

## Excessive Improvement by Judicial Activism: (For Pollution Free Environment)

Dr. Ved Prakash Rai\*  
Dilip Kumar\*

In recent years, in the face of these and other findings, the Supreme Court has spurred major environmental actions such as relocating polluting industries out of Delhi and replacing diesel with compressed natural gas in public transport. In so doing, the court has expanded the scope of "the right to life"-a concept enshrined in the constitution of India-to include the right to a clean and healthy environment.

"It is not as if the court is encroaching upon territories of legislature or government-it is only protecting citizen rights guaranteed under the constitution and various laws like the Environment Act," points out Sanjay Parikh, a Supreme Court attorney representing the public interest in the hazardous waste case. "If the state does not fulfill its legal and constitutional obligations, then the court can direct it to do so."

Under the Indian constitution the Supreme Court's directives are to be treated as law until the government enacts suitable legislation or changes existing regulations. This often happens in response to petitions filed by individuals or groups, but may also be initiated by the Supreme Court itself. At times, ever, informal complaints, written on postcards and sent to the court have been treated as petitions and proceedings initiated.

In the case of hazardous waste, the Supreme Court intervened because the government has signed the Basel Convention but failed to change the rules to check the import of hazardous waste it was the court's intervention that led to regulatory mechanisms and procedures for the import, transport, storage, recycling and final disposal of hazardous waste.

Most importantly, these constitutional provisions are making a substantial contribution to improving people's lives and well-being. Benefits include improved access to safe drinking water, cleaner air,

Associate Prof., Head & Dean Faculty of Law N.G.B. Vishwavidyalaya, Allahabad

Assistant Prof. Law (Research Scholar) N.G.B. Vishwavidyalaya, Allahabad.

more effective sanitation and waste management practices, more sustainable approaches to managing natural resources, and healthier ecosystems. Among the many laws spurred, at least in part, by constitutional environmental protection are national laws related to environmental education in nations including the Courts in India, Argentina, and the Philippines have issued creative orders requiring governments to develop and implement environmental education programs.<sup>1</sup>

The French Charter for the Environment reportedly revitalized environmental education in France. Also, extensive efforts have been made by international agencies to educate judges, enforcement agencies, prosecutors, and other groups involved in the implementation and enforcement of environmental laws about the right to a healthy environment.

### The Impact on Environmental Performance

While the foregoing developments are impressive, the ultimate test of constitutional environmental rights is whether they contribute to cleaner air and water and healthier people and ecosystems. This positive relationship was consistent in a heterogeneous group of 150 nations from across the world and in two smaller, more homogeneous groups of nations.<sup>2</sup>

The evidence in this regard is strikingly positive. Nations with environmental provisions in their constitutions have smaller ecological footprints, rank higher on comprehensive indices of environmental indicators created by researchers at Simon Fraser University and the Conference Board of Canada, are more likely to ratify international environmental agreements, and made faster progress in reducing emissions of sulfur dioxide, nitrogen oxides, and greenhouse gases than nations without such provisions.<sup>3</sup>

The consistency of the correlation between constitutional protection for the environment and superior environmental performance across three indices and four indicators provides persuasive, albeit not conclusive, evidence of substantial influence. There are other potential explanations for this pattern. For example, it might be that the causal relationship works in the other direction-a nation with strong environmental policies and broad public support for environmental protection may be more likely to entrench constitutional environmental rights.

### Implementing to Constitutional Environmental Responsibilities:

In such circumstances, the costs of implementing constitutional environmental responsibilities could be perceived as small. However,

when the consistent relationship between constitutional provisions and superior environmental performance is combined with the evidence of stronger environmental legislation, enhanced opportunities for public participation in environmental governance, and increasing enforcement of environmental laws, the case for entrenching environmental protection in national constitutions must be regarded as compelling. Most importantly, these constitutional provisions are making a substantial contribution to improving people's lives and well-being. Benefits include improved access to safe drinking water, cleaner air, more effective sanitation and waste management practices, more sustainable approaches to managing natural resources, and healthier ecosystems.

### **The Challenges Ahead**

Environmental rights have not been used to systematically trump other rights, with legislators and judges opting instead for careful balancing. There has been no flood of frivolous litigation, as lawsuits based on the right to a healthy environment represent a small fraction of the total number of constitutional cases in any given nation and enjoy a high success rate. Few of the potential downsides of constitutional environmental rights have materialized. The widespread reliance on the right to a healthy environment by citizens, legislatures, and courts demonstrates that it is not too vague to be implemented, nor does it duplicate the protection offered by existing human rights and environmental laws.

