Constitutional Recognition of Right to Healthy Environment: 
The way forward

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Abstract

Healthy environment is vital to human life as it allows a person to grow physically, mentally and intellectually healthy. Hence, it is vital that a healthy environment attained constitutional recognition as part of the fundamental right. Therefore, it is essential for a state to adopt an active and dynamic jurisprudence and constitutional framework into its legal system. The success and progressive move of the Indian jurisdiction are an example. The strong constitutional framework available in the Indian jurisdiction allows their apex court to develop creatively jurisprudence on a healthy environment as part of constitutional rights. Consequently, the Indian jurisdiction is the source of reference towards such move.

1. Introduction

Healthy environment is fundamental to human life. This right is pertinent as it allows a person to grow physically, mentally and intellectually healthy in the natural and built environment. According to the Stockholm Declaration on the Human Environment (United Nation Report, 1972):

- Principle I
  Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or

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perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

- **Principle 2**
  The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

- **Principle 3**
  The capacity of the earth to produce vital renewable resources must be maintained and wherever practicable, restored or improved.”

In line with the United Nation Declaration, it is out most essential to recognize the right to a healthy environment as fundamental. In addition, it is relevant to note the view of Dr. Abdul Haseeb Ansari. ([1998] 4 MLJ).

According to him:

“The right to a healthful environment has been regarded as a vital aspect of the right to life, for without a healthy environment it would not be possible to sustain an acceptable quality of life or even life itself. The right to life, which is an inherent and a natural right, lies in the central core of human rights. It may be observed that the values incorporated in these central core rights are not stated or finally expressed, but their dimensions will continue to expand as the levels of human liberty keep on ascending, and a new consciousness of their potential is realized. It is not unusual that changes of perspective induced by an enlarged or more enlightened awareness should open up new vistas of social, economic and cultural outlook, often producing fundamental changes in the orientation of human society.

The right to a healthful environment is gaining prominence. Greater emphasis is being laid on implementation of this right. The concept of sustainable development is a vital aspect of this right. All states, big and small, rich and poor, developed and developing, in principle have accepted the idea of sustainable development. Their constitution provides the right to life as a fundamental right...the right to a healthful environment is a vital aspect of the right to life. Even then some countries, like India and the Philippines, have provided for the right to a healthful environment as a separate fundamental rights in their constitutions. On violation of this right, citizens can invoke the writ jurisdictions of the higher courts. The courts are sincerely enforcing this right. In addition to this, some countries, like India, have provided the duty to conserve the environment as a fundamental duty.”

As far as Malaysia is concerned, right to a healthy environment is not expressly stipulated in the Constitution and any written laws. What Malaysia has at hand is the Environmental Quality (Amendment) Act 2012 and its regulations that legislates the law pertaining to environmental pollution in Malaysia. Nevertheless, the Act and its regulations do not confer any fundamental right to a healthy environment. Meanwhile, Article 5(1) made provision on the right to life as part of fundamental right protected under Part II of the Federal Constitution. However, the scope of right to life has yet to be determined. Conversely, in India, right to a healthy environment gets constitutional protection under Article 21 read together with other provisions of its Constitution. The provision is similar to Article 5(1) of the Malaysian Constitution. With the constitutional mandate received and the progressive approach adopted by the Indian apex court the jurisdiction is able to include right to life under Article 21 to include right to a healthy environment.

Since Article 21 of the Indian Constitution is similar to Article 5(1) of the Federal Constitution, the India jurisprudence and constitutional legal framework is the source of reference in moving forward in search of an appropriate jurisprudence and constitutional framework on right to life for a healthy environment.
This study aims to establish the jurisprudence and constitutional framework on the recognition of the right to a healthy environment as part of the fundamental right. Based on a qualitative research method, it will examine the availability of the public law jurisprudence and constitutional framework of an efficient system. The role of the courts and the current jurisprudence applied by the Indian jurisdiction in this area will be examined to confirm that a dynamic jurisprudence and an efficient constitutional framework is necessary for the constitutional recognition of right to healthy environment. Hence, jurisprudential concept would be adopted. The outcome of the study is the creation of a proposed model on the jurisprudence and constitutional framework that recognizes the right to a healthy environment as a fundamental right. The proposed model is practical to be adopted not only in Malaysia but also in other parts of the global.

2. Right to a healthy environment as part of fundamental rights

2.1. Position in Malaysia

In Malaysia no express constitutional and statutory provision on the right to a healthy environment. The only possible provision that can accommodate right to a healthy environment is right to life under Article 5(1) of the Malaysian Federal Constitution. In 1997, the Court of Appeal in Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor had interpreted the right to life under Article 5(1) to incorporate all facets that are an integral part of life itself and those matters which form the quality of life. With the broad interpretation given to the term “right to life”, it should extend to right to a healthy environment. This is because since ‘life’ means quality of life, a person has the right to enjoy a healthy environment and only with that a person can enjoy life meaningfully.

