
ENVIRONMENTAL JURISPRUDENCE: EVOLUTION, PRINCIPLES, AND THE JUDICIAL ROLE IN A GLOBALIZED WORLD

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ABSTRACT

The most significant and fastest growing field in present day jurisprudence has been environmental jurisprudence. Developed in the context of an expanding global environmental problem, it has now come to be the domain of constitutional principles and activism, constitutional and international treaty law, having its origins in pollution control laws. This article retraces the path taken by environmental jurisprudence from initial efforts to limit the negative externalities generated by industries and the imaginative development of the right to life under Article 21 of the Indian constitution by the Indian Supreme Court, from the Trail Smelter Arbitration to the famous *Urgenda* decision in the Netherlands. This article analyses the underlying themes of environmental jurisprudence sustainable development, precaution and polluter pays principles and intergenerational equity and how courts have given expression to them in the international and Indian arenas, rendering them enforceable laws. The article will also seek to address the great irony of environmental jurisprudence: that at a time when rights-based judicial environmentalism is at its most potent, the disconnect between the law and reality has been at its widest. This paper contend that the way forward is not through adding to the list of environmental rights, but through creating the institutional, political and social conditions under which those rights could be effective.

Keywords: Environmental jurisprudence, sustainable development, precautionary principle, polluter pays, judicial activism, public interest litigation, constitutional environmental rights.

I. Introduction

There are few parts of modern law that encapsulate the fear of our age so effectively as environmental law. The brown of the river, the grey of the city, the whiteness of the receding glaciers these have ceased to be just natural occurrences. They are becoming legal ones. One by one, the world's court rooms are agreeing with the proposition that destruction of the natural environment is not a technical or policy issue but a breach of rights, the right to breathe clear air, to drink clear water, and the right to human dignity.

In the past the connection between law and the environment was limited and instrumental. Legal environmental provisions were seen as economic regulatory instruments; ways of controlling and managing resource use, industrial emissions, and rival claims to land and water. Nature had no standing in the courts, nor did it represent a basic condition for the exercise of human rights in the legal realm. For most of the twentieth century, pollution was considered nothing more than an unfortunate but unavoidable consequence of progress and it was dealt with through permits and fines issued by administrative authorities, rather than by the courts.

This notion was first disturbed in the 1970s, when scientific fear combined with political mobilization. The emergence of the Club of Rome's Limits to Growth in 1972, not long after the Stockholm Conference¹ on the Human Environment, indicated the emergence of a new, global sense of ecological limits. Legal orders, both international and domestic, were forced to react. The world saw the rapid rise of environmental protection laws. Within India, the Water Act of 1974, the Air Act of 1981, and the Environment Protection Act of 1986 established what was, and would turn out to be, a surprisingly potent new area of law.

The judiciary, above all other actors, made Indian environmental law dynamic. In the 1980's and '90's the Indian Supreme Court, under its liberal reading of Article 21 of the Constitution and under the ingenious device of Public Interest Litigation, began to impose state and private responsibility for the environment with a boldness few courts anywhere else have succeeded in emulating. Cases such as *M.C. Mehta v. Union of India*² and *Vellore Citizens Welfare Forum v. Union of India*³ have not just been cases that decided a dispute, they established a whole new

¹ Stockholm Declaration on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

² *M.C. Mehta v. Union of India*, (1987) 1 SCC 395.

³ *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647.

jurisprudence, one in which an individual's right to a clean environment is paramount.

The article endeavors to chart and critique that body of jurisprudence. Part II provides a historical survey, showing the path of environmental law from regulation-driven to a rights-driven form. Part III analyses the key doctrinal foundations upon which the intellectual edifice of environmental jurisprudence rests. Part IV studies the seminal contributions made by the Indian judiciary in general and the mechanisms employed, especially Public Interest Litigation and landmark cases, in particular. Part V places the developments within the country against the backdrop of global trends and progress. Part VI highlights the enduring obstacles relating to enforcement and capacity. Part VII offers a critical perspective on the gains and shortcomings of the discipline. Part VIII discusses future prospects.

