

JUDICIARY DOES A TURN

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ABSTRACT

Every human born in the world is free, attached with certain natural rights that can't be taken away by any law. One of these rights is called the right to get healthy environment. In the Indian scenario, a citizen of India can claim this right through the Constitution of India. The States are also under an obligation to perform duty towards maintaining a wholesome environment. Article 47 and 48B of the Constitution mandate in favour of preservation of the natural environment of this country. Though we have legislations regarding the protection of environment, the growth of industrialisation and developments are a hurdle in the protection of nature. The independent Judiciary needs to be a part of environmental jurisprudence. Sometimes the judiciary has to take direct cognizance when a person³ dodges the environmental norms for his/her private interest. The *T. N. Godavaram* case⁴ is the best example set by the Indian Judiciary in the line of protection of environment. While dealing with the matter relating to the environment, the role of Judiciary is not mundane but potent enough to make certain laws. Precautionary principle, polluter pays principle, strict liability, absolute liability etc. are the judge made laws through certain decisions.

Keywords: Wholesome environment, Sustainable Development, Forest and Wildlife, Preservation and Conservation.

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³ As referred under section 11 of Indian Penal Code.

⁴ *T. N. Godavarman Thirumulkpad v. UOI*, (1997) 2 SCC 267; AIR 1997 SC 1228.

INTRODUCTION

“Human Knowledge and human power meet in one; for where the cause is not known the effect cannot be produced. Nature to be commanded must be obeyed; and that which in contemplation is as the cause is in operation as a rule.”

(Francis Bacon 1561-1626)

The Supreme Court of India, in last few decades has played a sagacious role in the development of environmental jurisprudence which have made a massive difference in the modern era. The Apex Court of India is witness to a plethora of public interest litigation on the environmental jurisprudence. In *Shubhash Kumar v. State of Bihar*⁵ the Supreme Court made it clear that right to fresh water and air is a Fundamental Right to life enshrined under Article 21 of the Indian Constitution. The judicial concern regarding right to wholesome environment has been reflected in subsequent pronouncement. It has issued appropriate directions where the government has failed to perform its statutory duty, and thereby undermining the rights of a person guaranteed by the Indian Constitution. The judiciary should also be credited for the term ‘corporate liability’ coined by it. We should not forget the landmark judgement in *MC Mehta v. Kamalnath*⁶ where Hon’ble Supreme Court quoted that the polluter pays principle means absolute liability for the harm to the environment and it extends to not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Establishment of National Green Tribunal is

Right to environment is, therefore, accepted as both human right as well as a fundamental right. By referring to the Stockholm Declaration, 1972 and Rio Declaration, 1992, the Supreme Court stated the importance of polluter pays principle, precautionary principle, Inter-generational Equity Principle, absolute liability principle, public trust doctrine and reversal of burden of proof in important environmental cases. This was no doubt an era where the Supreme Court showed remarkable leadership skill in implementing global environment concern.

⁵Shubhash Kumar v. State of Bihar, (1991) 1 SCC 598

⁶MC Mehta v. Kamalnath, AIR 2000 SC 1997.

