AN OVERVIEW OF ENVIRONMENTAL JURISPRUDENCE IN INDIA

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ABSTRACT

Concern for protection of environment[1] is not a new phenomenon but has existed since the Vedic era. However there has been a trend of unprecedented growth in environmental pollution in the past few decades. This trend has led to a concern that we must not develop industries at the expense of the environment.

The term environment means one's surrounding and includes everything that influences a living being during its life span. The word environment is derived from the French word "Environ" which means "surrounding" or 'en-circle'. Our surroundings include both biotic factors like human beings, plants, animals, and microbes and abiotic factors such as light, air, water, and soil. Thus the environment consists of an indivisible system of physical, chemical, biological, social and cultural elements.

Environmental pollution, undoubtedly, is a wide ranging problem which adversely affects

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[1]The term 'Environment' as defined under section 2(a) of Environment Protection Act 1986 reads as under: "environment" includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.

not only human beings, but also other species on the earth. The efforts to curb the rising menace of pollution have been growing worldwide. This paper seeks to present an overview of the environmental protection movement from the British period to the contemporary age.

I. DURING THE BRITISH PERIOD

The early days of British rule in India were days of plunder of natural resources. There was a total indifference to the needs of forest conservation. The onslaught on the forest was primarily due to the increasing demand for supply of teak and sandalwood for export trade. The British Government started exercising control over forests in the year 1806 when they requested the British East India Company, which already controlled large parts of the coastal regions, to investigate the feasibility of harvesting Malabar teak in Madras to meet the needs of British shipbuilding during the Napoleonic war. The move failed to conserve forests as the appointed Conservator of Forests plundered the forest wealth he was supposed to protect. Consequently, the post of conservator of forest was abolished in the year 1823.

The first step of the British Government concerning the monopoly right over the forest was the Forest Act - 1865. The Act was revised in 1878 and extended to most of the territories under British rule. It also expanded the powers of the State by providing for reserved forest, which were closed to the people, and by empowering the forest administration to impose penalties for any transgression of the provision of Act. The British Government declared its first Forest Policy by a resolution on 9 October 1894.

Besides controlling forest wealth, the British also prescribed various do's and dont's in the form of legislative sanctions. Penal laws were enacted making certain acts/omissions offences and prescribing penalties for the same. For example, the *Indian Penal Code, 1860* provided criminal sanctions in the long list of offences which have a direct or indirect bearing on environment. Provisions like Section 268, (public nuisance); Section 269, 284 (Negligence), Section 285 (poisonous substance), Section 286 (Explosive substance), and Section 425-440 (mischief) have an indirect bearing on the environment. Whereas Sections 277 and 278 directly deal with purity of water and air, Section 277 provides that, *"whosoever corrupts or fouls water of any public spring or reservoir so as to render it less fit for which is ordinarily used."* Section 278 makes it an offence for any person to voluntarily vitiate the atmosphere in any place so as to make it noxious.

Besides the criminal law sanctions during the British period, the common law remedies also were internalized like torts of negligence, nuisance, and strict liability. It may be further pointed out here that the principle of strict liability imposed a strict and non-delegable duty of a polluter by the Indian Supreme Court.[2]

Though critics point out that the British enacted legislations not with the object of protecting the environment, but with the aim of earning revenue for themselves it should still be regarded as the first step towards conservation of natural resources.

II. POST INDEPENDENCE JURISPRUDENCE

Post independent India witnessed a transformation in the policies and attitude of the Government with reference to environmental protectionism. The Constitution of India, which came into force on 26 January 1950, had a few provisions regarding environmental

[2]See, M. C. Mehta v. Union of India, AIR 1987 SC 1086.

management, particularly under Part IV of the Constitution of India. The most important of all articles is Article 37 which declares that the directive principles contained in Part IV of the Constitution is *"fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws"*. Further Article 39(b) provides that "*the State shall direct its policy towards securing the ownership and control of the material resources of the community so that they are distributed as to best serve the common good*".