II. The Evolution of Environmental Jurisprudence

A. From Regulation to Rights

The story of environmental jurisprudence is really the story of a slow but dramatic redefinition of the function of law. The first modern version of environmental law was simply administrative law for natural resources. Pollution was seen as a market failure, a kind of externality, that should be priced out or forbidden by law rather than as an offense against the individual human being, or against nature itself.

The legal framework was consistent with a broader cultural and philosophical consensus; nature was there to be utilized and it was law's job to mediate that utilization to prevent its harmful effects. 'Man's relationship with the environment was not characterized by a broad cultural and philosophical assumption that nature simply existed for him to use; rather, it constituted the organizational principle for the law in countries throughout the world.' The anthropocentric ideology that 'man is the only thing that matters; things only matter insofar as they serve some human purpose'-undergirded the laws of nuisance, property and the nascent environmental laws of the Industrial Age. Environmental claims were seen as little more than disputes between conflicting human needs.

The cracks in the construct described above started to appear unignorable from the 1960s and 70s. The US saw *Silent Spring* by Rachel Carson (1962) and the Santa Barbara oil spill (1969), which helped galvanise public imagination and the National Environmental Policy Act (1969)

and EPA (1970) brought into being a modern environmental regulatory state, whereas in India the insertion of Article. 48A and Art. 51A(g) to the Constitution via the 1976 amendments at last made environmental protection an integral part of the body of the Constitution, although the same did not change court behavior immediately.

B. The Indian Judicial Revolution

What transmuted Indian environmental law from an administrative framework to constitutional jurisprudence was essentially the Supreme Court's choice to read into the Article. 21 rights pertaining to the environment. It was articulated as a proposition in *Subhash Kumar v. State of Bihar* (1991)⁴ where Court asserted with language yet memorable: 'The right to life, guaranteed by Article 21 of the Constitution of India, and discussed herein, does not mean merely that life cannot be deprived except according to procedure established by law; it would be meaningless if it did not comprise the right to a healthy environment, to pollution free water and air'. This was hardly a trivial reading. This was the statement that environmental failures of the state are failures of the most primary kind, constitutional ones.

In *M.C. Mehta v. Union of India* (1987)⁵, another accident (oleum gas leak from the Shriram Food and Fertilizer plant in Delhi) resulted in the Supreme Court extending the boundaries even further. The hundred year old rule in *Rylands v. Fletcher* under which the defendant can escape liability by proving that the escape occurred due to the act of God, an act of a third party or an act of the plaintiff himself was found to be insufficient in this case, the court was in search of a novel doctrine, they invented it in the form of Absolute Liability: Chief Justice Bhagwati held, 'All enterprises that engage in inherently hazardous or dangerous activities have an absolute and non-delegable liability for any accident which occurs on account of carrying on such hazardous and dangerous activity. There are to be no exceptions at all; the deeper the pocket, the deeper the liability-this was an understandable rule and in India a just rule.'

The third of the doctrinal trio was completed by the *Vellore Citizens Welfare Forum* case in 1996⁶. The Court infused sustainable development and the precautionary principle into Indian law, stating them to be part of customary international law, binding on the Indian judiciary directly. The significance of the judgment was not just in its content, but also in its

⁴ *Subhash Kumar v. State of Bihar*, (1991) 1 SCC 598

⁵ *M.C. Mehta v. Union of India*, (1987) 1 SCC 395

⁶ *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647

methodology. The Court analyzed international instruments, relied on the Brundtland Report⁷ and gave binding domestic effect to these international norms-an exceptional instance of judicial cosmopolitanism and service to the environment.

C. Moving from Anthropocentrism to Ecocentrism

In recent times, there seems to have been a nascent emergence in this paradigm-an ideological shift from anthropocentrism toward ecocentrism. Under the earlier paradigm, even in rights-based terminology, environmental preservation served as an instrumental means toward enhancing human health, well-being, and dignity, which are in all essence utterly reliant upon a healthy environment. Emerging ecocentrism states not merely that nature should be preserved and law should protect it, but rather that nature holds an intrinsic value independent of its utilitarian worth to humans.

