

JUDICIAL CREATIVITY ON ENVIRONMENTAL PROTECTION: NEED A HUMAN LOOK

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Abstract

Basically, human Environment is pure, egoless, just as the sky is by nature clear, not cloudy, clouds come and go, but the blue sky is always there: clouds don't alter the fundamental nature of the sky, similarly, the human environment is fundamentally pure:-**Lord Goutama Buddha.**

Key words: - Environment, Judiciary, constitution, Protection

Introduction

The judiciary has played an indispensable role in expanding the legislation associated with environmental protection by interpreting the constitutional provisions creatively. The right to live in clean and healthy environment is not a recent invention of the higher judiciary in India. This right has been recognized by the legal system and by the judiciary in particular for over a century or so. The only difference in the enjoyment of the status of a fundamental right the violation of which the constitution of India will not permit. It was only from the late eighties and thereafter various High Courts and Supreme Court of India have designated this right as a fundamental right, hence the Indian judiciary always kept in mind open to bring about new dimensions and creativity in the decision-making process, over time there has been an effort to bring about new provisions in law to fit the best to the environmental needs and to promote the protection of environment.

Historical Background

In the Hindu Religious Philosophy, the Vedas, Puranas, Upanishads, and different sacred writings gave a point-by-point portrayal of Trees, plants and untamed life and their significance to the individuals. The Rig Veda¹ featured the possibilities of nature in controlling the atmosphere, expanding ripeness, and improvement of human life underscoring on a private family relationship with nature. Atharva Veda² thought about trees as dwelling place of different divine beings and

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¹. Great epic is an ancient Indian collection of Vedic Sanskrit hymns. It is one of the four sacred canonical Hindu texts known as Vedas it is having 10.552 Verses

². The Atharvaveda is the Knowledge storehouse of *atharvanas* the procedure for everyday life, Period, C. 1200-900 BCE, Verses, 5977

goddesses. Yajur Veda³ Emphasized that the relationship with nature and the creatures ought not be that of territory and oppression yet of shared regard and generosity. Numerous creatures and plants were related with Gods and Goddesses, so they were saved for the people in the future⁴.

Evolving New Doctrines by Judiciary

➤ **Sustainable Development**

The doctrine of sustainable development in India was introduced by the case of Vellore Citizen Welfare Forum v. Union of India⁵. It was held in this case that precautionary principle and polluter pays principle are the basis of sustainability. In the case of Narmada Bachao v. Union of India⁶, it was stated that development should be of the extent that can be sustained by nature with no or little mitigation. On similar lines it was held, in the case of Indian Council for Enviro Legal Action v. Union of India⁷, that while economic development should not be done at the cost of ecological destruction, the same should not be hampering economic development. It was stated that economic and ecological developments should be well balanced with effectiveness of both intact.

➤ **Absolute Liability Principle**

The rule of absolute liability, in simple words, can be defined as the rule of strict liability minus the exceptions. In India, the rule of absolute liability evolved in the case of MC Mehta v Union of India⁸. This is one of the most landmark judgments which relates to the concept of absolute liability.

The facts of the case are that some oleum gas leaked in a particular area in Delhi from industry. Due to the leakage, many people were affected. The Apex Court then evolved the rule of absolute liability on the rule of strict liability and stated that the defendant would be liable for the damage caused without considering the exceptions to the strict liability rule.

According to the rule of absolute liability, if any person is engaged in an inherently dangerous or hazardous activity, and if any harm is caused to any person due to any accident which

³. The Yajurveda is the Veda primarily of prose mantras for worship rituals, period 1200-800 BC Chapters-40 Adhyayas, verses-1,975 Mantras

⁴. Tiwari.H.N., Environmental Law, Allahabad Law Agency, (2007)

⁵. AIR 1996 SC 2715

⁶. 10 SCC,664, 2000

⁷. AIR 1996 SC 1466

⁸. AIR 1987 S.C.1086

occurred during carrying out such inherently dangerous and hazardous activity, then the person who is carrying out such activity will be held absolutely liable. The exception to the strict liability rule also wouldn't be considered. The rule laid down in the case of *MC Mehta v Union of India*⁹ was also followed by the Supreme Court while deciding the case of Bhopal Gas Tragedy case. To ensure that victims of such accidents get quick relief through insurance, the Indian Legislature passed the Public Liability Insurance Act in the year 1991.

