CHAPTER-IX

THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: A COMPARATIVE STUDY

9.1 Introduction

The Indian judiciary’s outstanding contribution in the development of environmental jurisprudence is world-famous. The present chapter focuses on the comparative analysis of Indian judiciary’s role in environmental governance. The comparison has been made for this purpose between the role of Judiciary in USA and Canada. These two countries have been preferred as they have federal structure.

9.2 The Role of judiciary in USA

The Comparative analysis of judicial approach for environmental justice between two Counties USA and India suggests that the Indian judiciary has tried to balance the need for environment protection and requirement for economic development, whereas the judiciary in USA has accepted the traditional concept of judicial restraint and shows pro-development attitude. Behind such approach of USA judiciary numbers of reasons are responsible. In USA Congress makes environmental laws on the basis of environmental and economic concerns. Congress is often unable to reach a consensus; and passes environmental laws that leave many important issues unresolved. Ambiguity is therefore a common problem in various environmental statutes. Most environmental statutes contain grand statements of legislative purpose, but their broad guidelines leave the detailed standards to be filled by implementing agencies or the courts. A great deal of policy-making shifts from Congress to agencies. Furthermore, Courts are often called upon to resolve institutional and policy conflicts between agencies and industry, between agencies and environmental groups, and between federal and state authorities. The Supreme Court exerts its power to interpret statutes as the final authority, and the Court’s interpretations of environmental statutes can create significant institutional and policy implications. The main reason for such conflict is the power of judicial review of the court for administrative action. The vested economic
interests employ judicial review to avert or avoid the impact of environmental regulations. The Administrative Procedure Act, 1946 allow the judiciary to have oversight of how the growing numbers of administrative agencies used or misused the authority that congress had conferred upon them. Under section 10 of APA:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, within the meaning of the relevant statute, is entitled to judicial review thereof.\(^{665}\)

The scope of the judicial review includes whether the agency acted in an arbitrary or capricious way or an abuse of discretion, or in excess of statutory authority, or without observance of proper procedures, or in a way unsupported by substantial evidence.\(^ {666}\) The courts have had to devote substantial time to interpreting the procedures for how environmental judicial review should take place, and this has delayed implementation of the environmental statutes. The greatest use of judicial review has been by the corporate economic interests. For example, *Lead Industries v EPA*\(^ {667}\) challenged the EPA’s evidence in establishing the exposure standards in the National Ambient Air Quality Standards to protect the public health from exposure to lead. The standard was upheld, ruling that Clean Air Act did not allow economic factors to limit the establishment of health based standards. It clearly proves that use of judicial review, makes the judicial process complicit in the executive branches’ efforts to avert or avoid strengthening of environmental law. Leading environmental law commentators have branded this abuse of administrative law as ‘sophisticated sabotage’.\(^ {668}\)

In the words of Nicholas Robinson, many rulings of the Supreme Court of USA , have limited the scope of environmental law . One pattern of USA Supreme Court cases illustrates this phenomenon. The Supreme Court gradually limited the scope of EIA under the National Environmental Policy Act.\(^ {669}\) Some cases illustrate a large opposition by vested business as usual interest to environmental analysis.\(^ {670}\) Some procedural reforms have also

\(^{665}\) 5 US code s. 702  
\(^{666}\) 5 US Code s.706  
\(^{667}\) 478 f.2d 1130 (DC Cir.,1980)  
\(^{668}\) McGarity, T.O., Shapiro,S., and Bollier D., Sophisticated sabotage: intellectual Games used to Subvert Responsible regulation(Washington, DC: ELI,2004)  
\(^{669}\) Robinson, Nicholas, United States of America, Louis J Kotze and Alexander R. Peterson (eds), the Role of Judiciary in Environmental Governance :Comparative Perspectives, p 197  
been made by State Courts. State Courts have undertaken procedural reforms that place the burden of proof on the party who is alleged to be harming the environment, to show that the threatened harm is or will be avoided.

Another method adopted by the court is the technology forcing. One of the innovations in the 1970 Clean Air Act is that it established a clear duty to protect the public health from air pollution. Simply because conduct was authorized and useful, as in the burning oil or coal to produce need electricity, did not sanction poisoning the air that everyone must breathe. Each state implementation plan is to assure that all the air within the state meets this standard. In *Union electric company v. EPA* the USA Supreme Court held that the statute establishes clear public health standard that had to be met by finding new technology or closing down the polluting activities. The Court allowed Missouri, in its implementation plan, to force the company to find or invent the needed new technology. This inducement process has been termed technology forcing.

In India expanded the locus standi and allowed public interest litigation. In USA each of the major federal environmental statutes makes a provision for citizens to enforce their provision. For instance section 505 of the Clean water Act provides that ‘any citizen’ may commence a civil action on his own behalf against any person (including the USA and any other governmental instrumentalities) who is alleged to be in violation of the Act or a standard adopted under its authorities. This provision has been widely used by many NGOs.

