JUDICIAL ACTIVISM IN THE ARENA OF ENVIRONMENTAL JURISPRUDENCE IN INDIA

Ritojit Dasgupta, Department of Law, University of Calcutta

"The earth, the air, the land and the water are not an inheritance from our forefathers but on loan from our children. So we have to hand over to them at least as it was handed over to us."

-Mohandas Karamchand Gandhi

ABSTRACT

Man has become a very materialistic being by virtue of the rapid growth of civilization. The modern consumeristic society has witnessed various technological developments and scientific inventions which have led to the exploitation of natural resources of the Earth. It has also become a threat to the environment. Various human activities have led to serious degradation of the environment. Hence, the issues relating to the environment has become a matter of deep concern for the past few decades. A polluted environment not only hampers the lives and health of the civilians but also affects their basic human right.

In India, as per the Constitution, right of wholesome environment is a fundamental right. It is pertinent to mention in this context that this right has not specifically been mentioned in Part III of the Constitution of India dealing with the fundamental rights. However, it is through judicial interpretation and activism the right to pollution free air and water has been recognized as a fundamental right of every citizen falling within the purview of the term 'life' under Article 21 of the Constitution of India. Although the Legislature has framed various laws to protect the environment, it is the Judiciary who has upheld the sanctity and the proper implementation of these laws. With the view to render socio-economic justice, the Judiciary has recognized various international principles, especially the principle of sustainable development, to safeguard the environment. The judiciary has also recognized and laid down various principles like the "Polluter Pays Principle" and the "Precautionary Principle". The paper aims to examine the role of Indian judiciary in protecting the environment and also embark upon the various principles adopted and laid down by the Judiciary. The paper also aims to highlight various judicial pronouncements that have led to the

development and synthesis of the laws relating to the protection of environment.

Keywords: Environment Protection, Sustainable Development, Polluter Pays Principle, Precautionary Principle, Public Nuisance, Judiciary.

INTRODUCTION

From the French word "Environia", which means to surround, the term environment has been derived. It comprises of both- Biotic (living) environment and Abiotic (physical or non-living). The word environment implies "surroundings in which organisms survive". Environment and the organisms which it comprises of; are two organized and complex components of nature. Environment dominates the life of the organisms it comprises of which also includes human beings. Environment can be described as the aggregate of all the living and non-living elements and their effects that influence human life. All animals, plants, forests, fisheries, and birds; form the living and biotic elements whereas water, land, sunlight, rocks, and air include the abiotic element.

In modern day law, environmental protection and human rights are two of the main mostly debated concerns. After the establishment of the United Nations the main focus of the international community was on the protection and promotion of human rights. It was only in 1972 when the voice about environmental protection rose at the domestic level became the global agenda. The UN Human Rights Council adopted the Resolution 48/13, on 8th October 2021, recognizing that having a safe, clean, healthy, and sustainable environment is indeed a human right. As per the Constitution of India, the right to pollution free air and water and the right of clean and healthy environment has been recognized by the higher Judiciary as an important element of right to life which is enshrined in chapter of Fundamental Rights. As per the perspective of Indian Judiciary right to pollution free environment forms a basic human right.

In early 1980s the role of higher judiciary in India underwent a massive transformation. A radically different kind of issues altered the landscape of litigation. Instead of being asked to resolve private dispute, Supreme Court and High Court Judges were asked to deal with public grievances over flagrant human right violation by State or to vindicate the public policies embodied in statutes or Constitutional provisions[1]. According to Professor Upendra Baxi

[1] Dr. I.A.Khan, *Environmental Law* 48(Central law Agency, Allahabad, 2nd Edition, 2002).

"Judicial Activism is that way of exercising judicial power which seeks fundamental re-codification of power relations among the dominant institutions of State, manned by members of the ruling classes." The Judiciary has always played a dynamic role in almost every sphere, for the purpose of protecting the rights of the citizens of our country and has always tried to maintain and respect the democratic nature of our nation. Similarly, the Judiciary has made immense amount of contribution to protect and preserve the environment for the future generations by accepting and acknowledging several principles of environmental jurisprudence. In light of the philosophy of rendering of socio-economic justice the Indian Judiciary has adopted and recognized several international principles relating to preservation of environment. The Supreme Court has categorically adopted the principle of sustainable development for the purpose of maintaining a balance between development and ecology. India being a developing nation, the different aspects of such development cannot be stopped altogether. It is also pertinent to mention in this context that the judiciary has played a magnificent role in upholding the rule of law while ensuring justice to environmental and developmental issues. The Supreme Court strengthened Article 21 in two ways. Firstly, it required laws infringing the personal liberty to also pass the tests of Article 14 and Article 19 of the Constitution[2], thereby ensuring that the procedure depriving a person of his or her personal liberty be reasonable, fair and just[3]. Second, the court recognized several unarticulated liberties that were implied by Article 21. It is by this second method that the Supreme Court interpreted the right to life and personal liberty to include the right to a wholesome environment.[4]