Article 47 provides 'that the State regard the rising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.' Article 48 directs that 'the State shall endeavor to organize agriculture and animal husbandry along modern and scientific lines and take steps for preserving and improving breeds while prohibiting the slaughter of cows, calves and draught cattle.' Article 49 directs that 'it shall be the obligation of the State to protect every monument or place or object of artistic or historic interest declared to be of national importance from spoliation, disfigurement, destruction, removal, disposal or export as the case may be'.

From the above articles, one may comprehend that the Constitution of India was not environmentally blind as suggested by some eminent jurists like Upendra Baxi. Though the word environment was not expressly used in the Constitution, the objective of the above articles is to conserve natural resources and protect the natural environment.[3]

The year 1976 is a milestone in the history of environmental management in India. It was the year in which the Parliament of India, drew upon the commitment made by the then Prime Minister of India, Mrs. Indira Gandhi, at the United Nations Conference on Human Environment held at Stockholm. The views expressed at the

[3] Tripathi N.M., *Environment Protection Act: An Agenda for Implementation*, (Bombay, 1987).

Stockholm Conference formed a core part of the basic environmental philosophy of India that found expression in various governmental policy pronouncements in subsequent years. These provisions are as under:

- Article 48A provides for "*Protection and improvement of the environment and safeguarding of forests and wild life. The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country*."[4]
- Inserted the Constitution (forty second amendment) Act, 1976, adding two very important provisions in the Constitution of India i.e. Article 48 A and Part IV A (Fundamental Duties) under Article 51 A(g).

A. Contemporary Environmental Jurisprudence

The Indian Judiciary, as one of the state organs is charged with the responsibility to protect the Constitution and safeguard the constitutional philosophy. Accordingly, in order to execute its constitutional obligations it has always been prepared to issue 'appropriate' orders, directions and writs against those causing environmental pollution and ecological imbalances. This is obvious in a plethora of cases starting from the Ratlam Municipality Case.[5] Environmental values or rights may be constitutionalized either explicitly, by amending the constitution or implicitly by interpreting the existing constitutional language to include environmental protection through judiciary. The Higher Judiciary has interpreted the existing constitutional provision viz., 'the right to life' guaranteed in Article 21 to mean the right to live in a healthy environment.[6] The Court through its various judgments[7] has held that the mandate of right to life includes the right to clean environment, drinking-water

[4]Inserted by the Constitution (42nd Amendment) Act, 1976.
[5]Ratlarn Municipality v. Varchichand, AIR 1980 SC 1622.
[6]Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh, AIR 1988 SC 1037
[7]Subhash Kumar v. State of Bihar, AIR 1991 SC 420.

and pollution-free atmosphere. The Supreme Court has also made expansive interpretations of Article 48A, 51A(g) read with Article 21 of the Constitution of India.

B. Protection of Historical Monuments

In the Taj Mahal's case[8], the Supreme Court issued guidelines that coal and coke based industries in the Taj Trapezium (TTZ) which were detrimental to the Taj should either change to natural gas or be relocated outside TTZ. The Supreme Court also directed that instantaneous steps to supply water to the plants around the Taj be taken by the Forest Department[9].

In *Rural Litigation & Entitlement Kendra v. Slate of U.P.* case[10], disorganized limestone quarrying in the Mussorie Hill range of the Himalaya and mine blasting had distressed the hydrological system of the valley. The Supreme Court ordered the closing of limestone quarries in the hills and observed:

> *"This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance".*

C. Public Health vis-à-vis Right to Life:

The Supreme Court has repeatedly emphasized the significance of safeguarding public health. In *Subba Rao v. State of Himachal Pradesh*[11], the Court ordered the shutting of a bone factory which was polluting the environment with its pungent smell upholding the right

[8]M.C. Mehta v. Union of India, AIR 1997 SC 734; See also, M.C. Mehta v. Union of India, AIR 1999 S.C. 3192.
[9]M. C. Mehta v. Union of India, (2001) 9 SCC 520.
[10]Rural Litigation & Entitlement Kendra v. State of Uttar Pradesh, AIR 1985 SC 652.
[11]Subba Rao v. State of Himachal Pradesh, AIR 1989 SC 171.

to health conjunctively with the right to a clean environment. In the landmark case of *Municipal Council, Ratlam v. Vardhichand,*[12] the Court condemned the failure of local authorities to provide the essential amenity of public conveniences that drives the miserable slum-dwellers to the streets. Similarly, in 2001, the Supreme Court imposed ban on smoking of tobacco in public places all over the country[13] as it harms not only smokers but also non-smokers.

