

CONSTITUTIONAL MORALITY VIS-A-VIS THE PRINCIPLES CONCERNING THE PROTECTION OF THE FRAGILE ECOSYSTEMS OF THE STATE OF ASSAM UNDER THE CONSTITUTION OF INDIA

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Literally speaking morality means the principles concerning the distinction between the right and the wrong. From Ecological point of view, it is right when we think about protection and conservation of our environment and it is wrong when we exploit our natural resources indiscriminately ignoring the importance of sustainability of the nature for the benefit of both present and future generations. Justice, therefore, demands that the fragile ecosystems must be protected to ensure sustainability of the earth. There cannot be any question, as such, on the issues of development without considering the importance and significance of environmental protection. Because the purpose of development is not to develop things but to develop man and environment. The burning issues of development must, therefore, be looked into from the eccentric point of view. The ecological issues of Dehing Patkai Reserve Forests in Assam need to be reviewed by the higher judiciary to ensure constitutional protection of the elephant corridors. This is the distinction between ecology and economy or right and wrong. Ecology is, indeed, the permanent economy. Both ecology and economy must be balanced within the meaning of Environment Impact Assessment (EIA) requirements. The constitutional vision, in this regard, is reflected in Articles 48-A, 14, 19 (1) (a) and 21 of the basic document. These mandates are the constitutional morality, as well, with regard to environment and development.

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CONSTITUTIONAL ENVIRONMENTALISM AND THE PUBLIC TRUST DOCTRINE :

The doctrine of constitutional morality means adherence to the noble principles enshrined in a constitution. Technically speaking these principles are the basis of good governance and adherence to these principles in letter and spirit, from ecological view point, can ensure environmental rule of law and can establish good environmental governance, as well.

In India “Constitutional Environmentalism” is embodied in Article 48-A² of the Constitution. It is the duty of the State, as such, to protect and preserve the fragile ecosystems and also to take all possible measures for its improvement.

That apart, the Constitution of India, itself, is a supreme document of trust³ and the State as a “trustee” of all natural resources is under a legal duty to protect them. The fundamental rights, enshrined in Part-III of the constitution, embody the rights of the beneficiaries and the directive principles of state policy in Part-IV embody the duties of the trustee i.e., the State.

The Public Trust Doctrine⁴, as such, emphasizes the State’s affirmative duty to protect the fragile ecosystems.

² This provision is a directive principle of state policy inserted into the Constitution of India by the Constitution (42nd Amendment) Act, 1976. As interpreted by the Apex Court, the mandates of Article-48-A are to be read and interpreted alongwith Articles-14, 19(a) (a) and 21 of the Constitution of India.

³ M.C. Mehta –Vs- Kamal Nath, 1997 (1) SCC 388; Shyam Divan and Armin Rosencranz, *Environmental Law and Policy of India: Cases, Materials and Statutes* (2001), pp. 167-169.

⁴ Joseph L. Sax, Professor of Law, University of Michigan was the proponent of the Modern Public Trust Doctrine.

DEHING PATKAI ECOLOGICAL CRISIS : WHEN PROTECTORS TURN PREDATORS :

However, at a time when rapidly dwindling elephant habitat has logged global attention, the Dehing Patkai Elephant Reserve, in Assam, is being pushed to the brink by coal mining, logging and encroachment.⁵

Significantly, the elephant reserve created in the year 2003 comprises the State's last remaining rainforests that shelter wide ranging fauna, such, as, the tiger and six other species of wild cats, six primate species including India's only ape hoolock gibbon, over 350 bird species including state bird white winged wood duck, reptiles, insects and rare orchids.⁶

Vast tracts of the Elephant Reserve that comprises several dozen Reserve Forests (RF) and the Proposed Reserve Forests (PRF), besides the Dehing Patkai Wildlife Sanctuary, have been lost due to rampant illegal logging, rate hole mining⁷ and organized encroachments. The open cast mining has also done irreversible damage to the forest belt across the Ledo-Margherita area.⁸

The Supreme Court of India observed that⁹ –

“Elephants are big, powerful but fragile. The elephant is a gentleman and man must give way to the elephant. We are not going to allow anyone to come in the path of the elephant.”

But inspite of clear directives by the Apex Court in the recent times, elephant corridors continue to bear the burnt of commercial, industrial and anthropogenic pressures resulting in blockages of these time-tested paths used by the pachyderms and, thereby, triggering man-elephant conflicts.