Although several laws and rules have been framed by the legislature, it is the judiciary who has made the ends meet to protect the degradation of the environment. The enforcement of the various laws and the rules has been made possible by virtue of the judiciary. The various judicial and Quasi-Judicial Bodies, other than the Supreme Court of India and the various High Courts, for Environmental Protection established under various environmental Protection Legislations for interpretation and effective implementation of the various statutes are:

- District and the other Subordinate Courts

[2]Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[3] Francis Coralie Mullin v. Union Territory of Delhi, AIR 1981 SC 746.
[4]Shyam Divan & Armin Rosencranz, *Environmental Law and Policy in India* 49 (Oxford University Press, New Delhi, Eighth impression 2007).

- Central Pollution Control Board
- State Pollution Control Boards
- State Biodiversity Board
- National Green Tribunal
- National Environmental Appellate Authority

PIL & JUDICIAL ACTIVISM

A massive revolution took place in the landscape litigation of Indian in the period of early 1980s. A new form of jurisprudence, which is known as 'Jurisprudence of Masses', evolved in the system. The strategy of Public Interest Litigation(PIL) was adopted by the Indian Judiciary with the view of rendering justice to all citizens, especially those citizens who could not move the Court because of social and economic restraints. PIL has been an important gadget by way of which the judiciary has protected and preserved the environment. In shaping the environmental jurisprudence in India, the strategy of Public Interest Litigation too has played a prime role.

In *Sachidananda Pandey v. State of West Bengal,*[5]a public interest litigation was filed challenging the decision of the Government of West Bengal to allot a land for the construction of a Five Star hotel in the vicinity of the Zoological Garden of Kolkata which would disturb the ecological balance and may even stop the migration of the birds. While examining the case the court passed a very importance observation:

"In view of Articles 48A and 51A(g) of the Constitution whenever any matter of ecology is brought before the court it would not refuse to interfere only on the ground that priorities are matter of policies and it is a matter for the policy makers instead the court could examine at least whether appropriate considerations are borne in mind while taking decision as such. The court has always the power to give necessary directions. In the State Government acted bona fide and such construction would not pose a threat to ecology. The Supreme Court has held that when its doors are knocked to give effect to the Directive Principles of State Policy and

[5] (1987) 2 SCC 295.

Fundamental Duties, the Court is not simply be the policy makers, but the Court may always give directions."[6]

In *S. Jagannath v. Union of India,*[7] a PIL petition was filed under Article 32 by the Chairman of Gram Swaraj Movement, a voluntary organization working for the upliftment of the weaker section of the society, seeking for the enforcement of Coastal Zone Regulation Notification dated 19th February 1911 issued by the Government of India for the purpose of stopping of intensive and semi-intensive types of prawn farming in the coastal areas. The Supreme Court held that setting up of shrimp culture farms in the coastal areas had adverse effect on the ecology and environment of such coastal regions and hence such shrimp culture could not be permitted.

THE CONCEPT OF SUSTAINABLE DEVELOPMENT

As per the Stockholm Declaration in the year 1972:

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

The concept of sustainable development, which means to meet with the needs of the present generation without compromising with the need of the future generations, was first heard in the Stockholm Declaration. This concept of Stockholm Declaration was given the term "Sustainable Development" by the International Union for the Conservation of Nature, in the year 1980. The concept was given a definite structure, in the year 1987, in a report by World Commission on Environment which was titled "Our Common Future". This Commission was chaired by G.H. Brundtland. This report is also known as the "Brundtland's Report".

Sustainable Development means the development in such a manner that meets the needs of the present without compromising the ability of future generations to meet their own needs,

[6]Sachidananda Pandey v. State of West Bengal AIR 1987 SC 1109.
[7] AIR 1997 SC 811.

improved living standard for all, better protected and managed ecosystem and a safer, more prosperous future.[8]

In June, 1992, further detail was added to the concept of Sustainable Development under Agenda 21 of the United Nations Conference on Environment & Development at Rio de Janerio, Brazil. The declaration of this conference is known as the Rio Declaration.

