

**PROF. S.K.BOSE MEMORIAL  
LECTURE,2002**  
**ON**  
**LEGAL ASPESTS OF ENVIRONMENTAL  
PROTECTION**

**BY**  
**Prof. N.R.MADHAVA MENON**  
**VICE-CHANCELLOR**  
**W.B.NATIONAL UNIVERSITY OF JURIDICAL SCIENCES**



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Esteemed Director and Members of the Faculty and Students, It is always a pleasure for an academic like me to visit centre's of higher learning which have acquired national and international reputation for scientific and scholarly contributions spanning several decades. The pleasure is all the more greater when you are asked to honour a fellow teacher who distinguished himself for scholarly contributions and in the making of the institution in its early periods. I thank the Director Dr. Bimalendu Bhushan Bhattacharya for the invitation and pay my respectful homage to that teacher and institution-builder, the late Prof. S. K. Bose in whose memory this lecture is being organized today.

I did not have the privilege to know Prof. Sudhanshu Kumar Bose, a Geology graduate of Calcutta University who later went to the Royal School of Mines in England to study Mining Engineering. It must have been a remarkable achievement for the young Bose to have studied the subject in a world class institution in the early part of last century when higher education was not accessible to average Indians however talented they might be. To become a professor at the age of 28 and to assume the role of head of the department of metal mining should have been a rare experience for Prof Bose working amidst Englishmen who would not admit equality of Indians however eminent they be. This institution on which Indian engineering community is justifiably proud owes a great deal to the pioneering efforts of Prof. Bose who, I understand, was a greatly admired teacher. May I once again pay my humble tributes to this great Indian scholar and scientist.

I have agreed to speak on the topic of environmental law for this memorial lecture. This is a subject which is critical for human survival and is one which brings the legal community closer to the scientific community.

The objects of environmental law are sustainable use of natural resources, prevention of avoidable injuries and distribution of risks inevitable in the process of development. In this regard environmental protection is the product of environmental law, environmental technology, environmental economics and of environmental management. In other words, unlike many other branches of law, environmental law is not confined to apportionment of rights and duties and adjudication of disputes arising therefrom. It is just a small component of environmental law. More importantly it is a policy instrument designed to manage natural resources intelligently with a view to moderate its use for sustainability, inter-generational equity and avoidance of irreparable consequences. In all these policy goals, it is science and technology which play a critical role. Hence one cannot see environmental law divorced from environmental sciences which, in turn, is a hybrid science of several knowledges across the scientific world. It is law and management which integrate these sciences at the policy level and provide for its functional application in pollution control and risk reduction. It is thus the single most important area of governance where science and technology meets jurisprudence more often and decisively. Lawyers can do nothing without the help of scientist in environmental issues. We need a new breed of scientist-lawyer for environmental control including disaster management. Perhaps in the area of environmental issues-relating to mining and petroleum, Indian School of Mines can have an academic relationship with the National University of Juridical Sciences which will not only be mutually beneficial but also essential for evolving integrated approach to knowledge for human development

#### Role of Law in Environment:

In the continuing pursuit for development, demands for land, water, forest, energy, minerals etc. constantly increases which, in turn, cause deforestation, displacement of people, generation of waste, population, disasters and diseases. The function of law is to take a holistic view of the demands, processes and consequences of development in order to maximize satisfaction of human needs consistent with justice, equity and sustainability. In doing so several approaches have been adopted which varied between conservation and exploitation of Nature. Two broad models have finally emerged in the legal systems of most countries which provided the principles of balancing of competing interests in the developmental process.

One model is predominantly market-based economic tools and consumer pressure deal with the negative externalities involved in production and consumption within a broad framework of cost-benefit analysis and balancing of interests. The second model is the regulatory model in which the State evolves the standards and organizes enforcement through varied regulatory systems. No legal system relies on any one model to the exclusion of the other. What obtains today is a combination of both incorporating three basic principles in varying degrees of emphasis. The first of these three principles which is universally valid today is the principle of caution and prevention which involves adoption of clear technology, environmental education and avoidance of injury by promotion of better standards and practices. Much of environmental law falls into this category.