If right to life extends to right to a healthy environment, it is able to develop environmental jurisprudence in Malaysia that received constitutional recognition. Consequently, strong platform for the protection of the environment could be created in Malaysia. Thus, recognising right to a healthy environment as part of the fundamental right is vital. Therefore, it is pertinent to take steps accepting right to a healthy environment as part of fundamental right under the Malaysian Federal Constitution. The way forward is to refer to any common law jurisdiction that is progressive in the development of the jurisprudence and constitutional framework in this area. Since the expression ‘life’ under Article 21 of the India Constitution is equipollent to the Malaysian Article 5(1) of the Federal Constitution, pronouncement from the Indian Supreme Court and the Indian constitutional framework on the relevant term may offer some guideline to the Malaysian Court and its system.

2.2. Position in India

2.2.1. General observation

The Indian jurisprudence and constitutional framework on right to a healthy environment as part of fundamental rights are well developed. Articles 21, 48A and 51A(g) of the Indian Constitution take measures to protect the right to a healthy environment.

According to Article 48A:

“The State shall endeavour to protect and improve the environment and to safeguard the forest and wild life of the country.”
Meanwhile, Article 51A(g) states that:

“to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.”

Further Article 21 provides:

“No person shall be deprived of his life or personal liberty except according to the procedure established by law.”

The Indian apex court has played an active role in supporting the achievement of the above constitutional mandate given. Ever since the decision of Maneka Ghandi v Union of India the Indian jurisdiction continued to move forward in its public law. To attain the objectives of Articles 48A and 51A(g) a dynamic attitude on interpretation of the constitution was adopted by the Indian courts. The proactive moves of the courts have enabled the Indian jurisprudence to extend the ambit of their fundamental right. For instance, the liberal interpretation on right to life under Article 21 by the Supreme Court in Maneka Ghandi allows the Indian apex court judges to widen the scope of fundamental rights, and this includes right to a healthy environment. Additionally, the energetic stand adopted have allowed India to extend right to a healthy environment, to comprise, amongst others, right to enjoy pollution-free water and air, protection and preservation of environment, sanitation, ecological balance, environment free from pollution of air and water and also healthy environment at work place.

2.2.2. Proactive development of the right to a healthy environment as part of the fundamental right

The pronouncement of Maneka Ghandi is the new frontier in Indian public law on right to life. The liberal attitude applied by the court in Maneka Ghandi forms the basis for the extension on the ambit of fundamental rights to encompasses right to a healthy environment. In the construction of the term “life” in their judicial pronouncement, the Supreme Court frequently cited the observation of Field, J. in Munn v Illinois which stated that ‘life’ meant something more than mere animal existence and the inhibition against its deprivation extend to all limbs and faculties by which life could be enjoyed. With the proactive approach applied, the Indian judiciary can create a positive behavioural pattern to imply the right to a healthy environment as part of fundamental life. The positive move has brought progressive development on a healthy environment in India. This was illustrated in numeral decisions of the Indian Supreme Court.

In Shantisar Builders v Narayanan Khimalal Totame, the Supreme Court said that ‘life’ under Article 21 consists of the rights to food, clothing, decent environment and reasonable accommodation. Meanwhile, in Board of Trustees, Port of Bombay v Dilikumar the Supreme Court stated that the term ‘life’ has a much wider meaning than just an animal existence. Clear acceptance of the right to a healthy environment within the ambit of Article 21 was made in Virendra Gaur & Ors v State of Haryana. In this case, the court held that right to life under Article 21 embrace enjoyment of life. Its attainment includes right to life with human dignity which encompasses, the protection and preservation of environment, ecological balance, free from pollution of air and water and sanitation without which life cannot be enjoyed. The Supreme Court in the case too had decided that right to the environment includes right to hygienic atmosphere and ecological balance. On the issue of ecological balance, the Supreme Court had included in its decision the importance of sustainable development. In the instance case, it was held that sustainable development is part of the jurisprudence so as to guarantee against any action that caused environmental damage.

In T.N Godavarman Thirumulpad (87) v Union of India the Supreme Court decided that natural resources are the asset of the nation and hence, the government has the duty to conserve and prevent
wastage of the resources. According to the court, if there was any danger made to the ecology it resulted with infringement of the fundamental right to a healthy life protected under Article 21. In Andhra Pradesh Pollution Control Board-II v M.V. Mayudu, the court decided that a decision to give exemption to particular polluting industry is an infringement to Article 21. The reason is since right to life under Article 21 embraces a right to a healthy environment it includes prevention on environmental damage.