⁵ www.downtoearth.org.in, *The Assam Tribune*, p. 1, dated June 29, 2020.

⁶ Ibid.

⁷ www.time8.in

⁸ Ibid.

⁹ The Supreme Court of India on January 22, 2020 while hearing a case on illegal resorts and structures on the Nilgiri Elephant Corridor in Tamil Nadu.

A case in point happens to be the two major elephant corridors – “Golai” and “Bogapani” in Dehing Patkai Elephant Reserve in Dibrugarh and Tinsukia districts where expanding commercial and residential space have robbed the elephants of their right of passage for no fault of theirs.¹⁰

The Golai elephant corridor connecting the east and west blocks of the reserve presents a pathetic site today with large structures including an Indian Oil Corporation (IOC) dispatch terminal, hotels and residential buildings effectively blocking what had been an unhindered elephant path since ages.¹¹

In spite of the hindrances, as stated above, the elephants still use the nearby areas to cross over the road but they have to move through villages and tea gardens often coming into conflict with humans.

GEOGRAPHY AND ECOLOGY OF DEHING PATKAI WILDLIFE SANCTUARY :

The Dehing Patkai Wildlife Sanctuary, also known as Jeypore Rainforest, is located in the Dibrugarh and Tinsukia districts of Assam and covers an area of 111.19 sq.m.¹² The sanctuary and the sprawling 937 sq.km elephant reserve constitute the last vestiges of the State’s rainforests.¹³

Dehing is the name of the river that flows through this forest and Patkai is the hill at the foot of which the sanctuary lies. Dehing Patkai is also popularly known as “Amazon of the East”.¹⁴ The rainforest has a significant ecological and cultural importance in the lives of the people of Assam. Ecologically the rainforest is the home of several rare and evergreen species of plants, animals, birds, insects and reptiles. A large number of Asiatic elephants also live in the rainforest which houses a

¹⁰ m.economictimes.com

¹¹ Ibid.

¹² www.drishtiiias.com

¹³ Ibid.

¹⁴ Ibid.

number of corridors for the mammals in and around the Saleki proposed reserve forests the area where illegal mining is going on for the last 16 years since 2003.¹⁵

Dehing Patkai Wildlife Sanctuary the core area of Dehing Patkai Elephant Reserve presents an appalling picture of neglect making it extremely vulnerable to all sorts of illegal activities inside the protected forests.

LEGITIMACY TO ILLEGAL MINING BY THE NATIONAL BOARD FOR WILDLIFE (NBWL) :

Facts remain that a proposal for coal mining by the North-Eastern Coalfields (NECF) inside the Dehing Patkai Elephant Reserve in Assam was granted approval by the National Board for Wildlife (NBWL) on April 24, 2020 despite a Rs.43.25 crore penalty imposed on Coal India Limited (CIL) by the Assam Forest Department.¹⁶

It needs to mention that NECF the Assam based coal producing company is a unit of CIL.

The above proposal of NECF granted approval by the NBWL called for the diversion of 98.59 hectares of forest land in the Saleki proposed reserve forest area, a part of the large elephant reserve.¹⁷

This 98.59 hectares of forest land, however, included land NECF mined illegally for several years according to a site inspection report by the Shillong Regional Office of the Union Ministry of Environment, Forests and Climate Change (MOEF & CC).¹⁸

The report submitted to the MOEF & CC on November 25, 2019 said that NECF obtained a 30 year mining lease. The lease expired in 2003 and NECF applied for a renewal only in 2012, while it continued mining operations. According to the

¹⁵ www.downtoearth.org.in

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

report, such unauthorized mining activities were in violation of the Assam Forest Regulation, 1891. The report called on the MOEF & CC to take necessary action on the gross violations committed by the user agency.¹⁹

PUBLIC INTEREST LITIGATIONS AGAINST ILLEGAL COAL MINING IN DEHING PATKAI ELEPHANT RESERVE:

Altogether four Public Interest Litigations (PIL) including one of the Gauhati High Court, itself, have been filed on the issues of mining in the Dehing Patkai region.²⁰

The petitions have been filed in the Gauhati High Court opposing the opencast mining in the proposed Saleki Reserve Forest in Dehing Patkai Elephant Reserve.