III. INTERNATIONAL ENVIRONMENTAL JURISPRUDENCE AND THE INDIAN JUDICIARY

The formulation of certain new principles and declaration of new doctrines as part of domestic legal system for the protection of the environment is a remarkable achievement of the Indian judiciary. Some such principles of Indian origin which were later incorporated into the international legal order are:

- Principle of Absolute Liability
- Polluter Pays Principle
- Precautionary Principle
- Doctrine of Public Trust &
- Doctrine of Sustainable Development

A. Principle of absolute liability

The Supreme Court of India formulated the absolute liability principle for harm caused by hazardous and inherently dangerous industries by re-interpreting the scope of the power under Article 32 of the Constitution of India. Absolute liability is a newly formulated doctrine free from the exceptions to the strict liability rule of the Common Law principle of England. This rule was evolved in the case of *M.C. Mehta v. Union of India* which is popularly known as the

[12]M. C. Mehta v. Union of India, (1996) 4 SCC 351.
[13]Murli S. Deorav. Union of India, (2001) 3 SCC 765.

'*Oleum gas leakage case*.' The Court re-examined and reiterated the principle of absolute liability in the case of Indian Council for *Enviro Legal Action* v. *Union of India.*[14] This case is popularly known as the 'Sludge's Case. The principle of absolute liability has now to some extent, attained the status of a statutory liability. The Public Liabilities Insurance Act, 1991 is one such law, which provides that there is no burden on the claimant to plead and establish that the death, injury or damage in respect of a claim was due to a wrongful act, neglect or default of any person. The National Environment Tribunal Act, 1995 is another significant legislation which provides strict liability for damages arising out of accidents that occur while handling hazardous substance.

B. Polluter Pays principle

It is now recognized it is necessary to devise various kinds of measures to prevent and minimize industrial pollution. Polluter Pays Principle (PPP) which was originally considered as an economic and administrative measure to restrain and control the pollution problem, has now become a powerful legal tool to combat environmental pollution and associated problems.

The Supreme Court for the first time applied the polluter pays principle explicitly in the case of Indian Council for *Enviro-Legal Action v. Union of India*.[15] The Court held that the polluting industries are "*absolutely liable to compensate for the harm caused by them to the villagers in the affected area, toe the soil and to the underground water and hence they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected area*s."

[14]Enviro Legal Action v. Union of India, AIR 1996 SC 1466.
[15]Enviro-Legal Action v. Union of India, (1996) 3 SCC 212.

In the case of *Vellore Citizen's Welfare Forum v. Union of India*[16] the Court declared that the polluter pays principle is an essential feature of sustainable development. The Court observed that the polluter pays principle ensured that the absolute liability for harm to the environment extents not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. It also observed that the polluter pays principle has been accepted as customary international law and hence it becomes a part of the law of this country.

The principle was later applied in the case of *M.C. Mehta* v. *Kamalnath*[17] In this case the Court held that the Span Motel interfered into the natural flow of the river Beas by trying to block the natural relief / spill channel of the river. Hence, the Motel was directed to pay compensation by way of cost for the restitution of the environment and ecology of the area in consonance with the polluter pays principle.

C. Precautionary Principle

Before 1972, there was a concept of 'assimilative theory' in operation at the international level. It is premised on the understanding that the environment absorbs the shock of pollution but beyond a certain limit the pollution may cause damage to the environment requiring efforts to repair it. Thus, according to the assimilative theory, the role of law will begin only when this limit is crossed. However, pollution cannot wait for action to be postponed for investigation of its quality, concentration and boundaries. So, there was a shift from the principle of assimilative capacity to the precautionary principle. In the case of *Vellore Citizens Welfare Forum* v. *Union of India* the 'precautionary principle' was declared to be an essential feature of sustainable development. This principle has been incorporated into municipal law to include:

[16]Vellore Citizen's Welfare Forum v. Union of India, (1996) 5 SCC 647.
[17]M.C. Mehta v. Kamalnath, (1997) 1 SCC 388.