CORPORATE LIABILITY: A NEW PHASE OF ENVIRONMENTAL JURISPRUDENCE

The Indian Legislation covered almost all anti-pollution laws but still left some loopholes for the corporation which is wide enough to escape the liability and hence the judiciary is playing vital role to fill up those loopholes. The concept of vicarious liability in the tort law was not enough to condone the damage caused to the environment. The corporations are strong enough to defend themselves from the civil liability. The *Oleum gas leak case*⁷ was the first case where the Apex Court, referring *Rylands v. Fletcher*⁸, brought new concept of strict liability to compensate the environmental damage. But it was not enough to restore. In 1981 Bhopal Gas Tragedy shook the whole country and was an eye opener for judiciary. In that case Indian Judiciary laid down a new judicial norm of “absolute liability” for hazardous and inherently dangerous industry to pay compensation. The Supreme Court, in these type of cases, has power to impose any amount of exemplary compensation. Now the question arose that whether compensations is enough for the corporation to fulfil the obligation and whether it is so exemplary that any corporation will not repeat the same? The answer is ‘no’. According to the water pollution control act the corporation can be criminally held liable for the pollution created by the corporation but up to what extent. Can it be imprisoned? Corporate imprisonment is still a debatable topic in India. Where other countries like USA, UK etc. have laws relating to corporate criminal liability and India is still struggling with these laws. Somewhere judiciary is restricted to and bound by the parliamentary legislations. As an opinion a company can be imprisoned. The existence of a company is for business and if it is restricted or curtailed that it can be termed as virtual imprisonment of a company. Judiciary has enough power to take certain steps towards it and can set certain guidelines. The judiciary has completely failed to prosecute the corporations. Establishment of the National Green Tribunal is a recent development in the environmental jurisprudence. Now it is easy to take immediate action against a corporation through speedy proceeding of the environmental related cases.

⁷M. C. Mehta & anr. v. UOI & anr. 1987 AIR 1086; 1987 SCR (1) 819.

⁸*Rylands v. Fletcher*[1868] UKHL 1.

COLLECTIVE INTEREST OVER INDIVIDUAL INTEREST

The tragedy of commons is an economic theory where a situation is depicted in which there is a common-property pasture available to all the villagers and that can be utilized as and when required by their cattle free of cost. The cattle in return produce output which serves as a source of income for the herders. There is no limitation on the chattel kept by each herder and thus they can keep on adding. However, there is a well understood consequence that at a point, even one addition of cattle would lead to the degradation of pasture permanently. However the herder sees it as if he adds even one more cattle, he will maximize benefits personally. On the other hand, if the herder fails to add one cattle, it will be to his disadvantage as other herders are already adding cattle to their stock.

What would be a rational behavior in these circumstances? Hardin says, when faced with a choice between one's selfish interest and a more diffuse public interest, the rational course is the selfish one.⁹ If this way is followed, the degradation of commons¹⁰ is thus inevitable and the consequence is already well-known to all.

However the Courts in India do not agree with the rational of Hardin and have taken an environment centric path. As shown in the case of *Jagpal Singh & Ors v. State Of Punjab & Ors*¹¹, involving persons illegally living in a pond in an area of the Patiala district. The lower court allowed the regularization of such an illegality on the ground that the respondents had spent huge money in constructing the houses and it would not be in public interest to dispossess them. However the Apex court took a strict view and stated that even if the appellants have built houses on the land in question they must be ordered to remove their constructions, and possession of the land in question must be handed back to the Gram Panchayat. Regularizing such illegalities must not be permitted because it is the Gram Sabha land that must be kept for the common use of villagers. Markandey Katju, J. extended the principle to state that such common lands are being used by commoners since time immemorial and that our forefathers were not fools to be preserving these common lands.

⁹ Hardin, G. (1968), 'The Tragedy of the Commons', *Science*, 24, 561-68.

¹⁰ Here commons mean property which is accessible to whole community and to which no individual has exclusive ownership. Also it is freely available like forests, grazing grounds, river and river bed, tanks etc.

¹¹ *Jagpal Singh & Ors v. State Of Punjab & Ors*, (2011) 11 SCC 396.

And thus they must be protected and just by the fact that such land is freely available to all, it does not amount to unfettered use by any one or group of individuals.

There have been many cases on the same line which make it clear that no individual or group of individual can use any common property to the contrary interest of the community and to that of the environment.

THE JUDGE'S COURSE

Environment movement once stood on the fringes of the human rights movement together with other issues as just another issue. Today it stands centre stage. It has been that deteriorated, and thus the Courts need to jump into the problems and help in finding the solutions.

The Judiciary is a source of contemporary law and it does a turn for protecting the environment when it establishes various principles like the principle of Absolute Liability in the *Oleum Gas leak case*¹² for the first time sidelining the exceptions to strict liability and pinning down the huge corporations for not taking enough precautions and for causing huge destruction to the environment.