➤ **Strict Liability**

The principle of strict liability evolved in the case of *Rylands v Fletcher*¹⁰. In the year 1868, the principle of strict liability states that any person who keeps hazardous substances on his premises will be held responsible if such substances escape the premises and causes any damage. Going into the facts of the case, F had a mill on his land, and to power the mill, F built a reservoir on his land. Due to some accident, the water from the reservoir flooded the coal mines owned by R. Subsequently, R filed a suit against F. The Court held that the defendant built the reservoir at his risk, and in course of it, if any accident happens then the defendant will be liable for the accident and escape of the material.

➤ **Public Trust Doctrine**

The Public trust doctrine in India evolved through landmark judgements. The court stated that as we follow the Common law system our constitution includes Public Trust doctrine in its jurisprudence. The court took procedural and substantive rights seriously and applied this doctrine for the protection of Environment. The court also referred to various Articles of the Indian Constitution such as Article 48A¹¹ which made a way through Article 21¹² by including the right to clean environment under the Right to Life and Article 39¹³ Directive Principles of State Policy, which states proper distribution of the resources¹⁴.

In India does not have specific environmental rights the supreme court went further and emphasized on Public Trust Doctrine. There are many such instances like when the supreme court of India declared unauthorized mining causing damage to the environment of that area as illegal

⁹. AIR 1990 273, 1989 SCC (2) SCC 540

¹⁰. 1866 LR 1 Exch 265 (1868) LR 3 HL 330

¹¹. Protection and improvement of environment and safeguarding of forests and wildlife the state shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country

¹². Ibid

¹³. Ibid

¹⁴. Pandey, J.N., Constitutional Law of India, Central Law Agency, 44th Edition, (2007).

as it violated Article 21¹⁵ of Indian constitution and the court stated that healthy environment is necessary for protecting and safeguarding the rights of the people. In another case, High Court of Kerala held that government cannot violate Article 21¹⁶ when a government action caused harm to a freshwater source. In the Bhopal disaster case, the court linked the right to life and clean environment. The public trust doctrine in India restricts the government and the private property rights in India. After reading judgments and various interpretations it is not clear how the court invoked public trust doctrine. It is not clear whether public trust doctrine was a part of Indian Jurisprudence or it is included now. The court only stated that it is included in the United States through various judgements and the British law also includes this doctrine and we also follow common law as a reason India should also include it. However, what court felt was necessary to protect the rights of the citizens and make the state responsible for the protection under the public trust doctrine¹⁷.

The Public Trust doctrine didn't exist in India as a doctrine but it came through a landmark judgement which was M.C. Mehta vs Kamalnath¹⁸. The public trust doctrine first alluded in India through this landmark case. This case is also known as SPAN Motel case.

In the case of M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu¹⁹ the court covered Public Trust doctrine under the right to life and stopped the construction of the shopping complex in the place of a public garden stating the garden as a public resource. The court observed that the park is a public place with historical importance. The court cited Public Trust doctrine and M.C. Mehta²⁰ case as a precedent. The court stated that allowing the construction will deprive the public of the quality of life as stated under Article 21²¹ of the constitution. The court put the government under the obligation to maintain the public park for the citizens as the government has obligatory duties under Public Trust doctrine which is applicable in India.

The court stated that public trust doctrine is derived and evolved under Article 21²² of the Indian constitution and it is evoked in India to protect the fundamental right of the people.