A second principle which again is widely in vogue in many legal systems is the "polluter pays" principle. The Common law of Torts is developed on this principle. The polluter has the choice

not to pollute by using better technologies or treating the waste properly or in the alternative to make good the cost of cleaning up the pollution or injury caused by him.

A third principle which is increasingly becoming part of environmental jurisprudence today relates to that of co-operation and shared responsibility in bearing the cost of development. Several tools for operationalising this principle have been evolved in the recent past. These include consultation with all stakeholders in environmental law making and setting of standards for environment friendly goods and services. The emphasis here is promotion of chances of compliance as a natural process. Industries generally have better specialists than government. NGOs sometimes have special expertise to assess the cost-benefit equation of projects including the invisible costs. Trade unions, professional bodies, universities and media can give inputs on the best way to find an acceptable solution to environmental problems. Ultimately in a democratic system it is public participation which should decide on the pace and pattern of development. In this perspective the economic impact assessment processes, the public hearing procedures etc. are useful techniques of co-operative management of environmental challenges.

In the above perspective if one were to assess the role of law in environmental protection over the last two hundred years or more, one can discern four or five approaches which served the objects with varying degrees of success.

(a) Liability - Compensation Approach :

Here the position which law took may be described as follows. Risk and injuries are inevitable in growth and development. Law should not stop risk-taking as it would stall growth. If harm results, law should step in to fix liability and compensate appropriately the victims. In extreme cases of gross negligence even prosecution and punishment under criminal law may be resorted to.

This approach to environmental damage is not popular nowadays because of the enormity of the damage, the inadequacy of law to fix responsibility and compensate victims and the inequities involved in such a process. Yet, liability-compensation approach at least in individual harm is very much part of the legal system.

(b) Conservation - Co-operation Approach :

Here the focus is more on prevention of harm and intelligent management of resources by co-operation among the stakeholders. Sustainable development is the mantra and not taking liberties with ecology and Nature is the approach. The Bio-diversity Convention and the Bio-diversity Act are examples of this approach. The Joint Forest Management proposal is another example. Chipko and Narmada movements again highlight the value of conservation usually canvassed by environmentalists.

(c) Bargain - Trade-off Approach :

Development involves environmental costs. Therefore the role of law is to see how and where to absorb these costs keeping the damage to the minimum. Take informed participatory and transparent decisions so that there is agreement on taking projects involving environmental cost. Wherever possible adopt strategies to internalize environmental externalities in production and if harm still occurs, apply the polluter pays principle. This is democratic provided there is adequate information understandable to all the decision makers and there is not much asymmetry in information availability and accessibility. Informed decision making is easily said than done. Nonetheless this is a popular and modern approach which legal systems have endorsed in environmental laws.

(d) Rights - Sovereignty Approach :

People have sovereign rights over natural resources and State can only regulate them. There is a Constitutional right to clean environment which is part of right to life. The protection of environment and ecology in this perspective creates a continuous tension between individual and collective rights on the one hand (right to health, food, environment, work etc.) and the development processes such as mining, industries, dams etc. Here environmental law is to be looked at from the point of view of the people rather than that of the State.

The Indian scheme of environmental protection as revealed by the legislative framework adopts aspects of all four approaches though it manifests the Rights and compensation approaches as its dominant paradigm.

The Principal Laws and Policies :

A brief overview of the legislative framework for environmental protection will be in order. The Constitution of 1950 did not have provisions relating to environment. The Forty Second Constitution Amendment Act of 1976 following the U.N. Conference on Human Environment (Stockholm Conference) of 1972, introduced Article 48-A (Protection and improvement of environment and safeguarding of forests and wildlife) and Article 51A (g) (Fundamental Duty) which led to a spate of environmental laws in later years. What was till then a private law matter (contract and tort) became a significant aspect of public law (Constitutional law, administrative law and international law). This shift had its impact in the nature of environmental actions and remedies in law.