The plea was filed online against the opencast project by North Eastern Coal Fields, a unit of Coal India Limited near the Dehing Patkai Wildlife Sanctuary. The sanctuary, as stated earlier, is referred to as the “Amazon of the East” and it is spread over a huge area in the upper Assam region.²¹

According to the petitioners the illegal mining carried out by CIL in the Saleki proposed reserve forest is violative of the right to life of the citizens of the state guaranteed under Article 21 of the Constitution of India.

The instant petitions are being filed under Article 226 of the Constitution espousing the cause of the people of the State of Assam to safeguard the flora and fauna particularly the wildlife of the Dehing Patkai Forest Reserve and to protect the ecological balance of the entire state.

The PILs sought to declare the Dehing Patkai Wildlife Sanctuary as a heritage site under the Biological Diversity Act, 2002.

¹⁹ Ibid.

²⁰ www.time8.in

²¹ Ibid.

The Gauhati High Court has issued notices to the State government, Central government and CIL seeking the reason for permitting coal mining in the wildlife sanctuary.²² The Supreme Court of India on June 11, 2020 directed the Centre to come out with a proposal to seek for an alternative site for coal mining in place of Saleki proposed reserve forest within three weeks.²³ The Standing Committee of NBWL had earlier on April 7 accorded approval to North Eastern Coal Fields of CIL for mining in the Saleki RPF. Saleki's total lease area of 98.59 hectares is situated within the 10 km. eco-sensitive zone of the 111.19 sq.km. Dehing Patkai Wildlife Sanctuary and also near to an elephant corridor.²⁴ The Apex Court, thereby, calls for finding middle path between ecology and development. The court observed that saving the environment should not come at the cost of economic development adding that a balance should be struck between the two.²⁵ The above observation by the top court came on a plea filed by a lawyer seeking a ban on mining in the Saleki forest reserve, situated close to the Dehing Patkai Wildlife Sanctuary in Asam.²⁶

Faced with conflicting positions between environment and development, the Supreme Court Bench, consisting of Chief Justice of India (CJI) SA Bobde and Justices AS Bopanna and Hrishikesh Roy, said "*we are conscious of the fact that our orders in favour of environment affect economic development adversely. There has to be some method by which economic development is not retarded as this has a direct impact on poverty in the country.*"²⁷

The Bench further said that it was aware of the constitutional duty to protect the environment but at the same time, it cannot be oblivious to the economic impact.²⁸ The Apex Court, therefore, directed the centre to come out with a proposal for an alternative site in three weeks.

²² Ibid.

²³ m.hindustantimes.com, www.pratidintime.com

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

As reported, the NBWL on July 22, 2020 ordered the CIL to stop all mining activities inside the Dehing Patkai forest in Assam.²⁹

Facts remain that earlier the NBWL had recommended the CIL's proposal of legalizing the illegal mining, which the company was indulging from 2003 to 2019 inside the forest, for approval provided it fulfills certain conditions. Reportedly the North Eastern Coal Fields, a unit of CIL failed to fulfill the conditions leading to violation of the provisions of the Forest (Conservation) Act, 1980.³⁰

The Supreme Court of India recently played a pro-environment role in a leading case observing³¹, thus, as follows :

“Elephants are big, powerful but fragile, the elephant is a gentleman and man must give way to the elephant. We are not going to allow anyone to come in the path of the elephant.”

The National Green Tribunal (NGT)³² has also, in the meantime, ordered formation of a committee to probe allegations of large scale illegal coal mining by NECF inside Dehing Patkai Forest Reserve.

Facts remain that the Constitution of India which is the supreme law of the land under the Indian Legal System is, itself, a green document that provides for adequate protection and conservation for ecology and environment.

Practical case studies reveal further that "Environmental law" is based on science and, indeed, truly speaking, no branch of law can even sustain, in practice, without the basics of science and technology. This was the reason as to why Professor Upendra Baxi, the former Vice-Chancellor of the Delhi University suggested, way back in 1986, to the then Chief Justice of India to establish a special cell on 'Science and Technology' in the Supreme Court itself where the scientists would interpret

²⁹ www.outlookindia.com

³⁰ Ibid.

³¹ Supra n.8.

³² m.hindustantimes.com

scientific facts and evidences for the judges to decide and give judgement on the cases arising out of environmental law violations.

It needs to be stated in this respect that the Expert Members of the National Green Tribunals are, therefore, always appointed from the scientists and the engineers having adequate expertise in their respective field.

