accurately is that judges make decisions not so much on the basis of the relevant legal principles. A transient gaze at Indian constitutional jurisprudence will advocate that the courts have used foreign legal authorities and international law as tools of interpretation so that it results in complete transformation of Constitutional law into liberal transnationalism.¹⁵ The

latest approach of the Indian Constitutional courts ardently adopting the legal order of the foreign countries in Indian much valued cultural contextual background raise voices among the scholars¹⁶ and even the judges of the Supreme court have expressed in landmark judgments that India as a nation to be identified by its own tradition, culture, moral and ethical backgrounds.¹⁷The above observations raise the critical question of the legitimacy of the judiciary to cross its border while interpreting law associating the social interest and Public policies. This in turn raises the fundamental question of Indian societal background and its cultural values as the court's orientation as of now is inculcating a proactive foreign approach and domestication of international law into Indian constitutional scheme. Now the moot question is the solicitation of proper philosophical approach as the environmental protection issues are global in nature and need a holistic approach so that it inculcates the international jurisprudence as well. Remembering R.W.M. Dias in his chronological attestation submits "In a country like Britain which has remained comparatively stable, it has been easy to preserve the philosophy of analytical positivism in which the science of law is abstracted from social, moral and other value-considerations. But when tensions begin to convulse the very surface of national life, Jurists, let alone judges are compelled to make conscious decisions as to which way to steer if shipwreck is to be avoided."

Indian Supreme Court approach towards climate change litigation

As mentioned above Climate change is a matter of global challenge and community of Nations are setting a climate favourable goal as per the Paris Climate Agreement¹⁸ implementing Nationally Determined Contributions and mandatory updating. Hence it would be sceptical if we look the issues merely through the prism of textualistic approach. It is quite an established factum that environmental damages are not caused solely by single factor. In the litigation like *Urgenda Foundation vs Netherlands*¹⁹, the judgment is considered to be first in the history of international judicial decision on climate change jurisprudence, where the government was directed to take effective steps beyond the statutory mandates to reduce greenhouse gas emissions. From human rights perspective the Supreme Court of Netherlands applied 'Doctrine of Accountability' on the Dutch Government for management of carbon dioxide emissions. The court applied Article 21 of the Dutch Constitution, European Union Emissions on reduction targets, European Convention on Human Rights, No harm Principle of International Law, Doctrine of Hazardous negligence, and principle of Fairness, Precautionary and the prevention Principle incorporated in European climate policy and the sustainability principle protuberant in the UN Framework Convention on Climate Change. The court established the nexus between present necessary and prompt action and the future environmental consequences keeping the aim of producing policy or social change with respect to the issue.

This judgment establishes that climate litigation has to be dealt as an 'ergaomnes' obligation on the part of States to save the globe and future generations. To be more germane the court did clarify and positively affirm the question that a domestic court has the power to enforce the obligation of the national government towards international treaties. This decision has been hailed by UN High Commissioner for Human Rights as a landmark ruling that paves the way forward to approach the climate change issue as part of Human rights jurisprudence. Moving onto Indian perspective, it is indeed an existing fact that being a country with its outstanding

population, topographical location, and agriculture based as well as implementing globalisation regimes in an optimistic way, the judiciary of India is highly expected to interpret and implement the environmental protection standards in a precise way so that climate change is obliterated. If not the end result will produce more ramifications on the Nation building. Necessarily the truth must be accepted as there existed some sort of inertia on the part of legislature to bring law in promptu and lack of accountability on the part of executive as evidenced by the decisions of the Supreme Court in *Vishaka vs State of Rajasthan*.²⁰

It is a hard-edged fact to be acknowledged, through the journey of judicial activism doctrine of separation of powers, representative democracy had been given a blow, but the causes behind the activism of the courts is well established. India has an elongated history of Public Interest Litigation and the development of Environmental jurisprudence fervently started with the Bhopal Gas Leak disaster case.²¹ Justice P.N.Bhagwati in *M.C.Metha vs Union of India (Shriram Foods and Fertilizers)*²² brought in the concept of absolute liability as opposed to the English system of strict liability. The activism journey further air crafted with *Indian council for Enviro - Legal Action vs Union of India*,²³ *Vellore citizen's welfare forum vs Union of India*,²⁴ evolving the principles of 'Polluter pays' and 'Precautionary principle' and declaring those concepts to be customary rule of International law binding on India. Having the constitutional mandate under the protective umbrella of contempt of court, the judiciary could better implement their judicial decisions.