This concept of sustainable development has received massive respect from the Indian Judiciary and has been implemented in India by the judiciary in order to overcome several environmental issues. In *Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh,*[9] which is also popularly known as Dehradun Quarry's Case, the Supreme Court, emphasizing the need for sustainable development entertained complaints from the Rural Litigation and Entitlement Kendra, Dehradun alleging that the operations of limestone quarries in the Mussorie-Dehradun region disturbed the fragile ecosystem of the place. The Supreme Court, in this case, for the first time dealt with developmental issues relating to the environment. On finding that the limestone quarries carrying on mining operations, had grave adverse effects on the environment which led to the degradation of the environment and thereby affected the fragile ecosystem of the region, the Supreme Court ordered for the closure of some of these quarries. The ground for such a decision was that these quarries were disturbing the ecological balance, thereby acting as an impediment to sustainable development and also violating the right to life under Article 21 of the local inhabitants.

In *Narmada Bachao Andolan v. Union of India,*[10] the Supreme Court reiterating the concept of sustainable development laid down that sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without litigation.

While deciding the case of *Vellore Citizens' Welfare Forum v. Union of India*[11], Kuldip Singh J. stated that while such industries are of vital importance for the country is progress as they generate foreign exchange and provide employment avenues, but having regard to pollution caused by them, principle of 'sustainable development' has to be adopted as a balancing concept between ecology and development' has to be adopted as a balancing concept between

[8] Report of the U.N. World Commission on Environment and Development.
[9] AIR 1988 SC 2187.
[10] (2001) 10 SCC 644 at p.727 para 123.
[11] (1996) 5 SCC 650.

ecology and development. It was also stated that 'polluter-pays principle' and 'precautionary principle' were the two important elements of this development and it was highly necessary to adopt those in India in order to encounter several environmental issues.

The various principles of Sustainable Development are:

A. Principle of Inter-generational equity

This principle is governed by the belief that every generation must have the right to enjoy the benefit of natural resources. Principle III of Rio declaration has laid down this principle. As per Principle III of the Rio Declaration "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." The aim of this principle is to prevent the present generation from abusing the resources that would deprive the future generation from abusing such resource.

The Supreme Court of India, in the case of *Vellore Citizens' Welfare Forum v. Union of India*[12], opined that the implication of Sustainable Development is to cater to the needs of the present generation without hampering the resources for the future generation. This principle of Inter-Generational Equity has been recognized by the Supreme Court in *Indian Council for Enviro-Legal Action v. Union of India*[13].

B. Precautionary Principle

One of the most integral principle of sustainable development is the precautionary principle. Principle XV of the Rio Declaration states that "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. 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."

This principle focuses on prevention over cure. Precautionary principle is a rule of evidence and particularly it deals with the burden of proof in environmental cases. This principle shifts the burden on the polluter – individual/industrialist/entrepreneur – to prove that his activity/industry/process/operation is not a health hazard, damaging the environment and his

[12] Supra note 11
[13] (1996) 3 SCC 212.

action is environmentally benign.[14]

In India, stress was laid down upon the importance of this principle by Kuldip Singh J. in the judgment of *Vellore Citizens' Welfare Forum v. Union of India*[15]. The Supreme Court, in the judgment of *M.C. Mehta v. Union of India*[16], also known as the Taj Trapezium Case, explained that the environmental measures taken by the State Government and the statutory authorities must anticipate, prevent and attack the cases of environmental degradation. In *M.C. Mehta v. Union of India*[17], which is popularly known as the Calcutta Tanneries Case, the Court had applied the precautionary principle directing the polluting tanneries to relocate themselves.

In the *Ganga Pollution Case*[18], the Supreme Court upheld the standing of a Delhi resident to sue the government agencies whose prolonged neglect had resulted in severe pollution of the river. The Supreme Court ordered the closure of tanneries near Kanpur, polluting river Ganga unless they took steps to set up treatment plants.

C. Polluter Pays Principle

Principle XVI of the Rio Declaration, that has laid down the polluter-pays principle, states that-

"National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."