Defendants have fought against expanding the role of citizens suits, and the USA Supreme Court has accommodated them. In *Gwaltney of Smithfield Ltd. v Chesapeake Bay Foundation (1987)* the court ruled that a citizen suit under the Clean Water Act could not continue once the polluter ceased discharges, since section 505 conferred authority to sue against persons ‘in violation,’ meaning a continuous and on-going act. Once the polluter stopped discharging wastes, citizen enforcement is no longer authorized.

In comparison to this the Indian judiciary has shown dynamic approach in implementing polluter pay principle and allowed environmental groups to file case to secure enviro justice.

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671 427 US 246 (1976)
672 484 US 49 (1987)
9.3 The Role of Judiciary in Canada

The Supreme Court of Canada has contributed to environmental governance in all areas of law including private, administrative, and criminal law, and in areas where there is overlap with competing fields, such as patent and municipal law.

It has been widely recognized that in the last two decades, the Supreme Court of Canada has made significant contributions to environmental governance by means of its explicit and consistent’ recognition of fundamental environmental values’.673 This evolution was traced by the court itself in British Columbia v. Canadian Forest Products Ltd,674 where the court started its reasoning with this important contextual statement:

As the Court observed in Canada (Attorney General) v. Hydro-Quebec, [1997] 3 SCR 213, at para. 85, legal measures to protect the environment 'relate to a public purpose of superordinate importance'. In Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 SCR 3, the Court declared, at p. 16, that '[t]he protection of the environment has become one of the major challenges of our time. In R v. Canadian Pacific Ltd, [1995] 2 SCR 1031, 'stewardship of the natural environment' was described as a fundamental value (para. 55)... Still more recently, in 114957 Canada Ltee (Spray-tech, Societe d'arrosage) v. Hudson (Town), [2001] 2 SCR 241, 2001 SCC 40, the Court reiterated, at para. 1:'... our common future, that of every Canadian community, depends on a healthy environment... This Court has recognized that '(e) very one is aware that individually and collectively, we are responsible for preserving the natural environment... environmental protection [has] emerged as a fundamental value in Canadian society (...)'.675

Commentators have observed that these 'fundamental environmental values' recognized by the Supreme Court of Canada include: environmental rights;676 the polluter-pays

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674 2004 SCC 38
676 DeMarcOj-swpra n. J.V. DeMarco, 'The Supreme Court of Canada's Recognition of Fundamental 77. Environmental Values: What Could be Next in Canadian Environmental Law?'. JELP 17 (2007): 159.165, reports that there are three cases in which the court 'has referred to environmental rights ... Notably, this has occurred regardless of whether the Court has been interpreting statutes in a jurisdiction that explicitly recognizes environmental rights ... or in one that does not: R v. Canadian Pacific Ltd [1995] 2 SCR 1031; Imperial Oil v. Quebec (Administrative Tribunal) [2003] 2 SCR 624; R v. Hydro-Quebec,
principle; the precautionary principle; the principle of inter-generational equity; the principle of sustainability; and the public trust doctrine.

Some of the most significant impediments to allowing courts to play a more effective role-in-environmental protection involve issues of procedure and not substance. Most environmental harms are imposed on large groups of people, and therefore they do not fit comfortably within the traditional two-party, private law, and adversarial model of litigation. Many of the innovations which have alleviated procedural barriers such as standing, intervention, group litigation and costs, were created by the courts themselves.

The barrier of standing prevented those who did not have a direct, personal interest in a dispute from litigating it. The Supreme Court of Canada developed the public interest standing rule, which now provides that anyone can bring an issue to court if: (1) there is a serious issue to be tried; (2) the applicant has a genuine interest in the issue; and (3) there is no 'other reasonable and effective way to bring the issue before the Court'. Interested individuals or groups may also participate in environmental cases if they obtain leave to act as interveners. Scholars have found that public interest interveners have strongly impacted

