RADICAL ENVIRONMENTALISM VS THE PRAGMATIC APPROACH: PERSPECTIVES FROM INDIA

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Abstract

When deciding how to approach environmental legislation, there is frequently a standoff between those who support property rights and environmental activists, or those who support development and those who oppose it. This mostly leads to unproductive results and obscures the ideology behind environmentalism itself. Through the course of this paper, both sides of the debate i.e., the vision, objectives and means which radical environmentalism employs (especially in the legal realm) as well as the property rights proponents who are often seen as "anti-environment rights", have been discussed. The first part will also critique both these approaches to ascertain the weakness inherent in them. In the second part of the paper, pragmatism as a solution has been proposed to the concerned problem, both as a philosophy as well as its possible practical implications. It is imperative to research on these philosophies in order to find the best possible environmental solutions which not only change the way we view environment problems, but which can also be practically implemented. This paper will try and answer the following research questions; firstly, what are the basic features of the current philosophy governing environmental law that is critiqued by the radical school of thought? Further, what are the different branches of this theoretic critique- (especially deep ecology movement and eco-feminism)? Secondly, can legal pragmatism be used as a successful way to reconcile the noble motives of radical environmentalism with the pressing needs

of development? Moreover, how can 'pragmatic judging' can help to serve the purpose of environment protection, without being anthropocentric? The paper will conclude by analyzing Daniel Farber's principles for environment protection and ascertaining how they have been used by courts; both domestic and international to come to a solution that balances the often-conflicting interests of the economists and the environmentalist.

Keywords

Eco-feminism, Pragmatism, Radical environmentalism, Development, Environment

1. Introduction: A Radical Critique of the Current Environmental Law

1.1 What is the Radical Environment Movement?

The emergence of the greater environmental movement, which was sparked by eco-centrism and dissatisfaction with the mainstream environmentalism's co-optation, gave rise to radical environmentalism[1]. It can be described as "uncompromising, discontented, discontent with traditional conservation policy and at times illegal".[2] Rethinking western concepts of religion and philosophy, such as globalization, capitalism, and the like, is necessary for radical ecology. This is frequently accomplished by "re-sacralising" and re-establishing a connection with nature.[3] As may be apparent by now, this philosophy conflicts directly with the notion that human beings have any real ownership over natural resources and property. Further, this school of thought bases its argument in certain *arganthropocentric* values i.e. values which are based on a notion that human beings have the free will to use natural resources the way they want to[4]. They directly clash with this arguing that the earth doesn't exist for humans, and hence, we can claim no special privilege[5].

[1]Leurs Jeff, "A Brief Description of Radical Environmentalism" Http://Www.enotes.com/Topic/Radical_environmentalism (2012).

[2]Manes Christopher, I Radical Environmentalism and the Unmaking of Civilization (Little Brown and Co., 1990).

[3]List Peter, I Radical Environmentalism: Philosophy and Tactics(Wadsworth Pub. Co., 1993).

[4]Karp, Aldo Leopold's Land Ethic, I Is an Ecological Conscience Evolving in Land Development Law? 737, 738-49 (Envtl. L, 1989).

[5]H. Jarrett Ed, Boulding, Economics of the Coming Spaceship Earth, in Environment Quality in a Growing Economy (Www.Google.Books.Com, 1966).

There are different kinds of radical approaches, all of which inform the legal movement as well. These are known as eco-centric values because what is common between them is that nature has a value independent of human labour or human interest. Thus, the focus of such values is nature centric as opposed to human centric. This paper will focus on two such philosophies, deep ecology and eco-feminism.

1.2 Deep Ecology

Regardless of how useful they are to humans as tools, all living things have intrinsic value, according to the deep ecology worldview[6]. Proponents of this school of thought argue that in the technology controlled industrialized societies such as the one we live in, humans are assumed to be isolated from nature and moreover, superior to nature. This underlying belief leads to the notion that humans retain full control and supervision over natural resources. The fundamental tenet of this ideology is that the living environment has the same right to life and prosperity as humans have[7]. The term 'ecology' has been described as 'deep' in this context because it raises questions at a deeper level in terms of 'why' and 'how' and therefore can be said to be concerned with fundamental philosophical reasoning about the impact that the human life has to undergo being a significant part of the ecosphere. It is significant to note that ecology has not been viewed through narrow lenses as merely a branch of biological science[8]. Deep ecology applies the knowledge that many components of the ecosystem, including humans, function as a whole rather than as distinct, fragmented units in order to achieve a more comprehensive understanding of the world in which humans live[9].