The principles of Environmental Jurisprudence approach through either preventive way or through compensatory way or both. But the principles yet in practice do not tend to render a complete solution to the problems we face as a community. The precautionary principle as said in the Report of The United Nations Conference on Environment and Development¹³ emphasizes on the point that even when there is no scientific evidence available to support a particular theory, precaution shall be taken. The Indian courts reaffirmed these principles and observed that

“In respect of the precautionary principle,...where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent Environmental Degradation” in the case of

¹² M. C. Mehta & anr. v. UOI & anr. 1987 AIR 1086; 1987 SCR (1) 819.

¹³ ‘Report of The United Nation Conference on Environment and Development’, General Assembly, 12 august 1992, A/CONF 151/26, vol. 1.

*Research Foundation for Science Technology and Natural Resources Policy v. Union of India and Another*¹⁴.

This principle describes an approach to protection of the Environment and Human Health and to take precautions even when there is no clear evidence of harm or risk from harm from an activity or substance.

Environmental Jurisprudence includes principles like the Preventive Principle, the Proximity principle, the Subsidiary principle, Polluter Pays principle¹⁵, Strict and absolute liability etc.

The polluter pays principle is one of the most important principles in the Environmental Jurisprudence and has been expressed in numerous International recommendations and treaties.¹⁶ The Principle is treated as a principle of liability and compensation for pollution damage. The liability is put upon the polluter and intrinsically excludes others from bearing the cost of Pollution. The victim, taxpayer, Society at large, Nature and the Future Generation cannot pay and cannot be made liable for the same.¹⁷

Judicial concern regarding right to wholesome environment has been reflected in numerous pronouncements of the Supreme Court and various courts like in the case of *Indian Council for Enviro-Legal Action And Others v. UOI and others*¹⁸, where the court interfered to give proper remedy to the destitute village where the water, soil and air was contaminated through discharge of toxic effluents and had made the life of villagers miserable. The court has stated that the liability on the aquaculture industry and shrimp culture industry would be imposed on the basis of polluter pays principle.¹⁹

The courts have an important role to play in conservation and preservation of the wildlife also judiciary has always taken the forefront in preservation of the wildlife as in the recent case of Uttarakhand where the High Court on December 19, 2016 has prohibited killing

¹⁴ *Research Foundation for Science Technology and Natural Resources Policy v. Union of India and Another* (2005) 3 Comp LJ 193 (SC), MANU/SC/0013/2005.

¹⁵ The polluters pay principle has been recently best explained in the case where the Supreme Court lifted a seven-month long ban on the sale of diesel cars and SUVs with engine capacity of 2000cc or more in the Delhi region by accepting the offer to pay interim green cess of 1% of vehicle's ex-showroom cost.

¹⁶ It was included in the EC treaty in 1987 in Art. 130 R of the Single European Act (Now Art. 174 of the EC Treaty); 1992 Declaration of the UN Conference on Environment and Development as Principle 16 (Rio Declaration).

¹⁷ J Ebbesson & P Okowa *Environmental Law And Justice In Context*; (412, 1st Ed.), Cambridge University Press, Cambridge, 2009.

¹⁸ *Enviro-Legal Action and Others v. UOI and others*, (1996) 3 SCC 212.

¹⁹ *S Jagannath v. UOI*, (1997) 2 SCC 87.

of big cats (man-eaters) and even officially calling them to be man-eaters in the wake of rising levels of conflict between humans and big cats. In Uttarakhand, the primary response of the Forest Department has been killing these so-called man-eaters. This area of Uttarakhand has been seeing varied and increased number of these big cats due to various theories of Climate change. However these species being already endangered, need protection, quotes the High Court. The Court has taken a more humane approach towards protection of the wildlife, along with tackling the problem.