Progress toward this end has been limited yet promising in India. In *Animal Welfare Board of India v. A. Nagaraja* (2014)⁸, the Supreme Court of India bestowed certain rights upon animals, including the right to live in a humane environment. Most startling, however, was the 2017 New Zealand Parliament's granting of legal personhood to the Whanganui River. The implications for the future of environmental law on a global scale are staggering.

III. Core Principles of Environmental Jurisprudence

There are certain principles at the core of the subject of environmental jurisprudence; these principles function both as rules of law as well as moral commitments. There is no single law that conjured these principles *ex nihilo*; rather, over the past many decades, these principles evolved through the interplay of science and politics and law. These principles arose through successive rounds of legislative process, political bargaining and adjudication, Stockholm to Rio, Brundtland Commission to National Green Tribunal and understanding these principles is central to grasping this subject.

A. Sustainable Development

Of all the terms used in environmental law, 'sustainable development' is undoubtedly the most frequently invoked and the most contested. It articulates a seemingly easy idea that human

⁷ World Commission on Environment and Development, *Our Common Future* (1987).

⁸ *Animal Welfare Bd. of India v. A. Nagaraja*, (2014) 7 SCC 547

beings can exploit the planet's resources for present ends only if they do not prejudice the ability of subsequent human beings to fulfill their ends. Framed in this way by the Brundtland Commission in 1987⁹, the concept began its global march to be written into constitutions, laws and judgments from one end of the world to the other.

For India, the aspiration of sustainable development is also a constitutional value. Vellore Citizens Welfare Forum¹⁰ ruled that it was part of the municipal law, an affirmation which has been subsequently upheld by a number of decisions. It necessitates, in practice, a fairly finely balanced judgment, courts and legislators needing to consider the requirements of economic development and environmental protection, balancing one against the other to the extent that neither can fully consume the other. This cannot be an easy process and has not always been successfully executed by the courts. The principle itself-that environmental protection and economic development need not be mutually exclusive-is, however, a step forward on from the comparatively crude mechanisms of earlier regulatory law.

B. The Precautionary Principle

The precautionary principle is unique among the provisions of environmental law in that it specifically addresses uncertainty¹¹- what science doesn't yet know about a projected action and the potential consequences of that action. The essential command is clear: where there are threats of serious or irreversible damage to the environment, lack of scientific certainty should not postpone cost-effective measures to prevent environmental damage.

The consequences of this are startling. It overturns the usual assumption of regulatory law - that harm is to be proven, and safety is to be taken on trust; it places the burden on to those asserting safety. In the environmental sphere, this would mean that it would be the government or the industry that wishes to carry out an activity (such as a new technology, or development, or ecosystem modification) that presents the possibility of causing serious harm that must prove, to the highest possible scientific confidence, that it will not. The activity will otherwise not proceed, however economically desirable it may be.

The precautionary principle has been given an enthusiastic welcome by the Indian courts. In

⁹ World Commission on Environment and Development, *Our Common Future* (1987).

¹⁰ Vellore Citizens Welfare Forum v. Union of India, (1996) 5 SCC 647

¹¹ Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Aug. 12, 1992).

Vellore Citizens Welfare Forum and subsequent cases, it has been interpreted by the Indian Supreme Court as meaning that in environmental cases the burden of proof will fall upon the developer and not the victims of alleged harm. This has real implications for Indian law in the sense that it is far more difficult for industries to achieve environmental clearance simply by showing that no harm is proven. It also allows communities and courts to require industries to prove it is safe for a project to go ahead.

C. The Polluter Pays Principle

At the surface, the 'polluter pays' principle is one that is economically sensible. If one causes harm to the environment, it would make economic sense to require that party to pay the costs of remedying the damage done to the environment. The reason for its rationality is based on the economics it is an externally generated bad and the internalisation of this externality through legal principles of liability is sensible not only in terms of efficient resource use but also in terms of fairness or distributive justice. But in the case of Indian Courts, the 'polluter pays' has been vested with an almost immediate and aggressive effect.

The landmark case was Indian Council for Enviro-Legal Action v. Union of India (1996)¹², where the Supreme Court was faced with the miserable condition of Bichhri village, Rajasthan, where industries were dumping toxic effluents from chemical plants untreated, causing lasting and damaging effects on the land, groundwater and the lives of people inhabiting the region. It held the industries liable for remediation expenses and damages to villagers, thereby putting an end to the notion that polluters would be free by blaming the poor and ignorance or governmental inaction.