To utter in the words of Justice Krishna Iyer,²⁵ "Of course, new legislation is the best solution, but when lawmakers take for too long for social patience to suffer, as in this very case of prison reform, courts have to make-do with interpretation and carve on wood and sculpt on stone ready at hand and not wait for far away marble architecture". The need for a creative judiciary has been the necessity of time and there occurred a shift from traditional role to modernist role that made the judicial process more accessible, participatory and democratic. So far as Environmental jurisprudence is concerned the progressive path is pursued by the judiciary. Declaring right to healthy environment being a fundamental right, in the case of *Tirupathi v. State of A.P. & Others*²⁶ conglomerated the importance of sustainable development and the right of the future generations. In the categorical journey of Environmental protection the Indian judiciary has adopted two categorical approaches, i.e., Domestication of International Environmental law and Access to Environmental justice by National Green Tribunal (NGT). While adjudging on 'aggrieved person' it was the liberalistic approach adopted by the NGT in the case of *Samir Mehta v. Union of India*²⁷ held:

"Environment is not a subject which is person oriented but is society centric. The impact of environment is normally felt by a larger section of the society. Whenever environment is diluted or eroded the results are not person specific."

CONCLUSION

Realism becomes formalism at a point of time. Realism contains both cynical and Rule bound principles. It could be taken in a sense that it emphasizes upon the flaws, limitations and openness of law. It seems sceptical in the sense, as there exist bias and subjective influence of the person making authoritative decisions. The optimistic aspect lies in the evolution of rules and regulations as per the universal order. The doctrines and Principles stated above in climate change litigation are evolution by social actions and policy by international community of

nations and inculcated at domestic level. Once the principles are applied and settled it becomes a formalistic approach being established principles of law. The statement of Justice Cardoso to be kept in mind: No doubt there is a field within which judicial judgment moves untrammelled by fixed principles. Obscurity of statute or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function. We must not let these occasional and relatively rare instances blind our eyes to the innumerable instances where there is neither obscurity nor collision nor opportunity for diverse judgment.

Hence the answer would be to strike the balance between two approaches and attain the developmental goals. In *Hanuman Laxman Aroskar vs Union of India*,²⁸ the court noted the government failed in its duty to consider impacts on the environment. Both the Paris agreement and India's Nationally Determined Contribution to the Paris agreement as key aspects of India's Environmental rule of law and as reasons that the government was required to adequately balance the environmental concerns with airport development. The balancing attitude of the court is quite evident in *Ashish Kumar Garg v. State of Uttarakhand*.²⁹ The issue for deliberation was whether proposed felling of trees to widen roads would be against sustainable development. Applying balancing test, the court said that the amount of forest cover was more and it is not going to affect the habitat. In an era of transnational liberalism the courts in India are adopting the balanced approach between Economic growth and sustainable development.

Footer Note:

1 Ross Guest, 'The Economics of Sustainability in the context of Climate Change: An Overview' *Journal of World Business*, Volume 45, Issue 4, October 2010, p.326-335.

2 Peter Jackson, "Green Our World!", June 2007, Vol. XLIV, No. 2, Cf, <https://www.un.org/en/chronicle/article/stockholm-kyoto-brief-history-climate-change#:~:text=In%201988%2C%20global%20warming%20and,public%20debate%20and%20political%20agenda>, viewed on 12/02/2024.

3 Svante Arrhenius, Wikipedia, https://en.wikipedia.org/wiki/Svante_Arrhenius, viewed on 01/02/2024.

4 Climate Change, "The Calender Effect: Here is how the man is connected to human's to global warming in 1938", <https://www.weforum.org/agenda/2022/02/climate-change-global-warming-carbon-dioxide-fossil-fuels/> Viewed on 28/01/2024.

5 National Green Tribunal Act (2010), Section.14 – NGT has jurisdiction over all civil cases involving substantial question relating to environment (including enforcement of any legal right relating to environment) arising out of the implementation of the enactments specified in the schedule I of the 2010 Act. Dr. Naveen S. 'Climate Change and Indian Courts: Are we on the right Track', *VBCL Law Review*, December 2022, Issue VII, Vol. 1, pp. 81-102.