¹⁵. Right to life and personal liberty

¹⁶. Supra

¹⁷. Mohanty, S.K., Environment and Pollution Laws, Universal Legal Manual, (2010)

¹⁸. (1997) 1 SCC 388

¹⁹. (1991) 6 SCC 464

²⁰. Supra

²¹. Right to life and personal liberty

²². Supra note

In the earlier judgment, the court portrayed the state in a negative figure. But in *Shailesh R. Shah v. State of Gujara*²³ the Gujarat high court portrayed the obligation of the state in a positive nature. The court stated that the state holds all the resources like the lake, pond, natural gases, wetland and as the state is held as the trustee it is the duty of the state to maintain and protect them for public use. According to the court, this is a positive duty of the state to prevent the resources and the environment from degradation and safeguard them from extinction, it is a positive duty of the state to preserve the resources²⁴.

➤ **Public Nuisance**

Public nuisance is caused when the action of one affects many individuals or affects a community at large. It is an act or omission that affects the health, safety, and/or the dignity standard of living of many people at once.

For example, in the cases of, *Ram Lal vs. Mustafabad Oil And Cotton Ginning*²⁵ It was held that when the noise level crosses a certain threshold value it should be considered as a public nuisance. It falls under the category of noise pollution. It is a public nuisance as it causes discomfort to many at once.

- **Private nuisance:** Private nuisance is caused when a person is harmed individually. This can happen in two scenarios:
 1. The pollution causes harm to only an individual and does not affect many people.
 2. The pollution caused harm to a group of people but that person suffered additional harm individually apart from the harm that is caused to everybody in that group.

In cases of nuisance, to determine liability it is important to look at two factors:

- **Foreseeability:** If the accident/incident was foreseeable and could be prevented then the defendants are to be held liable.

In *Overseas Tankship (U.K.) Ltd. v. Miller S. S. Co. Pty*²⁶. oil was spilt from the ships of the defendants which caused a fire and caused harm to the plaintiffs. It happened due to the carelessness of the defendants which means that the incident was foreseeable. The defendants were held liable.

²³. (2002) 3 GLR 447

²⁴. Leelakrishna.P, Environmental Case law Book (3rd edn, 2004)

²⁵. AIR 1968 P H 399

²⁶. (1967) 1 AC 617

- **Reasonableness:** In nuisance cases, the burden of proving unreasonableness is often difficult because the reasonableness of the defendant's conduct is determined by weighing its utility against the gravity of harm to the plaintiff.

➤ **Polluter Pays Principle**

The 'Polluter Pay' principle essentially holds the polluter liable for the pollution caused to the environment. The polluter is liable for every damage caused to the environment. So according to the 'Polluter Pay Principle', the polluter has to not only compensate the victims of pollution but also compensate for the restoration of environmental degradation caused Under 1972 and 1974 OECD Recommendation(1)(2), the measures to be taken by the polluter for controlling the pollution is decided by public authorities so that the environment is in acceptable state post the industry operation. Therefore, the polluter bears the cost of health hazard caused to the public as well as the cost of restoration of the environment. In other words, the costs of the measures should reflect on the cost of the goods and services, the production and/or consumption of which led to pollution. The cost of the measures should not be accompanied by the subsidies as it would lead to distortion in international trade and investment²⁷.

The Polluter Pays principle is part of a set of broader principles to guide sustainable development worldwide the 'Polluter Pay' principle forms a part of the environmental law of India.

Judicial interpretation on Polluter pay principle

In India, the 'polluter pays principle' was for the first time applied and defined in the 1996 case of Indian Council of Enviro-Legal Action vs Union of India²⁸. In this case, Justice Dalveer Bhandari determined that reversing the imbalance caused to the ecology is the part and parcel of the industrial process. The judge, in this case, Justice Dalveer Bhandari considered that it is easier for men with power and authority to disobey or non-comply with the judicial pronouncements²⁹.

In the cases of Research Foundation For Science Technology National Resource Policy v. Union of India³⁰ and Vellore Citizens' Welfare Forum v. Union of India and Ors³¹, the judges respectively ended up with the conclusion that principles such as the precautionary principle, the

²⁷. Shyam Divan and Armin Rosencranz, Environmental Law and Policy in India, Cases, Materials and Statutes (2nd edn, 2001)

²⁸. AIR 1996 SCC (3) 212

²⁹. Melosi, Martin V., Garbage in Cities: Refuse, Reform and the Environment, 1880-1980 (College station: A and M University Press, 1981).