The first major Act enacted by Parliament was the Water Act, 1974 [The Water (Prevention and Control of Pollution) Act]. "Water" is a subject in the State legislative list and it required a lot of consultation between the States and the Centre to evolve a central law regulating a subject in the State List. The water Act empowers the Central and State Boards to prevent and regulate pollution of water through licensing and supervision system. Effluent norms are prescribed according to national standards evolved under the Environment (Protection) Act, 1986, as umbrella legislation in environmental management. The Board can by administrative orders direct the closure of any industry or withdraw its water supply.

The Air Act, 1981 [The Air (Prevention and Control of Pollution) Act] is similar to the Water Act. The Boards under Water Act are empowered to monitor and control air pollution. National emission norms are prescribed by the Environment Protection Act. Pollution of air would include noise pollution as well.

The Environment (Protection) Act, 1986 defines 'environment' to include water, air, land and inter-relationship between these and human beings, other living creatures, plants, micro-organism and property. Environmental pollution is defined to mean any solid, liquid or gaseous substance present in such concentrations that may or tend to be injurious to environment. The Central Government is empowered by the Act to frame rules for environmental protection. Thus, the Government promulgated the Environment (Protection) Rules prescribing emission standards, environment impact assessment (EIA), pollution control in ecologically sensitive areas, mandatory environment audit and regulations of storage and movement of toxic substances.

The National Environmental Tribunal Act, 1995 provides a mechanism for expeditious disposal of claims for compensation on the basis of strict liability principle in the event of accidents while handling any hazardous substance. The claims can be made for death, injury, environmental

degradation, harm to the fauna including aquatic fauna, damage to flora including aquatic flora, trees, crops etc., and cost of restoration on account of harm or damage to environment including pollution of soil, air, water, land and eco-systems. Application for claims can be made apart from the victim, by any representative body functioning in the field of environment and recognized in this behalf by the Central Government. The Act, however, is not yet brought into force.

The Public Liability Insurance Act, 1991 imposed a no-fault liability in case of accident and injury upon the owner of hazardous industry. The industry had to compulsorily insure itself and compensation for death, injury, medical expenses and damage to property was to be paid on a no fault basis under this statute while preserving the right of the injured to claim additional compensation under the ordinary law.

The National Environment Appellate Authority Act, 1997. This is an appellate body empowered to entertain grievances from NGOs, members of the public etc. against the licences and clearances granted for setting up of industries by different environmental authorities.

Apart from these, recent laws updating the Indian Statute Book on environmental regulation, there are important laws concerning forests, wild life, mines, etc. which together presents a picture of an ecologically sensitive society ready to use all conceivable legal instruments to protect the environment in all its aspects. If the ground reality is different, the fault lies in poor implementation of laws for which India has been a notoriously soft State. Corruption and lack of political will also play its role in non-performance of the pollution control regime.

#### (e) Environment And The Indian Constitution

So far we have been discussing about administrative regulation and private law actions in the matter of environmental protection. However, the most promising development in India in the post-Bhopal period (Union Carbide Disaster) has been the increasing constitutionalisation of environmental actions based on a human rights approach. The Indian Constitution in the Chapter (Part IV) on Directive Principles of State Policy contains specific provisions related to environmental protection (Articles 47, 48, 48-A, 49). Part IV A containing Fundamental Duties mandates every citizen "to protect and improve the natural environment including forests, lakes, rivers and wildlife..." (Article 51A(g)). Recently the Supreme Court of India ruled that every person has a fundamental right to the "enjoyment of pollution free water and air" as part of right to life guaranteed under Article 21 of the Constitution of India (Subash Kumar v. State of Bihar, AIR 1991 S.C. 420, 424; Virender Gaur v. State of Haryana (1995) 2 SCC 577). The environmental dimension of right to life under Article 21 is part of constitutional jurisprudence of the country today.