1.3 Eco- Feminism

Eco-feminism is the theory that regards that the oppression of women and nature is interconnected. According to this theory, the domination of people over nature is comparable to the dominance of the powerful over the weak, the masculine over the feminine, and even the dominance of the West over non-Western cultures[10]. In some way, the battered wife is made an analogy

[6]Devall, The Deep Ecology Movement (Nat. Resources J. 299, 1980).
[7]Zimmerman Michael, "An Introduction to Deep Ecology, Global Climate Change & Environmental Review" Http://Www.context.org/ICLIB/IC22/Zimmrman.htm(1989).
[8]Naess Arne, "A Defence of the Deep Ecology Movement, Environmental Review" (1984).
[9]Drengson Alan, "An Ecophilosophy Approach, the Deep Ecology Movement, and Diverse Ecosophies" The Trumpeter: Journal of Ecosophy14(3), AT P. 110 (1997).
[10]McIntyre, "The Maleness of Law" 1 Berkeley Womens L.J 39 (1985).

to nature, which is forever giving and being taken from, in silence. Most importantly, they believe that no nature should be changed in its form or purpose. Such modifications to the environment should be seen as depriving it of its 'inherent value'. A common radical critique to liberal feminism is criticizing the assumption that the value of women and their representation can't be secured merely by adding them as a subsection of the dominant system, and termed this the "add women and stir" problem[11]. Similar to race theorists and feminists, radical environmental critics attacks the very root of the anthropocentric philosophy underlying environmental law, and opine that you can't just "add environment and stir" without real systemic change[12].

2. Dominant Public Trust Doctrine

Closely connected with the property rights framework is the public trust way of looking at environmental protection. In 1970, Joseph Sax propounded the public trust doctrine, which argued that humans were the trustees of the environment which was precious property that we had to therefore, use judiciously[13]. He argued that all natural resources had to obviously be depleted, but in a manner that was sustainable for future generations.

This doctrine's roots are in the common property ideas of Roman law, which held that the air, rivers, sea, and shoreline were all public domains and could not be privately owned[14]. This doctrine was further developed in the US in the late 1800s, the Courts began to infer that the public possessed "rights" over natural resources and had the duty to use them for certain traditional purposes[15]. Although land/natural resources are viewed as requiring protection, the responsibility and trust of such protection is placed with the State. This is seen as a measure to protect nature from the whims and fancies of the private sector undertakings.

Under this theory pollution resulting in injury is actionable under law but the question of guilt hinges upon whether the property right holder was

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[11]Mellor Mary, I Eco feminism and Eco socialism: Dilemmas of Essentialism and Materialism 3(2), at p. 43 (1992).

[12]Stone C, I Should Trees Have Standing? - Towards Legal Rights for Natural Objects (45 S. Cal. L. Rev. 450; L, 1972).

[13]Sax Joseph, I The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention (68 Mich. L. Rev. 471, 1970).

[14]"Public Trust Doctrine, California State Law Commission" Http://Www.slc.ca.gov/Policy_statements/Public_trust/Public_trust_doctrine.pdf.

[15]Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892)

permitted to injure the party without compensation. The state, under this model, has this privilege and this forms the basis of criticism against the model. The Public Trust Doctrine accomplishes two crucial goals namely, it gives citizens the authority to challenge inefficient use of natural resources and requires the state to take proactive measures for efficient resource management.

The Stockholm Declaration of United Nations on Human Environment, gives effect to such a doctrine. To quote, "*The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural system, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate...*".

2.1 Public Trust Doctrine in India

The view that humans being are trustees of the environment has translated into legislations, case law and basic thinking about the environment not only in the US, but also in India in the landmark judgment of *MC Mehta v. Kamal Nath* [16]. In this case, there was an attempt to alter the River Beas' path and intrude on forest area in order to make it easier to build a motel. The company, Span Motors Pvt. Ltd., involved in this project, alleged had close relationship with former Minister of Environment and Kamal Nath, which gave birth to this case. The Supreme Court echoed the public trust doctrine, quoting,

"The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is beneficiary of the sea- shore, running waters, airs, forests and ecologically fragile lands The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit then- use for private ownership or commercial purposes."