³⁰. (2005) 13 SCC 186

³¹. AIR 1996 SC 2715

polluter pays principle form an intrinsic part of the laws of the environmental laws of India. The 'Polluter Pays Principle' was already considered as a part of the customary practices of international laws for the protection of the environment. Hence, the principles ought to be included in environmental laws of India, according to the judges.

The judges further improved the scope of implementation of the principle in *A.P. Pollution Control Board v. Prof. M.V. Nayudu and Ors*³². In this case The judges enabled the courts, tribunals and other environmental organizations to apply these principles when cases are registered in the tribunals or organization.

Article 21³³ of the Indian Constitution emphasizes on the basic right of every Indian inhabitant. The basic right mentioned in Article 21³⁴ is right to life and personal liberty. As simple as it can be put, polluting the surroundings of a locality would take away the basic right from the inhabitant. Pollution being the inevitable part of industrialization, community participation for protection of the environment is a duty of every citizen. Hence, the right to community participation for protection of the environment is considered to flow from Article 21³⁵ of the Constitution of India.

➤ **Precautionary Principles**

The Indian Judiciary actively supports the Precautionary Principle. In the judicial pronouncement of *Vellore Citizens Welfare Forum v/s. Union of India*³⁶ the Court opined that sustainable development is the need of the hour. The court emphasized on the fact that there should be a balance between economic growth and protection of the environment. The Court rejected the traditional concept that ecology and development are opposed to each other. The Court also reviewed the development of the concept of sustainable development in the international sphere. The Court referred to the Stockholm Declaration of 1972, Caring for Earth, 1991, the Earth Summit, and the Rio Declaration of 1992 and opined that the Precautionary Principle and the Polluter Pays Principle are indispensable features of Sustainable Development. In the case of *M. C. Mehta v/s. Kamal Nath*,³⁷ the Supreme Court reiterated the decision given in *Vellore Citizens*

³². AIR 1999 SC 912

³³. Supra

³⁴. Supra

³⁵. Supra

³⁶. AIR 1996 SC 2715

³⁷. (1997) 1SCC 388

Welfare Forum case stating that the Precautionary Principle is a part of the environment law in India.³⁸

The Precautionary Principle was very comprehensively reviewed by the Apex Court in the case of Andhra Pradesh Control Pollution Board vs. Prof M V Nayadu³⁹. The Court stated that it is better to go wrong in taking caution and prevent environmental harm rather than waiting for the issue to materialize into an irreversible problem. The Court opined that the Precautionary Principle was evolved because of lack of scientific certainty only, and the principle involves anticipating the harm the environment may suffer and act on the basis of that. In the case of Narmada Bachao Andolan v Union of India,⁴⁰ the Apex Court very clearly laid down the proposition of law, and specifically of Precautionary Principle. The Court stated that when an issue pertains to environmental damage, the onus of proof is on the person who is contending that the activities carried on by him are not harmful to the environment. The party who is giving such contention also has to satisfy the Court of the same, that there will be no environmental degradation due to his activities.

Judicial creativity on environmental protection

In many cases where the legislative and executive authorities have failed to carry out their constitutional obligations, the Judiciary has stepped up to offer “judicial activism”. The environmental jurisprudence in India underwent some major changes in the 1980s. The period not only involved executive and legislative activism but also effective judicial activism. An effective measure of judicial activism was the relaxation of locus standi and allowing citizens to approach the courts under Article 32⁴¹ and Article 226⁴² of the Constitution.