Courts have also launched the concept of continuing Mandamus in which the cases get listed automatically if the subject matter is similar as done in the case of *T. N. Godavarman Thirumulkpad v. UOI*²⁰ which is a watershed in the history of conservation of forest cover in India and the Apex court took the cutting and felling of trees as a serious threat to the Vegetation cover. Under this heading, the Courts have made more than 120 pronouncements. The courts in 2006, declined to accept the apology tendered by the Minister of State of Maharashtra and the principle Secretary, Department of Forest and Environment, which had permitted to install sawmills in the forest area in a flagrant violation of orders of the Supreme Court. The court made it clear that an apology is not a defence for contemnor.²¹

However there have been recent cases which explain even more the need for Judiciary's intervention in matters of Environmental pollution like the recent oil spill in Chennai on 18th February, 2017 that has brought up a pan India problem into lime light again when the authorities of Karamajar Port showed a lackadaisical approach in dealing with the issue. The port authorities didn't remove it immediately, rather the lack of coordination between the port authorities and the Coast guard has aggravated the condition. The coast guard claims to have not been intimated about the situation at all. The fishermen had to suffer a lot as the fish markets remained empty for the fear of highly contaminated fishes and fish products. The city has not less than three ports located in the near proximity and the fear of small chunks of oil being divided and spread in the waters. The matter is yet to have a final order and is being looked upon by the Courts.

²⁰ T. N. Godavarman Thirumulkpad v. UOI (1997) 2 SCC 267; AIR 1997 Sc 1228.

²¹ SATISH C SHASTRI, ENVIRONMENTAL LAW; (483, 4th Ed.) Eastern Book Company, Allahabad, 2012.

Situations like these demand that there has to be some emergency plan to tackle situations and thus comes the role of judiciary which grants direct sanction to them to act as and when required so that the damage is minimal.

The courts have even turned a blind eye to some of the issues in the name of sustainable development where huge projects clearly defy the environment norms like in the building of the Commonwealth games village on the floodplain of Yamuna river and the construction of the Akshardhama temple a little time later covering 24 hectares on the riverbed had become a centre of controversy. The courts allowed it on the factum that it was a question of national stake, and so the fate of this case was almost pre-determined. The stand of the court was proved wrong with the floods of 2010. The flood waters of the Yamuna released by Haryana came into the floodplains and was blocked on two sides by the Akshardham temple complex as well as massive commonwealth games village, and had flooded parts of Delhi and left stagnant waters and almost causing an Epidemic level rise in Malaria, Dengue and other water-borne diseases.

JUDICIAL OVER ACTIVISM RELATING TO ENVIRONMENTAL ISSUES

The T N Godavaram case was heavily criticised due the term ‘continuous mandamuses evolved by the judiciary. It was criticized because judiciary over exercised its power relating to the environment. The Supreme Court stated certain guideline to be followed relating to the felling of trees by the timber industries and saw mills. Sometimes judicial over activism can be termed as positive activism of the judiciary. Taking this particular case, state had certain policy regarding regulation of the timber industry but it was not properly implemented.

The first MC Mehta case had laid down a lot of guidelines for the regulation of the hazardous industries which was further trimmed down by the same Apex Court in the Second MC Mehta case. This shows how the first case had over spirited approach to the concept of hazardous industries so much so that it had to undergo a lot of changes in the second one and a much clearer approach had to be taken.

In Ganga Pollution (Municipalities) case, the Apex Court had come up with a ruling against the municipalities and also including other Government entities had ordered them to take the necessary steps to prevent pollution of Ganges. The Honourable Court had to come up with directions, with a majority of them being interim for the administration to wake up from its slumber and follow the constitutional ethic and law. The learned judge played a role which was unprecedented as he took up a multitude of *suo motu* interventions with the appointment of investigation committees, spot visits, monitoring exercises to ensure conformity with the law. The important part of the Court’s decision is the high level of accountability that it makes for the concerned authorities and statutory bodies, with respect to the protection of the environment. Although the observations and directions were related to the pollution of the river Ganga, they had the force of law in relation to similar cases of pollution throughout the country. It may seem impressive, but there is limit of courts in the face of an indifferent bureaucracy. Despite of specific rulings and direct monitoring, the administrators have not faithfully implemented the orders.

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