- Environmental measures - by the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental degradation.
- Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
- The "*onus of proof*" is on the actor or the developer / industrialist to show that his action is not dangerous to the environment.

Invoking the principle in the case of *M.C. Mehta* v. *Union of India*, the Court observed that "*the atmospheric pollution in TTZ has to be eliminated at any cost. Not even 1% chance can be taken when-human life apart-the preservation of a prestigious monument like the Taj is involved*." Therefore, the industries identified by the Pollution Control Board as potential polluters, had to change over to natural gas as an industrial fuel and those who were not in a position to obtain has connections should stop functioning in TTZ.

D. Doctrine of Public Trust

The Supreme Court's decision in the case of *M.C. Mehta* v. *Kamalnath*[18] is an excellent exposition of the Doctrine of Public Trust. The 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 Doctrine enjoins upon the Government to protect the resources for the enjoyment of the' general public rather than the permit to use for private ownership or commercial ownership.

[18]M.C. Mehta v. Kamalnath, (1997) 1 SCC 388.

According to Joseph L Sax, the Public Trust Doctrine imposes the following restrictions on governmental authority:

- Firstly the property subject to the Trust must not only be used for a public purpose, but it must be held available for use by the general public.
- Secondly, the property may not be sold even for a fair cash equivalent and
- Finally, the property must be maintained for particular types of uses.

E. Doctrine of Sustainable Development

'Sustainable development' means development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.[19]

In the case of Rural Litigation and Entitlement Kendra v. State of U.P[20] (Popularly known as Doon Valley case) the Court reaffirmed and reiterated that development is not antithetical to environment. The Court observed that:

> *"we are not oblivious of the fact that natural resources have got to be tapped for the purposes of the social development but one cannot forget at the same time that tapping of resources have to be done with the requisite attention and care so that ecology and environment may not be affected in any serious way, there may not be depletion of water resources and long term planning must be undertaken to keep up the national wealth. It is always to be remembered that these are permanent assets of mankind and or not intended to be exhausted in one generation."*

[19]See, BRUNDTLAND COMMISSION REPORT "OUR COMMON FUTURE" (1987).
[20]Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh, AIR 1985 SC 652.

In *Indian Council for Enviro-Legal Action v Union of India* [21] (popularly known as the Coastal Zone Management case) it was held that:

> *"While economic development should not be allowed to take place at the cost of ecology or by causing wide spread environmental destruction and violation, at the same time, the necessity to preserve ecology and environment should not hamper economic and other developments. Both development and environment must go hand in hand, in other words, there should not be development at the cost of environment and vice-versa, but there should be development while taking due care and ensuring the protection of environment."*

IV. CRITICAL ANALYSIS AND CONCLUSION

It is noted that the "*Environment*" is vast in its meaning and it is very difficult to define it in its final form. Even the great environmentalists who have contributed to the protection of environment have not defined the term environment with required precision. The degradation in environmental quality has been evidenced by enormous pollution, loss of vegetal cover and biological diversity, excessive accumulation of harmful chemicals in the atmosphere and in food chains, growing risks of environmental accidents and threats to life support systems.

The judiciary, particularly the Apex Court has exhibited utmost dynamism and taken proactive steps in safeguarding human lives, plants, forests, wildlife, other natural resources including flora and fauna realizing their significance in sustaining life on the earth. It has used various tools, i.e. Vedic literature, common law

[21]Indian council for Enviro-Legal Action v. Union of India, (1996) 5 SCC 281.

principles/directives, constitutional provisions and the principles of doctrines of international environmental law in order to accord an expansive interpretation of various provisions. Nevertheless, the Court's sensitivity towards the protection of the environment has only laid the preliminary foundation for the legal framework to be built.