The courts in various environmental law cases have ruled that “The Right to Life” enshrined in Article 21⁴³ of the Constitution also included the “Right to A Clean and Healthy Environment”. Many of the environmental law cases are brought before the court under Article 32⁴⁴ and Article 226⁴⁵ of the Constitution. Writ Petitions are preferred as it is inexpensive, expeditious and allows the citizens to directly approach the High Court and the Supreme Court. Primarily, the Indian

³⁸. Supra

³⁹ AIR 1999 SC 812.

⁴⁰ AIR 2000 SC 3751.

⁴¹. Writ Jurisdiction to Supreme Court

⁴². Writ Jurisdiction to High Court

⁴³. Supra

⁴⁴. Supra

⁴⁵. Supra

Constitution had no independent provisions governing environmental laws in India. However, after the mandate of Stockholm Declaration 1972 and growing awareness concerning the environment, the historic Forty-Second Constitution Amendment Act, 1976 was enacted. This amendment introduced principles of environmental law through Articles 48A⁴⁶ and 51A(g)⁴⁷. Article 48A⁴⁸ obligates the state to protect and improve the environment whereas Article 51A(g)⁴⁹ requires the citizens to realize their responsibilities towards the protection of the environment.

Importance of Judiciary in Environmental protection

This should be noted that the Indian judiciary has taken a leading role in environmental protection and sustainable development in India. The judiciary's commitment to social good in general, and environmental protection in particular, has resulted in the innovative use of "Public Interest Litigation" under Articles 32⁵⁰ and 226⁵¹ of the Indian Constitution as a tool for social and environmental justice.

The right to a healthy environment has been incorporated directly and indirectly into Indian top court judgments, with the first link between environmental quality and the right to life being established in the case of Charan Lal Sahu Etc. vs. Union of India and Others⁵², also known as the Bhopal Case.

In Subhash Kumar vs. the State of Bihar⁵³, the Supreme Court of India construed Article 21⁵⁴ of the Indian Constitution to hold that the right to life includes the right to a healthy environment, which includes the right to pollution-free water and air for full enjoyment of life. The Supreme Court has recognized the right to a healthy environment as a basic right in this judgment.

The Supreme Court introduced the new concept of "Absolute Liability" for disasters arising from the storage or use of hazardous materials from their factories in M.C. Mehta Vs. Union of India & Others⁵⁵, also known as the Oleum Gas Leak case. The enterprise must ensure that no harm has been caused whether negligence occurred or not.

⁴⁶. Obligation of state for protection and improvement of Environment

⁴⁷. Obligation on individual to protect and improvement of Environment

⁴⁸. Supra

⁴⁹. Supra

⁵⁰. Writs to Supreme Court, Heart and Soul of Indian Constitution

⁵¹. Supra

⁵². 1989 SCR Supl. (2) 597

⁵³. AIR 1991 SC 420

⁵⁴. Ibid

⁵⁵. Supra

The Supreme Court of India held in *Vellore Citizen Welfare Forum vs. Union of India*⁵⁶ while businesses are important for a country's development, the doctrine of sustainable development must be adopted by them as a balancing concept, and the 'Precautionary Principle' and the 'Polluter Pays Principle' must also be accepted as part of the law.

The Supreme Court stated in *M. C. Mehta vs. Kamal Nath*⁵⁷ that "any disruption of the basic environment elements, namely air, water, and soil, which are necessary for existence, would be hazardous to life." As a result, a court exercising jurisdiction under Article 32⁵⁸ can award not only damages but also fines for environmental degradation.

The Gujarat High Court stated in *Abhilash Textiles vs. Rajkot Municipal Corpo*⁵⁹. that "the petitioners cannot be allowed to harvest profit at the expense of the public health."

Conclusion:

About my conclusion on my research paper judicial creativity on environmental protection there are number of state legislations, rules and central legislations on protection of environment and judiciary also creatively and actively giving landmark verdicts for protection of environment, but it is not possible to protection of environment for future generation, hence it is necessary to evolve new doctrines and parliament and state legislators should enact strict and stringent legislations for protection of environment.



⁵⁶. Supra

⁵⁷. Supra

⁵⁸. Supra

⁵⁹. AIR 1988 Guj 57