6 Article 51 of the Indian Constitution, 'The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another'.

7 Richard A. Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 1971 *International Journal of Law Management & Humanities* [Vol. 4 Iss 3; 1970], 2021. *International Journal of Law Management & Humanities* [ISSN 2581-5369].

- 8 Brian Leiter, Legal Formalism and Legal Realism: What is the Issue? *Legal Theory*, 16(2), Cambridge University Press 111-133. DOI:10.1017/S1352325210000121. Cf, Kumari Sweta, A Jurisprudential Analysis of Legal Formalism and Legal Realism under Indian Legal System, 2021. *International Journal of Law Management & Humanities* [ISSN 2581-5369].
- 9 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harvard Law Review* 457 (1897), reprinted in 110 *Harvard Law Review* 991 (1997), at 460-461.
- 10 Hakim Yasir Abbas, India's "Too Much Constructivism" Syndrome: A Critical Analysis of Indian Constitutional Regime in the Light of American Legal Realism, *IJLPP* (2014-15) Vol.1.1, p.5.
- 11 511 U.S. 328 (1994).
- 12 Eeshan Chaturvedi, Climate Change Litigation: Indian Perspective, *German Law Journal* (2021), 22, pp. 1459–1470, doi:10.1017/glj.2021.85, Cambridge University Press, p.1459.
- 13 Ronald Dworkin, *Taking Rights Seriously*, Cambridge: Harvard University Press, 1977, at p. 3.
- 14 Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 *Cal. L. Rev.* 200, 203 (1984); See also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, 44 (1980). [Cited in Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, *Texas Law Review*, December 1997, at p. 267 ; Steven J. Burton, *Judging in Good Faith*, 43 (1992). [Cited in Leiter, 1997, at 268]; Frederick Schauer, *Playing by the Rules*, 191 (1991). [Cited in Leiter, 1997, at 268]. 14 Robert Satter, *Doing Justice: A Trial Judge at Work*, 64 (1990). [Cited in Leiter, 1997 at 268].
- 15 *Kharak Singh v. State of Uttar Pradesh & Ors.*, AIR 1963 SC 129, *Bennett Coleman v. Union of India*, AIR 1973 SC 106, *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.
- 16 This zeal is well reflected in the way that the Indian constitutional courts have developed environmental jurisprudence. Due to the Supreme Court's interpretation of the Constitution, almost all of Indian legal jurisprudence regarding environmental law has been established. India's natural environment has been under the watchful eye of the Supreme Court, which gained notoriety as an activist court in the mid-1980s.; See, Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice*, in *Fifty Years of the Indian Supreme Court: Its Grasp and Reach*, pp. 156-210 (S.K. Verma, et. al. eds., 2000); Saptarishi Bandopadhyay, 'Because the Cart Situates the Horse: Unrecognised Movements Underlying the Indian Supreme Court's Internationalization of International Environmental Law', 50 *Indian J. Int'l. L.* 204 (2010).
- 17 It is conspicuous to note, Chief Justice Bhagwati stated in *M.C. Mehta v. Union of India*, (1987) 1 SCC 395 as follows: "We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for that matter in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence." [Id. at 421] ; *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 [The Hon'ble Supreme Court denied to apply the concept of "affirmative action" as it exists in U.S.A. to Indian conditions and stated that: "under these circumstances [where the social context in which the law is made], judgments from the US, while entitled to respect, must be approached with great caution, for their adoption

would lead to jettisoning of over half a century of our jurisprudence.” [Id. at 307]. Cf, Hakim Yasir Abbas, ‘Critical Analysis of the Role of Non-Indian Persuasive Authorities in Constitutional Interpretation’ CALQ (2013) Vol. 1.2.

18Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015,

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²⁰ AIR 1997 SC 3011.

²¹ AIR 1988 SC 1531.

²² AIR 1987 SCR (1) 819.

²³ 1996 AIR 1446.

²⁴ 1996 5 SCR 241

²⁵ Sunil Batra v. Delhi Administration, AIR 1978 SC 1548 (India) at Page 23.

²⁶ (2006) 3 SCC 549,

²⁷ O.A. No. 24 of 2011, Decided On: Aug. 23, 2016.

²⁸ M.A. No. 965 of 2019.

²⁹ Special Leave to Appeal (C) No (s). 12591/2022.