D. Intergenerational Equity

The most philosophically interesting of the principles underlying contemporary environmental ethics is arguably the principle of intergenerational equity, or the assertion that the present generation owes duties not merely to its contemporaries, but to unborn people. This principle follows directly from the principle of sustainable development but explicates what the principle of sustainable development, in some accounts, might assume. That is to say, 'present humans 'hold' the resources of this earth 'in trust' for all humankind, past, present and future

¹² Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 SCC 212

generations’.

Perhaps the most radical judicial invocation of the principle is by the Philippine Supreme Court in the case of *Minors Oposa v. Secretary of the Department of Environment and Natural Resources* (1993)¹³. The Court ruled that minor children have standing to sue on their own and future generations’ behalf, on the grounds that the environmental provisions in the Philippine Constitution give rights that can be enforced by future persons. The case was internationally hailed and has since been influential on courts in India, South Africa and elsewhere. The fundamental concept that future generations are not a rhetorical phrase but legal stakeholders of some nature is slowly gaining ground in environmental law.

IV. The Judiciary as Environmental Guardian

A. Public Interest Litigation and The Democratization of Environmental Justice

The Indian environmental jurisprudence has arguably been best shaped by the Supreme Court of India, through public interest litigation (PIL). PIL arose in the early 1980’s owing to the general understanding that the Indian legal system had become inaccessible to the majority in India, that it was unavailable for the illiterate, the poor, the marginalized to enforce their rights under law. The pioneering liberalization of locus standi by P.N. Bhagwati, Supreme Court Justice, announced in *S.P. Gupta v. Union of India* (1982), removed obstacles to approaching the court: any individual acting bona fide in the public interest could approach the Supreme Court. For environmental law, this led to a paradigm shift.

PIL allowed interested citizens, non-governmental organizations, reporters, and academics to put environmental cases before the apex courts in India without demonstrating that they personally, directly, and concretely suffered from environmental degradation. The number of environmental lawsuits skyrocketed and placed truly fundamental questions before the courts, the pollution of the Ganga, the destruction of mangrove forests, the management of hazardous waste, the contamination of the air over cities. In decision after decision, the Court not only declared legal principles, but also took on continuing mandamus: continued oversight and a role in directing government agencies that can extend for years or even decades.

The most astonishing illustration of this trend began in 1995 with the *T.N. Godavarman*

¹³ *Minors Oposa v. Sec’y of the Dep’t of Env’t & Nat. Res.*, G.R. No. 101083, 224 S.C.R.A. 792 (Phil. 1993).

Thirumulpad forest conservation case¹⁴, and its ongoing orders are still managing forests for nearly thirty years, a demonstration of judicial governance unprecedented in any democracy, anywhere in the world. It will take us to the question of whether it is an experience to be emulated or a lesson for the boundaries of judicial competence.

B. The National Green Tribunal

With the institution of the National Green Tribunal (NGT) in 2010, there has been an institutional recognition that environmental litigation warrants specialized adjudication. In effect, the NGT embodies the intersection of legal and scientific know-how by ensuring that its benches comprise both judicial members as well as technical members with expertise in fields like environmental science and ecology. It can also grant damages and penalties and order remediation. It applies the precautionary principle and the polluter pays principle as statutory mandates.

In the decade-plus that it has been functioning the NGT has heard over tens of thousands of cases on diverse issues like groundwater contamination, mining, waste disposal and restoration of wetlands. While it certainly demonstrates both the promise and peril of specialized environmental litigation, its expertise may have indeed helped improve the quality of environmental decision-making in cases that come before it. Its effectiveness in redressing governance failures and its immunity to political pressure is yet to be conclusively determined.

C. Judicial Activism: Promise and Peril

The transformative intervention of the Indian judiciary in the environmental field is a cause both for celebration and concern. Those who celebrate the court's achievement cite a series of gains: a complex body of environmental law has been put in place; previously immune, powerful actors from the business sector have been held accountable; environmental rights have been vindicated for communities otherwise powerless to enforce them. However, critics offer compelling criticisms of the judicial role in environmental governance, questioning the courts' democratic legitimacy and their capacity to assume long-term management responsibilities over environmental problems.