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679 Imperial Oil case J.V. DeMarco, 'The Supreme Court of Canada's Recognition of Fundamental 77. Environmental Values: What Could be Next in Canadian Environmental Law?', JELP 17 (2007): 159., 165, reports that there are three cases in which the court 'has referred to environmental rights ... Notably, this has occurred regardless of whether the Court has been interpreting statutes in a jurisdiction that explicitly recognizes environmental rights ... or in one that does not.' R v. Canadian Pacific Ltd [1995] 2 SCR 1031; Imperial Oil v. Quebec (Administrative Tribunal) [2003] 2 SCR 624; R v. Hydro-Quebec, Friends of the Oldman River Society v. Canada (Minister of Transport) [1992] 1 SCR 3.
680 Friends of the Oldman River Society case, supra n. 59; Imperial Oil case, DeMarcOj-supra n. 76, 165, reports that there are three cases in which the court 'has referred to environmental rights ... Notably, this has occurred regardless of whether the Court has been interpreting statutes in a jurisdiction that explicitly recognizes environmental rights ... or in one that does not.' R v. Canadian Pacific Ltd [1995] 2 SCR 1031; Imperial Oil v. Quebec (Administrative Tribunal) [2003] 2 SCR 624; R v. Hydro-Quebec, supra n. Friends of the Oldman River Society v. Canada (Minister of Transport) [1992] 1 SCR 3.
165, reports that there are three cases in which the court 'has referred to environmental rights ... Notably, this has occurred regardless of whether the Court has been interpreting statutes in a jurisdiction that explicitly recognizes environmental rights ... or in one that does not.' R v. Canadian Pacific Ltd [1995] 2 SCR 1031; Imperial Oil v. Quebec (Administrative Tribunal) [2003] 2 SCR 624; R v. Hydro-Quebec,Friends of the Oldman River Society v. Canada (Minister of Transport) [1992] 1 SCR 3.
682 In some cases, these changes were later included in legislation
683 The traditional public nuisance rule provided that where harm was imposed on the public generally, the Attorney General must bring the case to court on behalf of the public, unless any individual could show special damage. A classic case is Hickey v. Electric Reduction Co. of Canada Ltd (1970), 21 DLR (3d) 368 (Nfld TD).
684 The test was developed in a trilogy of cases involving challenges to the constitutionality of legislation: Thorson v. Attorney General of Canada [1975] 1 SCR 138, Nova Scotia Board of Censors v. McNeil [1976] 2 SCR 265, and Minister of Justice of Canada v. Borowski [1981] 2 SCR-575; and expanded to the administrative law sphere in Minister of Finance v. Finlay [1986] 2 SCR 607. Although not dealing expressly with environmental issues, the rules developed by the courts above are of direct relevance to the environmental context.
on the development of important precedents in environmental law, in particular by: making new, or fuller, arguments on points of law; suggesting 'novel interpretive approaches' to legislative interpretation; bringing inter-disciplinary research findings to the attention of the court; enlarging the context to include 'social, cultural or economic circumstances'; and presenting comparative jurisprudence.

Canadian courts have often sought to indicate that environmental harm is illegal and offensive and should be treated as such so as to achieve the criminal law goals of punishment and deterrence. More recent and creative approaches to sentencing have also attempted to emphasize its potential preventative and remediatory role, which is even more important in the context of environmental law.

In *R v. United Keno Hill Mines Ltd*686 the offending corporation was charged with discharging mining effluent into a creek in excess of its water license. The court provided a detailed inventory of the kinds of harm done by pollution to human health and the environment, and the problem of overlooking cumulative impacts.687 While it conceded that there is a 'range of inherent criminality in pollution offences', the court emphasized that 'pollution offences must be approached as crimes, not as morally blameless technical breaches of a regulatory standard'.688

The court went on to consider a range of 'sentencing tools' beyond the traditional monetary fine, including: personal liability of corporate directors;689 continuing judicial orders to prevent continued violations by repeat corporate offenders;690 and the possible involvement of victims, or at least public interest environmental groups to personify them, in devising appropriate penalties.691

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686 (1980) 10 CELR 43 (Yukon Terr. Crt.).
687 Ibid. para. 9.
688 Ibid., para. 10.
689 Ibid., paras 38-48
690 Ibid., para. 53, proposal 9.
691 Ibid., at para. 53, proposal 10. On the facts of this case, the contrition and cooperation of the corporation, as well as lack of significant environmental harm, led to a moderate penalty. However, the clear and detailed analysis of underlying principles regarding the role of criminal law in environmental protection, and the special considerations applying to corporations, was a breakthrough.
The most remarkable contribution of the Canadian courts is the implementation of international principles in domestic law. In comparison to USA, the courts in Canada are more dynamic.

9.4 Conclusion

The study of judicial approach in USA shows that the USA’s judiciary has preferred rule of strict interpretation of environmental statutes. The Supreme Court has shown more faith in the agencies appointed for environmental standards as they are more equipped with technical experts. The judges do not possess such technical expertise. The corporate and business houses and property owners have resorted more to invoke the power of judicial review of the Court rather than citizens in environmental decisions. The USA constitution does not contain the provision for right to environment.

In Canada also the courts have shown faith in laws made for environment protection. They have shown creativity in implementation of environmental laws.

In India, the judiciary is conferred with the power to do complete justice under the constitution.\textsuperscript{692} The writ jurisdiction under article 32 and 226 has further widened the scope for judicial intervention in environmental issues.

The Indian judiciary has played extraordinary role in securing enviro-justice. In a developing democracy of India, the problem of poverty is curse. The judiciary has allowed public interest litigation and thus brought justice to the doorsteps of poor people. The Indian judiciary has relaxed procedural rule and shown activism. The Supreme Court in India has not accepted the traditional concept of judicial constraint like USA court but it has proved that it is independent and one of the important organs of democracy.

In comparison to Canada, the procedural relaxation by judiciary is remarkable in India. The major problem in the environmental issues is to produce evidence which is a costly affair as it required scientific, laboratory proof with expert opinion. In India, the plaintiff need not have to be bothered about it. This will be taken care of by the court appointed committee. The Indian judiciary has shown commitment to constitutionalism by securing enviro-justice to Indian people.

\textsuperscript{692} Article 142