It is evident from this judgment that State was made the trustee of the environment resting on the assumption that the State will necessarily confer benefits to the public. The Court identified the State as the guardian of natural

[16]MC Mehta v. Kamal Nath, (1997) 1 SCC 388

resources. However, such a stance has been critiqued by radical critics, who point out there is an unquestionable belief that natural resources are "meant for" public use and enjoyment. The same view point was referred to in the case of *Intellectuals Forum* v. *State of Andhra Pradesh*[17]. This case came about in the context of sustainable development and the Stockholm Convention of which India is a signatory. Once again, the Apex Court held that it is only the State's responsibility to protect and preserve tanks. They contended that the government must guarantee the wise use of resources for future generations by reading the public trust doctrine with the concept of sustainable development. Numerous subsequent court rulings[18] have upheld this principle, which has led us to conclude that this doctrine is a fundamental component of Indian environmental law and provides the courts with a theoretical framework for resolving environmental cases in which a significant community resource has been allocated for uses other than those that promote common enjoyment and benefit[19].

2.2 Radical Critique to the Public Trust Doctrine

Critiques of the public trust theory argue that this paradigm has failed to achieve the basic objective of environment law, i.e. to prevent pollution and degradation. All it does is restrict the onus of protection to one sphere of individuals/corporations. *Richard Delgado*, one of the most important critiques of this theory has a two-fold argument. Firstly, he argues the law cannot bring about a change in the attitude towards the environment. This philosophy takes for granted the "natural" impulse of man is to hunt, mine, destruct instead of ushering a change in attitude to one of conservation. However, by merely appointing a trustee to take care of the environment, all that it results in is accepting the fact that human beings naturally destroy the environment and thus need to appoint someone who can act in a trustworthy manner. He argues that this view falls flat because the State is comprised of ordinary individuals as well, suffering from these same human impulses to obstruct, modify and damage the environment for profit. As he puts it, "*the public trust legal doctrine operates to expand the public benefit in natural resources, while contracting the private choice on how those*

[17]Intellectuals Forum v. State of Andhra Pradesh, 2006 (3) SCC 549.
[18]T.N. Godavaram Thirumulpad v. Union of India, 2006 (1) SCC 87
[19]Kartik S.A, "The Doctrine of Public Trust and Environmental Protection in India, Centre for Environmental Law, Education, Research and Advocacy" Http://Www.nlsenlaw.org/Environmental-Protection/Articles/The-Doctrine-Of-Public-Trust-And-Environmental-Protection-In-India.

resources are best used". To put this argument in legal terms, this is nothing more than redistribution of property rights and at the end of the day this is entirely contingent on the will of the Parliament enacting the laws.

The second critique of this doctrine is that the law is not acknowledging any radical change in philosophy towards the environment, and is merely reproducing the anthro-centric approach that is the cause of the problem in the first place. It is imperative to note that Delgado doesn't reject the contribution of this view altogether, he only states that it is a compromise and there could be much more ambitious reform. However, he argues, that unless the law accepts a radical change in thinking then no such initiative will ever be seen as successful because it will never be seen as a realistic solution.

The author argues that although Delgado claimed that the human perspective is "inherently self defeating", his vision is flawed and unrealistic because it cannot be forgotten that human perspective is all that any individual can claim access to as argued by the pragmatic school of thought.

3. Environmental and Legal Pragmatism- Finding the Meeting Point

T.S Eliot had once said, "*The great weakness of pragmatism is that is ends by being of no use to anybody*". In light of this statement the author will analyze the pragmatic approach towards environmental law, ascertain in application by the judiciary and argue whether or not this approach should be followed by future environmental theorists.

The claim of environmental pragmatism is that human intervention is embedded in all aspects of the natural sphere[20]. Therefore, this must be kept in mind while restructuring social institutions so that the '*public can have a voice in deciding what kinds of environments'* we inhabit[21]. Instead of viewing human beings as the enemy, this school of thought tries to harmonize the two divergent and antagonistic schools in order to meet certain mutually desired goals. This doctrine believes that human beings must be seen as part of the environment and continuous with nature given that we are eventually biological beings.

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[20]Farber Daniel (ed.), Eco-Pragmatism (1999).

[21]Paul Veatch Moriarty, "Pluralism Without Pragmatism" Http://Www.cep.unt.edu/ISEE2/2006/Moriarty2.pdf.