The legitimacy criticism is more than a purely technical one. When courts start running forest

¹⁴ T.N. Godavarman Thirumulpad v. Union of India, (1997) 2 SCC 267

policy, ordering the clean-up of rivers, regulating the placement of industries, they are usurping the decision-making powers vested by constitutional arrangements in the executive and eventually in the elected legislatures. Judicial over-reach that serves to protect individual rights from the tyranny of majority rule, becomes questionable when judges are not merely nullifying illegal executive actions, but stepping into executive boots themselves and thereby engaging in direct administration of environmental policy over a sustained period.

The capacity concern is no less profound. Courts are neither institutionally designed, procedurally structured, nor professionally equipped to deal with the complex, time-consuming, and evidence-intensive job of environmental regulation and management. The courts lack the expertise of dedicated technical agencies, the institutional flexibility of administrative mechanisms and the political accountability of representatives. The judiciary is often ill-equipped to manage the environment, and its intervention does not necessarily improve environmental quality but results in mere diffusion of accountability instead of diffusion of administrative burden.

V. The International Dimension

A. The Trail Smelter and the Foundations of International Environmental Law

The story of international environmental law really began with a dispute between the United States and Canada concerning the fumes originating from a Canadian lead and zinc smelter and affecting crops and property in the State of Washington. The Trail Smelter Arbitration of 1941¹⁵, a decision rendered long before the modern environmental era, established a principle of fundamental importance for international environmental law to this day: ‘no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another state.’ That is, no state has the right to cause transfrontier environmental damage. That concept forms the bedrock of contemporary international environmental law. The principle was codified and elaborated in 1972 at the Stockholm Conference by Principle 21 of the Stockholm Declaration¹⁶; it attempted to reconcile the right of the state to sovereign use of natural resources with a responsibility to ensure that such use of natural resources within state jurisdiction does not cause damage to the environment of other states or areas beyond national jurisdiction. The principle was reaffirmed in 1992 in the Rio

¹⁵ Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1938 & 1941).

¹⁶ Stockholm Declaration on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

Declaration¹⁷, and that Declaration added the element of impact assessment- now established, after the ICJ's ruling in Pulp Mills, as an obligation of general international law.

B. The ICJ and International Environmental Adjudication

The International Court of Justice has, in a rather limited and circumscribed fashion, certainly been a force in international environmental law. The 1997 Gabkovo-Nagymaros¹⁸ case, originating from the dispute between Hungary and Slovakia over a major dam on the Danube, provided the International Court of Justice with its most substantial dealings with the principle of sustainable development, and while only on one occasion with it directly, its consideration within the lengthy and impactful separate opinion of Judge Weeramantry provided a framework by which it could be understood as both a norm of mediating between inconsistent treaty obligations, and a principle of general customary international law. In the Pulp Mills case (2010¹⁹), this approach was extended so far as to regard the principle of environmental impact assessment as a rule of general international law, rather than only domestic administrative law, and a procedural, not legally operative breach. It could therefore no longer be considered by states to be only an internal administrative procedure; it was an obligation toward the international community.

C. Climate Change and the New Frontier

The single greatest threat to international environmental law today is obviously climate change. The 2015 Paris Agreement²⁰, in its structure of nationally determined contributions and its ambitious temperature targets, provides the most advanced multinational response to the climate change challenge, yet the legal structure of the Agreement is intentionally soft on enforcement: the NDCs are voluntary and determined at the domestic level; no enforcement penalties are available for failure to reach them. The gap between the normative aspirations of the Agreement and the legal means by which those goals are to be met remains very wide.

National courts are now beginning to fill the enforcement vacuum that international law can only inadequately address. In Urgenda Foundation v. State of the Netherlands²¹, where the

¹⁷ Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Aug. 12, 1992).

¹⁸ Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. 7.

¹⁹ Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14.

²⁰ Paris Agreement, Dec. 12, 2015, T.I.A.S. No. 16-1104.