CONSTITUTIONAL AND LEGISLATIVE PRINCIPLES CONCERNING THE PROTECTION OF FRAGILE ECOSYSTEMS :

The Indian Constitution is a unique document containing provisions for environmental protection in its Articles 48-A³³ and 51A(g).³⁴ While Article 48-A, in part-IV of the Constitution, is a fundamental duty of the State, Article-51A(g), in its Part-IV-A, is a fundamental duty of every citizen of India in this regard.

That apart, as shown below, the Parliament of India passed a number of comprehensive legislations concerning environmental protection, in its three Phases, significantly in the aftermath of Stockholm Conference,³⁵ Rio-Earth Summit³⁶ and Copenhagen meet on Climate Change³⁷ respectively and, thereby, implementing the Government of India's Commitments as mandated in Article 253³⁸ of the Constitution of India.

Phase-I : (Stockholm and thereafter)

- (i) The Wildlife (Protection) Act, 1972;
- (ii) The Water (Prevention & Control of Pollution) Act, 1974;
- (iii) The Constitution (42nd Amendment) Act, 1976;
- (iv) The Water (Prevention & Control of Pollution) Cess Act, 1977;

³³ Directive Principles of State Policy

³⁴ Fundamental Duty of Citizens of India

³⁵ U.N. Conference on the Human Environment, 1972 held at Stockholm, Sweden in 1972.

³⁶ Rio Earth Summit, 1992, The U.N. Conference on Environment and Development held in Rio de Janeiro in Brazil in 1992.

³⁷ Climate Summit, 2009.

³⁸ Parliament's power to legislate to implement government commitments in the international conferences.

- (v) The Forest (Conservation) Act, 1980;
- (vi) The Air (Prevention & Control of Pollution) Act, 1981;
- (vii) The Environment (Protection) Act, 1986;
- (viii) The Public Liability Insurance Act, 1991;

Phase-II: (Rio and thereafter)

- (ix) The Protection of Human Rights Act, 1993;
- (x) The National Environment Tribunal Act, 1995;
- (xi) The National Environment Appellate Authority Act, 1997;
- (xii) The Protection of Plant Varieties and Farmers Rights Act, 2001;
- (xiii) The Biological Diversity Act, 2002;
- (xiv) The Right to Information Act, 2005;

Phase-III : (Copenhagen and thereafter)

- (xv) The National Green Tribunal Act, 2010, the Parliament, thereby, repealing the earlier two legislations of 1995 and 1997. This new legislation draws inspiration from the India's Constitutional provision of Article 21 which assures the citizens of India the right to a healthy environment.

The National Green Tribunal (NGT) came to be established, in India, under the National Green Tribunal Act, 2010. It started functioning w.e.f. 18th of October, 2010 and has already seen a large number of cases being transferred from the erstwhile National Environment Appellate Authority and from the various courts including the Supreme Court of India.

There are, at present, four circuit branches of NGT with eastern branch at Kolkata, the western branch at Pune, the central (northern) one at Bhopal and the southern branch in Chennai. New Delhi is the principal place of sitting of the National Green Tribunal besides the above Bhopal, Pune, Kolkata and Chennai circuit branches.

JUDICIAL INTERVENTION TO CONSERVE FORESTS, WILDLIFE AND BIODIVERSITY :

In a case where the Apex Court intervened to protect the forest wealth and wildlife from the ravages of mining in and around Sariska Wildlife Sanctuary in the Alwar district of Rajasthan,³⁹ the court viewed its constitutional role thus :

“This litigation concerns environment. A great American judge emphasizing the imperative issue of environment said he placed Government above big business, individual liberty – above the Government and environment above all. The issues of environment must and shall receive the highest attention from this court.”

In Animal and Environment Legal Defence Fund –Vs- Union of India,⁴⁰ the Supreme Court of India held that on the promulgation of the Constitution, the right to safeguard forests and wildlife has received constitutional sanction. Moreover, in order to maintain ecological stability, the court observed that it could not afford to allow any further shrinkage in the national forest cover. T.N. Godavarman Thirumulkpad – Vs- Union of India,⁴¹ is a leading case regarding judicial intervention to conserve biodiversity. The Supreme Court of India issued interim directions on 12.12.1996 to conserve our biodiversity wealth. The interim directions were issued in a Public Interest Litigation filled by T. N. Godavarman Thimmulkpad under Article 32 of the Constitution of India vide Writ Petition (Civil) number 202 of 1995. The Supreme Court passed orders for the protection of the forests by prohibiting new felling and movement of timber. The interim directions issued by the Apex Court have made it mandatory on the part of Union of India and State Governments to take measures to protect forests wealth and conserve the richness of floral and faunal biodiversity. The interim directions also touched upon complex issues concerning interpretations of the term 'forest' for the purpose of the Forest (Conservation) Act, 1980 and the Forest Policy, 1988.