Legal pragmatism merely infuses this pragmatic way of thinking into a legal framework. Starting from a more general view, it is argued that law has always been informed more by experience rather than pure logic. Legal pragmatist say that the phrase "*you must see it in context*", is the basis of pragmatic principles. *Richard Posner* sees pragmatic jurisprudence as a counter to the concept of positivist logical law and instead using law as an instrument for social ends. In such a situation, interpretation of statutes becomes a tool to achieve a pre-decided outcome[22].

In the famous American case of *Reserve Mining Co. v. United States*[23] the courts have innovatively used this philosophy to arrive at their conclusion. This case concerned the massive discharge of asbestos in Lake Superior and the pollution caused as a result of this act. However, as asbestos is known to be carcinogenic only when airborne, it was still doubtful whether it created any risks to the water. Moreover, if any verdict ordered the closure the industry causing the discharge, it would lead to loss of thousands of jobs, and several millions of dollars. Thus the courts had to balance the delicate question of economic versus environmental rights. The court held,

"Without appealing to public values, environmental regulations couldn't long enjoy general support based purely on the calculus of private interests. But without recognizing private interests as legitimate, environmental regulations may provide unmanageable resistance from those paying the price and are likely to be seen by society as a whole as too draconian to be acceptable"

This case has been the reference pint for any future pragmatic thinkers. One among them is *Daniel Farber* who has formulated the following guidelines for environment protection:[24]

It is necessary to take all practical precautions to avoid a risk once it becomes likely significantly. The only times this wouldn't apply are if the costs were evidently greater than any prospective advantages. At the same time, he advocates "prudent precautions against potentially serious risks".

Preserve the obligation of the present generation to secure a sustainable future and consider environmental conservation as a long-term societal investment.

Acknowledge that environmental issues are dynamic and employ adaptable tactics. These consist of regulations that shift the burden of proof, delaying

[22]Haac Susan, "Legal Pragmatism: Where Does the Path of Law Lead Us" Legal Pragmatism: Where Does the Path of Law Lead Us (2005).
[23]Reserve Mining v. United States, 514 F.2d. 481 (8th Cir. 1975)
[24]Daniel Farber and Joel Mintz, Some Thoughts on the Merits of Pragmatism as a Guide to Environmental Protection (B.C. Envtl. Aff. L. Rev 1, 2004).

making final decisions, and deregulation as necessary because of evolving conditions.

Finally, strive to keep balance even while retaining a commitment to environmentalism. This would imply that economists shouldn't be given discretion over the regulatory process, however, their views can't be disregarded completely. This economic perspective must be scrutinized as a reality check on over-regulation of natural resources.

These four principles have been extensively used as an environmental baseline for reconciling the precautionary principle within a cost benefit analysis, in the economic sense. Further, this is used by scholars like *Keith Hirokawa* to critique the radical approach. They argue that this approach excludes the possibility of persuasion by ignoring the importance of debate. The challenge needs to be directed so that we can "find a way the law can be understood to include conceptions of the oppressed as they are coming to be, even if the weight of legal institutional clearly excludes them [25]". Every environmentalist must choose between two strategies. One is to persist in the hope that the legal system, and society in general will see that environmental policy is inherently faulty and hope for a total revolution. The other would be recognizing that the barriers to integration of environmental ethics and law are perceived, and not rigid. Therefore, persuasion and rhetoric would be important tools to integrating the two. This can be described in terms of dogmatic versus pragmatic thinking.

3.1. Applying Pragmatic Judging to Environmental Law

Pragmatic judges are those who always do the best they can do for the present and the future, unchecked by any felt duty to secure consistency in principle with precedent". They diverge from the strict principle of applying legal precedents and justify the same on the ground that it serves a bigger purpose. This has been termed as the 'green' interpretation of the law.

Conclusion

To conclude, the author argues that the very fact that environmental law has developed in almost all countries evidences the success of the pragmatic school of thought. The Supreme Court, in the case of *A.P. Pollution Control Board v. Prof. M.V. Nayudu (Retd.)*[26]had said that often judges would have to decide between permanent harm to the environment if it is permitted or between severe adverse impact on economic interest of the country. In fact, certain scholars advocate the constitution of separate tribunals with a simple procedure which follows the pragmatic approach to each case.

[25]Margarat Radin, The Pragmatist and the Feminist (63 3 Cal. L. Rev. 1699, 1721, 1990).
[26]A.P. Pollution Control Board v. Prof. M.V. Nayudu (Retd.),, 1999(2) SCC 718.