The evolution of environmental action as a right in public law is facilitated by a number of provisions in the Constitution of India which gave powers of judicial review and writ remedies to the High Courts and the Supreme Court (Articles 13, 32, 136, 142, 226). Citizens have direct access to the Supreme Court to ventilate environmental grievances as they are now deemed to be fundamental rights violations. The Indian Courts have not only recognized a substantive fundamental right to environmental protection but also read an important procedural right of fairness and reasonableness as part of the right to life and liberty. This "due process" provision, in turn, has led to the creation of a variety of other rights (right to legal aid, right to education and information, right to health etc.) which made the judiciary an activist agent in environmental protection and management. Thus, the courts have not only ordered municipalities to enforce public nuisance laws against polluters, they have also ordered that local governments find the budgetary resources to build water supply and sanitation systems in reasonable time (Ratlam

Municipality Vs. Vardi Chand, AIR 1980, SC 1622; (AIR 1986 Guj. 49; AIR 1994 M.P. 48).

The emergence of public interest litigation consequent on the relaxation of the locus standi doctrine led to a number of matters relating to executive action and inaction affecting environment being brought before the court. A pro-active court invented new remedies and evolved convenient procedures to give meaningful justice where fundamental rights and public interests were involved. Apart from energising a sleepy bureaucracy, judicial activism on environmental matters led to a great deal of public environmental education and to an environmental movement based on civil liberties. This is a positive development which hopefully will sustain the new jurisprudence for better environmental management in India.

One serious problem in this regard is the veil of secrecy maintained by government departments and the non-availability of information on environmentally sensitive issues. Investigative journalism in the Indian print medium sometimes helps the generation of sensitive information essential for litigating environmental issues. What seems to be developing is an alliance among academics, NGOs, media and public interest lawyers in the cause of environmental protection. Though this is not a substitute for an effective regulatory system, it does promise greater compliance of environmental norms and better accountability in case of environmental damage in the coming years.

#### Environmental Protection, Law And Globalisation

What is the future of legal regulation of environment? For a variety of reasons, future seems to be better for environmental protection. India faces two types of challenges in the environmental sector. The first set of problems relate to poverty, over-population and consequent pressure on resources, conventional problems of access to clean drinking water, proper sanitation and sewerage facilities, control of infectious diseases etc. These depend on economic growth, education, health care, employment, food security and a variety of conditions of human development. Strictly speaking, they do not directly fall into the domain of environmental protection though the relationship is too obvious to be ignored. Development policies have to take care of the environmental dimensions of social sector reforms in order to improve the quality of life and clean environment. It is interesting to note that the Supreme Court could intervene on behalf of environmental protection through the window of human rights including right to live with dignity. In India this jurisdiction of constitutional courts will continue to intervene in extreme cases of environmental degradation caused due to governmental policies and actions. Since human rights are fundamental rights guaranteed by the Constitution and the Supreme Court and High Courts are constitutionally bound to protect them, one can safely assume that the Courts will intervene through writ jurisdiction even when private parties violate the right to clean environment.

The second set of problems which are created as a result of industrial activity deserve to be addressed by the political and administrative apparatus in which the civil society has to play a leading role. For this there has to be environmental awareness in the population, easy access to environmental information and capacity and willingness on the part of regulatory institutions to conduct a control regime which is transparent, participatory and consensual. This must happen in policy formulation, standard setting, decision-making and social audit of polluting units. Environmental activism is more needed in civil society groups than in judiciary. A convergence of interests needs to be created between economic and environmental goals to increase the probability of compliance with the norms and standards. Environmental goals should receive adequate attention in corporate governance and management.

Development is common urge of mankind everywhere. It seeks to fulfil the ever-widening desire to an ever-increasing standard of living. Unfortunately, in modern global civilisation this does not come about without deterioration of the environment like water, air, land etc. which are in limited supply and cannot be recreated. It is this realisation which has led to the slogan of "Sustainable development" which demands conservation of natural resources, prevention and regulation of polluting activities, co-ordinated scientific research and action plans for eco-regeneration, environmental education and effective, expeditious settlement of environmental disputes.

Environment is a global issue as well and there is a growing body of international treaty law setting standards and enforcement systems for global control of environmental harm. The strategy towards environmental management for the future must give up sectoral, repair-oriented methods and move towards an integrated, interactive, holistic plan which balances environmental and developmental concerns with the support of scientific research and democratic consensus.

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