²¹ Urgenda Found. v. State of the Neth., ECLI:NL:HR:2019:2007 (Hoge Raad Dec. 20, 2019)

Dutch Supreme Court required the state to reduce greenhouse gas emissions by at least 25% by 2020 based on the rationale that failing to do so would be in breach of a right to life guaranteed by the ECHR (2019), we witness the establishment of climate litigation as an effective force of environmental governance. Since then, litigation and favourable judgements have occurred or at least been filed in numerous jurisdictions (Germany, Australia, Colombia, etc.), giving birth to the global climate litigation movement.

VI. Persistent Challenges in Environmental Jurisprudence

For all its theoretical accomplishments, environmental jurisprudence labors under an obvious, dispiriting fact: even in those countries with the most advanced systems of environmental law, environmental degradation continues, and in many instances accelerates. India is a good example. There is a sophisticated doctrine system embodied in the Indian constitution, an independent body to take care of the environmental issues, and a very vibrant environmental jurisprudence emerging from the apex court of India, as active as anywhere else in the world. Still, the Indian cities remain among the most polluted on the earth, the rivers most impure and forests are declining.

A. The Implementation Gap

The problem is most fundamentally that which scholars and practitioners refer to as the ‘implementation gap’-the difference between the norm and the social fact. Laws and court orders on the environment cannot write their own ticket. Enforcement depends on agencies that are properly staffed, funded and independent from political pressure. It depends on prosecutors who are willing to bring actions against polluters, judges who can comprehend scientific testimony about environmental contamination, and a society that values environmental compliance as a rule. India has, for a number of reasons, the relevant, but not sufficient, conditions.

The pervasive under-resourcing of environmental regulatory agencies perhaps offers the most direct illustration of the implementation gap. The Central and State Pollution Control Boards have the responsibility of monitoring pollution in one of the largest countries and one of the world’s largest industrial sectors. They are attempting to do this with an infinitely smaller budget and fewer personnel than comparable agencies in the EU and the US. There is no dishonesty or cynicism in that, merely incompetence. The law says that such pollution should

not be accepted. The violations are pervasive. But there is no infrastructure for prosecuting them.

B. Corporate Power and Regulatory Capture

Secondly, and perhaps of greater concern, is that environmental management is shaped by the private sector. The nature of the relationships between the industry sector and the regulator in developing countries can often be described in terms of the concept of regulatory capture, where the regulatory agency slowly moves towards seeing things from the perspective of the regulated industry. The study of environmental impacts might be commissioned from consultants funded by the project developer; pollution data may be generated by the polluting facility itself; and enforcement action may be postponed or abandoned due to political influence by financially powerful agents.

The judiciary has been quick to respond to this threat and has often stepped in to prevent capture. However, the role of the judiciary cannot replace institutional changes in regulatory institutions. If the regulatory agencies do not receive sufficient funding from their budget, if the civil service position of officials is not secure and if the agency's institutional culture continues to be one of cooperation rather than enforcement, the problem of the implementation gap would never be solved.

C. The North-South Divide

There is an underlying structural tension in international environmental law which no amount of doctrinal nicety can overcome: the tension between states' commitments to the environment and the developing world's commitment to development; in other words, between all states' awareness of the need for an environment and the undeveloped world's wish to gain developed status. This was initially evident in the arguments leading to the Stockholm Conference when the developing world demanded that they be given the right to development and not just the right to be polluted, and it has never been resolved since.

The system of NDCs that underlies the architecture of the Paris Agreement is now the international community's answer to this structural tension. Rather than obliging every state to do the same thing, it allows each state to decide for itself the scale of its contribution, taking into account the circumstances that affect it. This has the advantage that it is politically palatable

but environmentally disastrous: as every commentator has said, the sum total of the existing NDCs will not be nearly enough to achieve the target temperatures laid out in the Paris Agreement. The central dilemma that still exists is the tension between fairness and ambition: between differentiated responsibility as it exists between rich and poor countries, and the intensity of action required to deal with the problem of climate change.