### **Two critiques have some degree of validity.**

**First**, there are some countries where constitutional environmental rights and responsibilities have had minimal impact. The absence of the rule of law, widespread poverty, civil wars, or authoritarian governments can pose daunting obstacles to progress in realizing human rights, including the right to a healthy environment. Thus the constitutional environmental provisions have not yet had a discernible effect in Sub-Saharan Africa.<sup>4</sup>

**Second, excessive judicial activism** can undermine democracy by shifting power from elected politicians to unelected judges. The most prominent example is the Supreme Court of India, which has been accused of exceeding its reach in several high-profile cases, involving motor vehicles in Delhi, pollution of the Ganges River, and forest conservation.<sup>5</sup> The Indian Supreme Court's actions can be defended as responding to government's persistent failure to implement and enforce

its environmental laws, as mandated by the constitution.

### **In general, however, excessive judicial activism is rare:**

There are still dozens of countries that have not incorporated environmental rights into their constitutions, including the United States, Canada, China, Japan, Australia, and New Zealand. Some of these countries refuse to recognize that the right at all, making constitutional recognition unlikely in the short term. In response to a case brought for the Inter-American Commission on Human Rights citizens of the U.S. government argued that no right to a healthy environment exists under international law.<sup>6</sup> The U.S. government claimed that the right would not apply to American citizens, since the United States had persistently objected to the recognition of such a right. In China, it is likely that meaningful recognition of the right to a healthy environment and other human rights will have to wait until the current authoritarian government is replaced.

### **Another some countries amending in his constitution:**

Like wise the Denmark and Canada's constitution is also notoriously hard to amend. In countries whose constitutions are silent on the environment, options for moving forward include legislative recognition of the right to a healthy environment, litigation that seeks to establish that the right is implicit in another constitutional right, or recognition at the sub national level.<sup>7</sup>

In the United Kingdom, a joint committee of the House of Commons and the House of Lords recommended that the right to a healthy environment be included in a proposed United Kingdom Bill of Rights.<sup>8</sup> Canada came close to legislation environmental bill of rights in 2011.<sup>9</sup> While ordinary laws recognizing the right to a healthy environment lack the legal strength and symbolic power of constitutional provisions, they are a step in the right direction.

From Argentina to Israel-where the constitution did not include explicit environmental rights, supreme or constitutional courts have ruled that the right to life includes an implicit right to a healthy environment.<sup>10</sup> In a typical example of judicial reasoning, Quoted that 'since a clean and healthy environment is an essential element for our survival, the right to life encompasses the right to a clean and healthy environment.'<sup>11</sup>

### **Right to Live as a Healthy Environment:**

The right to live in a healthy environment continues to gain rec-

ognition. New constitutions incorporating the right to a healthy environment were enacted in Kenya and the Dominican Republic in 2010 and in Jamaica, Morocco, and South Sudan in 2011. New constitutions in Iceland and Zambia, pending formal approval, include the right. A broad coalition of Zimbabwean civil society organizations has called for the drafting of a new constitution with a 'justiciable Bill of Rights that recognizes civil, political, social, economic, cultural and environmental rights.'<sup>12</sup>

The *UN Human Rights Council* appointed an independent expert to report on the universal right to a healthy environment.<sup>13</sup> In communities, legislatures, and courtrooms around the world, a new human right is blossoming from seeds planted decades ago. The constitutional right to live in a healthy environment represents a tangible embodiment of hope, an aspiration that the destructive, polluting ways of the past can be replaced by cleaner, greener societies in the future.

Overall no nation has yet achieved the holy grail of ecological sustainability; the evidence indicates that constitutional protection of environmental rights can be a powerful and potentially transformative step toward that elusive goal.<sup>14</sup> Recently stated, "I am very excited about the move to rights-based environmentalism. Lord knows we need some stronger approaches."

#### References

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3. 30 members of the Organization for Economic Cooperation and Development and 17 large, wealthy democracies
4. e.g., effective legal institutions, including an independent judiciary
5. Delhi motor vehicle pollution-M.C. Mehta v. Union of India, 2002 (4) SCC 356; Ganges pollution-M. C. Mehta v. Union of India, AIR 1988 SC 1115; forest conservation-T. N. Godavarman Tirumulpad v. Union of India, AIR 1999 SC 43.
6. Mossman Environmental Action Now v. United States (2010), Report no. 43/10, 17 March 2010
7. S. J. Turner, A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers Towards the Environment (New York: Kluwer Law, 2009).
8. UK House of Commons and House of Lords Joint Committee

- on Human Rights, Twenty-ninth Report (London: House of Lords, 2008).
9. Canadian Environmental Bill of Rights, Bill C-469, 40th Parliament, 3rd Session. Bill C-469.
10. D. Boyd, "The Implicit Constitutional Right to a Healthy Environment," Review of European Community and International Environmental Law 20, no. 2 (2011): 171-179.
11. Suray Prasad Sharma Dhungel v. Godavari Marble Industries and Others (1995), WP 35/1991, S.C. of Nepal
12. Cambridge, MA: Harvard Law School International Human Rights Clinic, 2009), p. 80.
13. UNHR Council, Resolution on Human Rights and the Environment, A/HRC/19/L.8/Rev.1, 20 March (2012).
14. As Gus Speth, former dean of the Yale School of Forestry,