The polluter pays principle was recognized by the Supreme Court of India in *Indian Council for Enviro-Legal Action v. Union of India*[19]. The court laid down that on the basis of the principle of polluter pays remedial measures are to be determined and on the basis of that costs to be paid by the respondents. In India, this principle forms an essential part of the environmental jurisprudence. This principle not only holds the polluter liable for causing pollution but also it imposes a duty upon the polluter to compensate the victims affected by his

[14] Prof. Satish C. Shastri, *Environmental Law* 65 (Eastern Book Company, Lucknow, 4th Edition,2012).
[15] Supra note 11
[16] AIR 1997 SC 734
[17] AIR 1997 SC 411
[18] M.C. Mehta v. Union of India, AIR 1988 SC 1115.
[19] (1996) 3 SCC 212.

pollution. It also imposes a duty to restore the environment degraded by the polluter.

The Supreme Court, in *A.P. Pollution Control Board v. Prof. M.V. Nayudu*[20], laid down that the polluter must pay for:

- The cost of pollution abatement;
- The cost of environment recovery;
- Compensation costs for victims of damages if any, due to pollution.

In the celebrated *Taj Trapezium Case*[21], the Court had directed the industries to change over to natural gas as industrial fuel within a certain specified time and if they could not do so, they must stop functioning. The Court, applying the polluter pays principle, stated that the industries had to provide compensation in form of housing accommodation till their job in the industry resumes.

DOCTRINE OF PUBLIC TRUST

Common law doctrines have heavily influenced the Indian legal system. The legal system has been inspired by various doctrines formulated by the common law and the same has been applied by the Courts, time and again, in the process of administering justice. In environmental jurisprudence, Public Trust Doctrine is a common law doctrine that has been recognized by the Indian Judiciary for the protection and preservation of environment in India.

This doctrine was propounded by Prof. Joseph L Sax. The public trust doctrine primarily rests on the principle that certain resources like air, water, sea, forests are the gifts of nature and of great importance to the people. Hence, these natural gifts of the nature are to be made available to the people, free of any cost, irrespective of their status. These can never be the subject-matter of private ownership. Therefore, it is the duty of the government to uphold these resources for the enjoyment of general public rather than to permit their use for private and commercial purposes.

[20] (1999) 2 SCC 718.
[21] M.C. Mehta v. Union of India, AIR 1997 SC 735.

In *T.N. Godavarman Thirumalpad v. Union of India*[22], the Supreme Court said-

"Our legal system is based on English Common Law and includes the public trust doctrine as a part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. The public at large is the beneficiary of the seashore, running water, air, forests and ecologically fragile land. The State as trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership."

According to Prof. Sax three restrictions are imposed by the Public Trust Doctrine on the Government, viz:

1. 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;

2. the property may not be sold, even for a fair cash equivalent; and

3. the property must be maintained for particular types of uses.[23]

The Supreme Court, for the first time, had applied the Doctrine of Public Trust while deciding the case of *M.C. Mehta v. Kamal Nath and Others*[24]. The Supreme Court, on the basis of this doctrine and along with the polluter pays principle, had directed the Span hotel to pay damages for restitution of environment and ecology that was destructed by them.

ENVIRONMENTAL LAW AND PUBLIC NUISANCE

Nuisance, the common law principle, has often been correlated with environmental pollution. Generally speaking, the tort of nuisance implies an unlawful interference with a person's enjoyment of land. The Supreme Court while interpreting Article 21 of the Constitution has often stated that public nuisance is the root of present day environmental pollution. Public Nuisance in interferes with the right to wholesome environment, pollution free air and water have been recognized as an integral part of right to life under Article 21 of the Constitution.

[22](2002) 10 SCC 606.
[23]Shyam Divan & Armin Rosencranz, *Environmental Law and Policy in India* 169 (Oxford University Press, New Delhi, Eighth impression 2007).
[24] (1997) 1 SCC 388.

In *Municipal Council, Ratlam v. Vardichand*,[25] the environment pollution in Ratlam affected large community of poor people and arose from a combination of several causes – private polluters, slack enforcement agencies, weak financial resources and haphazard town planning. The Supreme Court held that the right to pollution-free environment is an integral part of the right to life under Article 21 of the Constitution of India, thereby asserting that human rights are to be respected.

In *Ram Lal v. Mustafabad Oil and Cotton Ginning*[26], the Court held that upon crossing a certain threshold, the noise would be regarded as noise pollution as it amounted to public nuisance. In *Subhash Kumar v. State of Bihar*,[27] the Supreme Court observed that "If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution."