Environment that is hygienic is also necessary as it guaranteed environment that is healthy. Therefore, Article 21 has embrace hygienic environment as part of right to life of a person to live in dignity. The Supreme Court in M.C. Mehta v Union of India decided that the right to a living atmosphere amiable to human existence is part of right to life under Article 21. Consequently, the State has the obligation to include in its policy to maintain ecological balance and a hygienic environment. (Bhagabati, 2012). The obligation was also clearly explained by the Supreme Court in Virendra Gaur & Ors v State of Haryana. According to the Court:

“Therefore, hygienic environment is an integral facet of the right to a healthy life, and it would be impossible to live with human dignity without a humane and healthy environment. Environment protection, therefore, has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore, there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment.”

In the effort to have a creative jurisprudence on the rights to a healthy environment, the Indian courts used several principles on environmental protection. This includes the doctrine of public trust which rests on the basis that certain natural resources such as air, sea, water are means for general use and cannot be restricted to private ownership. This is because these natural resources are said to be a gift of nature. By virtue of this doctrine, the State as trustee is duty bound to protect them while the general public is the beneficiary of the natural resources. If there is any move that endangers or impairs that quality of life in derogation of laws, an action is maintainable by the affected person or persons or an interest group by way of public interest litigation under Articles 226 or 32.

Further, in order to protect and safeguard the environment it is also significant to note the principle of principle forms part of the Environmental law in India. Applying those principles, not only person who carries out hazardous activities is made responsible to remedy the loss caused by another person by such activities, but the authorities are duty bound to anticipate, prevent and eliminate the causes of environmental degradation. Thus, the creative and dynamic approaches of the Indian Courts help develop a proper environmental jurisprudence. As a result, not only the affected person is given an appropriate remedy, the environment too could be protected.

Right to health of workers too is part of right to a healthy environment protected under Article 21. In Consumer Education & Research Centre v Union of India, the decision stated that workers right of a healthy environment consists of working in a hygienic working condition in the work place and leisure to workmen which comprised better standard of life, connoting the traditional and cultural heritage of a person. (Bhagabati, 2012).

The above illustrates the jurisprudence on the right to a healthy environment as practiced in India. As from the decision of Manekha Ghandi the Indian Supreme Court was active in developing right to a healthy environment as a matter of the fundamental right that attain constitutional status. With the strong
mandate received from the constitution, India is able to extend its ambit on the right to the environment as part of the fundamental right. Henceforth, India had a much stronger platform to rely on to protect, preserve and conserve the environment.

3. The move towards recognising right to a healthy environment as part of the constitutional right

The vibrant move towards recognising right to a healthy environment as part of the fundamental right is important. Healthy environment is essential to human living and needs. Proper constitutional right recognition would make certain that good quality of life of a person is preserve. Besides, adequate recognition to a healthy environment is a step further to protect the environment. The Constitution is the supreme law of the land. It is able to provide a strong legal recognition on fundamental rights needed in the society. Moreover, Constitution is a living instrument that could be interpreted in accordance with the contemporary needs of the society. Hence, with the right attitude and behaviour adopted by the Malaysian apex court, right to a healthy environment could form part of fundamental rights provided in the Federal Constitution.

Hence, the courts are required to construe the constitutional provision of right to life under Article 5(1) according to the contemporary needs so that the interpretation would serve a social purpose. This could be achieved by considering the social, economic and political setting in which the constitutional provision is to operate. In this perspective creativity of the court is needed in performing their function. With that justice could be upheld.

The dynamic and active move in the cases above showed that the court played a vital role in interpreting the right to the environment as part of fundamental rights. By extending the scope of Article 21 (which is similar to Article 5(1) of the Malaysian Constitution), the Indian Courts are capable to be creative to incorporate right to a healthy environment as a matter of fundamental rights under the Constitution. Since right to life under Article 5(1) of the Federal Constitution is the same as provided for under Article 21, the Indian jurisprudence is the source of reference and whenever permissible, the Malaysian Courts should adopt the approach taken by the Indian Courts. If such an attitude is adopted the Malaysian Courts can march progressively in developing suitable jurisprudence on environmental law in Malaysia.

4. Conclusion

To conclude, the constitutional provisions and the court’s powers could be interpreted broadly and liberally to include right to a healthy environment as part of fundamental rights of a person. In the process of doing so the creative and dynamic approaches of the Indian court could be made as reference. Every effort has been made to relate them to the interpretation of the right to a healthy environment as right to life under Article 5(1). Since right to a healthy environment is important to the healthy living of a person, it is necessary that the right must be interpreted in the widest amplitude. This would guarantee that the utmost protection could be given to the public. The dynamic jurisprudence and constitutional framework are the way forward in getting recognition of Right to Healthy Environment as part of the fundamental right.

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