VII. Critical Analysis: Achievements and Limitations

To say anything honest about environmental law is to be capable of holding two seemingly contradictory claims at once. The first claim is that, for all their problems, what has been accomplished in the last half-century is real. In the words of one influential judge, constitutional environmental rights, fundamental principles such as sustainable development and the precautionary principle, enlarged access to justice via public interest litigation, and an ever more robust body of international environmental law have established a legal regime that, whatever its limitations in enforcement, does impose a real limit on state and corporate liberty to pollute and degrade at will. The second claim is that what has been accomplished is not enough. As one can easily see by looking at environmental indicators worldwide, the pace of the climate crisis, the accelerating collapse of biodiversity, and the existing legal structures have not halted this destructive trajectory. This is not, principally, a failing of the law. It is a failing of political will, institutional capacity, and social organization. Environmental law does, though, play a role in that failing, and understanding its role can help inform its improvement.

A. The Limits of Rights-Based Approaches

However, the greatest benefit of the rights-based approach to environmental protection—its potential to create judicially enforceable duties and make environmental interests immune from normal political horse-trading—is also the source of its weakness. Rights are absolute in form, even if their content may be controversial; and while they are susceptible to dramatic judicial declarations, they are ill-suited for the kinds of incremental, bargained-for, evidence-based decision-making that actual environmental management entails. While the Supreme Court’s holding that a right to life entails a right to a clean environment is hugely significant as a constitutional matter, the holding alone does not indicate what level of pollution will be constitutionally intolerable, nor does it provide guidance regarding how best to allocate limited resources to environmental protection over competing concerns, nor does it answer how the environmental rights of, say, an impoverished rural community dependent on a polluting

industry can best be balanced with the environmental rights of the broader public. These are questions which courts cannot answer; they are questions that call for democratic deliberation informed by science and the expertise of administrative agencies. Environmental law, perhaps, has been too quick to believe that these questions can be answered by law and too slow to develop legal doctrine that facilitates the resolution of these issues through democratic processes.

B. Toward More Effective Environmental Governance

What we need, therefore, is not less environmental law but better environmental law that is more mindful of the institutional features of environmental regulation, that defers to democratic processes while not becoming inattentive to democratic failings, and that takes creativity in remedies not to replace executive management with judicial management but to enable institutions to develop and maintain themselves. We need, in short, doctrines imposing constitutional requirements of public support (financial and human) for environmental institutions; doctrines of public information and participation in environmental decision-making; doctrines of corporate responsibility for the systemic costs of regulatory corruption (and not just the direct costs of the pollution); and doctrines strengthening the international law of the environment, creating liability for states that cause trans-boundary environmental injury and the atmosphere and oceans as common.

VIII. Conclusion

Environmental jurisprudence has indeed come a long way from a time when pollution was considered a regrettable but acceptable cost of development. Over half a century of imaginative judicial interpretation, bold legislative action, and international treaty-making has produced a jurisprudence that has transformed the environment from an object to be managed into a right-holder and obligation-bearer within an established institutional order. In its long evolutionary path, it has laid down key principles of sustainable development, the precautionary principle, polluter pays principle and intergenerational equity; yet, these have been translated and tested in the realm of actual conflicts, that too in cases that had profound effects for actual human beings. Notwithstanding these developments, the environment continues to degrade, the implementation deficit is increasing, and forces of politics and profit-making continue to strongly oppose any move for good environmental governance. Even where it has managed to give formal recognition of environmental rights, their realization in the shape of clear rivers,

pure air, expected climate, sound ecosystems, and liveable future for the coming generations stands as its greatest challenge.

Success in this endeavor will transcend technical legal expertise, although that too will be indispensable. It will demand political will, institutional investment, participatory democratic processes, and an evolution of human perception towards nature. The jurisprudential contribution to these broader aims will be in the norm-setting role of environmental law, in its function of demanding accountability from power structures, in providing an independent voice for the otherwise silenced, and most importantly, in maintaining that the long-term future of the earth, despite all short-term inducements otherwise, represents a legal commitment, not merely a political vision.

The pathway for environmental law is to adopt a comprehensive view, such as this one, in which law is not just rules that will be policed and punished, but rather as one vehicle among many through which societies may bargain over responsibilities to one another, to the natural world, and to posterity.

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