PRINCIPLE OF ABSOLUTE LIABILITY

Before delving into the concept of Absolute Liability it is necessary to discuss the Rule of Strict Liability. The roots of the principle of Absolute Liability lie in the Rule of Strict Liability which evolved in the case of *Ryland v. Fletcher*[28]. The principle of Strict Liability, as propounded by Blackburn J., lays down that when any person brings anything and stores it in his land, for a person of his own, which is likely to cause mischief if it escapes must keep it in his peril and if it escapes then the person is answerable for all the damage caused by its mischief. Therefore, for Strict Liability to apply, the following three essentials are to be proved: -

a) Some inherently dangerous element must have been brought by a person into his land

b) The thing must escape

c) There must be a non-natural use of the land.[29]

However, there are certain defences/exceptions to the Rule of Strict Liability viz.: -

i) Plaintiff's own fault

[25] AIR 1980 SC 1622.
[26] AIR 1968 PH 399
[27] (1991) 1 SCC 598.
[28] (1868) LR 3 HL 330.
[29] Ryland v. Fletcher (1868) LR 3 HL 330.

ii) Act of God

iii) Volenti non fit injuria vis-à-vis consent of the plaintiff to suffer the risk

iv) Act of Third party

v) Act of Statutory Authority

The Rule of Absolute Liability evolved in India from the principle laid down in the case of *Ryland v. Fletcher*[30]. The Rule of Absolute Liability was propounded in the case of *M.C. Mehta v. Union of India*[31] by P.N. Bhagwati J., this case is also known as the Oleum Gas Leak case.

Broadly speaking, the Rule of Absolute Liability is much wider in ambit than the rule of Strict Liability and it consists of no exceptions vis-à-vis defences. It holds the defaulting party absolutely liable. Hence it is also known as "no fault liability". P.N. Bhagwati J. stated-

"This, rule (Ryland v. Fletcher) evolved in the 19th century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norm and the needs of the present day economy and social structure. We do not feel inhibited by this rule which was evolved in the context of a totally different kind of economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments, taking place in this country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot allow our judicial thinking to be constrained by reference of the law as it prevails in England or for the matter of that in other foreign legal order. We in India cannot hold our hands back and I venture to evolve a new principle of liability which English courts have not done."[32]

The Court further laid down the following principle-

"We are of the view that an enterprise, which is engaged in hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an Absolute and non-delegable duty to the

[30] (1868) LR 3 HL 330.
[31] (1987) 1 SCC 395.
[32] M.C. Mehta v. Union of India (1987) 1 SCC 395.

community to ensure that no harm results to anyone on account of hazardous or inherently dangerous activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity the enterprise must be absolutely liable to compensate for such harm and it should be no answer to enterprise to say that it has taken all reasonable care and that the harm occurred without any negligence on its part."[33]

The Rule of Absolute Liability was implemented to decide the infamous case of *Union Carbide Corporation v. Union of India*[34] which is also popularly known as the Bhopal Gas Leak Tragedy Case. In order to provide an immediate relief to the victims and give a legislative shape to the concept of Absolute Liability, The Public Liability Insurance Act, 1991[35] was enacted which came into force from 1st April, 1991. The principle of Absolute Liability has specifically been incorporated under Section 3[36].

PARTING NOTES

At present it is of utmost necessity to maintain balance between ecology and development. In in the era of globalization, development cannot be halted and at the same time development cannot be allowed to cost ecology. The Judiciary is the one who has to play the pro-active role in maintaining the balance between the two. The Judiciary, applying their judicious minds, has played a significant role in preserving the environment. Judicial Activism has led to the adoption of strategies like Public Interest Litigation, has developed the principle of Absolute liability from the rule of strict liability and has further recognized the international principles such as sustainable development, polluter pays principle, precautionary principle, public trust doctrine and various other policies.

The Apex Court has recognized the right to wholesome environment, right to pollution free air and water within the provisions of the Constitution and more specifically within the Part III that deals with Fundamental Rights. It is pertinent to mention in this context that in a democratic set up where the rule of law is the essence, the rights of the citizens need to be

[33] Ibid
[34] (1989) 1 SCC 674.
[35] The Public Liability Insurance Act, 1991(Act 6 of 1991)
[36] The Public Liability Insurance Act, 1991(Act 6 of 1991), S. 3

protected in order to transform the country into a welfare Nation and that has been done by the Apex Court and the High Courts on numerous occasions.