³⁹ Tarun Bharat Sangh, Alwar –Vs- Union of India, Writ Petition (Civil) No. 509 of 1991.

⁴⁰ (1997) 3 SCC.549.

⁴¹ AIR 1997 SC 1228.

Forests help in maintaining the ecological balance. They render the climate equable, add to the fertility of the soil, prevent soil erosion, and promote perennial stream flow in rain-fed river. The Supreme Court took note of this role in Rural Litigation and Entitlement Kendra –Vs- State of U.P.⁴² Convinced of the need to stop mining that caused an ecological imbalance in a forest area, the Court said :

“The trees in the forest draw water from the bowels of the earth and release the same into the atmosphere by the process of transpiration and the same is received back by way of rain as a result of condensation of clouds formed out of the atmospheric moisture. Forests, thus help the cycle to be completed. Trees are responsible to purify the air by releasing oxygen into the atmosphere through the process of photosynthesis. It has, therefore, been rightly said that there is a balance on earth between air, water, soil, plant. Forests hold up mountains, cushion the rains and they discipline the rivers and control the floods. They sustain the springs; they break the winds; they keep the air cool and clean.....”

Wetlands are bogs; swamps and marshes. They provide numerous ecosystem services including water purification, maintaining surface moisture, curbing soil erosion, reducing the impacts of floods and droughts and re-charging wells. Wetlands support a host of wildlife, such as, birds, fish, reptiles, amphibians, and insects. There is no specific statute regulating wetland use of conversion, leaving the field open to judicial control on a case-to-case basis. The pioneering judgment in this field was delivered by the Calcutta High Court, which responded to a petition filled by an NGO concerned about the rapid dredging and filling of the marshes near Calcutta. Convinced of the need to stop further damage to the wetlands, the Court observed.⁴³

“In the Calcutta wetlands we find that there are 40 species of algae and 2 species of fern, 7 species of monocods and 21 species of dicods. Latest data suggest the presence of about 155 species of summer birds of which 64 species are resident birds and 91 are migratory. There are 90 species of winter birds of which 44 are

⁴² AIR 1988 SC 2187

⁴³ People United for Better Living in Calcutta (PUBLIC) –Vs- State of West Bengal, AIR 1993 CAL 215 CAL.

residents and 46 are migratory. Calcutta wetlands present a unique ecosystem apart from the material benefit to the society at large Wetlands also help in mitigating floods, recharging aquifers and in reducing surface run-off and consequent erosion.....”

CONCLUSION:

The NGOs can help in the implementation of the laws by encouraging public participation and creating public awareness. They can motivate the people, and thereby, can also propagate the core message of environmental protection that threat to any species of plant or animal life is a threat to man himself. The fight against environmental degradation does not belong to the government alone. The common citizen must understand the gravity of the environmental problems and engage themselves wholeheartedly for their solution. Success of the environment protection movement largely depends upon the public participation with full awareness of their right as per exhaustive interpretation of Article 21 by the Apex Court. Saving the elephant corridors from destruction is a complex exercise as many of that fall outside the forest land. Therefore, a concerted action by the civil and forest officials can effectively save these fragile ecosystems. Both civil and forest officials need to work together to protect the corridors that often fall on patta land and crop land and often bisected by roads or railway tracks. Two important corridors, namely, Golai and Bogapani are narrow strips of land that often-pass-through crop land and tea gardens etc. According to Project Elephant guidelines and strong directives by the Apex Court and the NGT, in this regard, civil authorities need to be proactive in securing the elephant corridors falling in non forest land. Unfortunately, implementation of the guidelines and even the directives by the courts remains lax. NGT had made several important directives asking the authorities concerned to take certain steps for facilitating unhindered elephant movement in the Golai and Bogapani corridors. But these have not been implemented in practice.

Therefore, concerted efforts by the non-governmental organizations, citizens, engineers, scientists, lawyers, and the government agencies can only save the fragile ecosystems.