

ENVIRONMENTAL LAW: ITS DEVELOPMENT AND JURISPRUDENCE

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Today, most discussions on environmentalism in our country begin with the Stockholm Conference (1972). But, some ancient texts tell us that our society paid more attention to protecting the environment than we can imagine. These texts tell us that it was the *dharmā* of each individual in society to protect Nature, so much so that people worshipped the objects of Nature. Trees, water, land and animals had considerable importance in our ancient texts; and the Manusmriti prescribed different punishments for causing injury to plants. Kautilya is said to have gone a step further and determined punishments on the basis of the importance of a particular part of a tree.¹ Some important trees were even elevated to a divine position.²

From this, what comes forth vividly is that environmental management and control of pollution was not limited only to an individual or a group, but society as a whole accepted its duty to protect the environment. The *dharmā* of protecting the environment was to sustain and ensure progress and welfare of all. The effort was not just to punish the culprit, but to balance the eco-system as well. In this attempt, the ancient texts acted as cementing factors between the right to exploit the environment

¹ C.M. Jariwala, “*Changing Dimensions of Indian Environmental Law*”, in *Law and Environment* (P. Leelakrishnan (ed.), Lucknow: Eastern Book Co., 1992) p.1 at 2

² So also, the fouling of water was considered a sin and it attracted punishments of different grades, which included a fine (akin to polluter pays principle), etc. The earth or soil also equally had the same importance and ancient literature provided the means to purify the polluted soil. *Ibid.*, at p.3

and a duty to conserve it - which is now internationally recognized as the concept of 'sustainable development'.

The definition of 'environment' and, therefore, environmental law in India has always been rather broad. Even today, not only does it include the concept of sustainable development but also air and water pollution, preservation of our forests and wildlife, noise pollution and even the protection of our ancient monuments, which are undergoing severe stress due to urbanization and consequent environmental pollution. Community resources such as tanks, ponds, etc. have now been articulated by the Supreme Court for inclusion in the concept of environment, and why should it not be so, considering they all affect the quality and enjoyment of our life.³ Awareness about the environment and, particularly matters relating to pollution, have been reborn, so to say, such that it is difficult to imagine that our modern environmental jurisprudence is a little over three decades old. In these decades, however, the march of the law has been so rapid and sure that one is tempted to repeat the statement of Lord Woolf that "while environmental law is now clearly a permanent feature of the legal scene, it still lacks clear boundaries"⁴.

A MODEST BEGINNING

However, without going back to the ancient texts, it can be said that environmental jurisprudence in India made a beginning in the mid-seventies when Parliament enacted the Water (Prevention and Control of Pollution)

³ Hinch Lal Tiwari v. Kamala Devi, (2001) 6 SCC 496: "[T]he material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the guaranteed right under Article 21 of the Constitution."

⁴ Are the Judiciary Environmentally Myopic? (1992) Journal of Environmental Law, Vol.4, No.1, p.1

Act, 1974. But soon, there was a quantum leap with the amendment of our Constitution in 1976 and incorporation of Article 48-A⁵ in the Directive Principles of State Policy and Article 51-A(g)⁶ in the Fundamental Duties of every citizen of India. Both these Articles unequivocally provide for protection and improvement of the environment. Inevitably, Parliament enacted the Air (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act, 1986. With this core group of three enactments, a modest beginning was made by Parliament. Unfortunately, soft laws were enacted (and they continue to remain so) at a time when strong legislation was critical for environmental conservation.

Fortunately, the Supreme Court appreciated the necessity of sternness in environmental issues and seized the opportunity in *Municipal Council, Ratlam*⁷ that arose out of a problem daily faced in our country. A residential locality was subjected to extreme filth and stench, partly due to the discharge of malodorous fluids from an alcohol plant into public streets and partly due to the complete insensitivity of the municipal body in maintaining basic public sanitation. A few public-spirited citizens decided to constructively use the available legal resources to remedy the situation. A complaint was instituted under the provisions of Section 133 of the Criminal Procedure Code requiring the municipal corporation to carry out its statutory duties under Section 123 of the M.P. Municipalities Act, 1961. A Sub-Divisional Magistrate issued necessary mandatory orders, but the Sessions Court held them as unjustified. The High Court, however, upheld the views of the Sub-Divisional Magistrate. The Municipal Council approached the Supreme

⁵ **Protection and improvement of 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.

⁶ **Fundamental duties.** – It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

⁷ *Municipal Council, Ratlam v. Shri Virdichan and others*, (1980) 4 SCC 162

Court and one of the key questions raised was whether “by affirmative action a court can compel a statutory body to carry out its duty to the community by constructing sanitation facilities at great cost...”

The Supreme Court answered the question in the affirmative while noting the low priority granted to public health and sanitation, and the dimensions of environmental pollution. It was said that the municipality’s plea that notwithstanding the public nuisance, financial inability validly exonerates it from statutory liability has no juridical basis. It was held by the Supreme Court that:

“Public nuisance, because of pollutants being discharged by big factories to the detriment of the poorer sections, is a challenge to the social justice component of the rule of law.”

A little later in the decision, it was said that, “Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies”.

Having given its *raison d'etre* for taking a proactive approach in matters pertaining to the general environment, the Supreme Court later entertained a letter petition from an NGO called the Rural Litigation and Entitlement Kendra. This initiated the first case that directly dealt and concerned itself with the environment and ecological balance. In a series of decisions⁸ the Supreme Court considered the complaint of the petitioner regarding illegal and unauthorized limestone quarrying and excavation of limestone deposits which apparently affected the ecology of the area, caused environmental disturbances which damaged the perennial water springs in the Musoorie Hills, disturbed the natural water system and the supply of

⁸ Rural Litigation and Entitlement Kendra v. State of U.P. (1985) 2 SCC 431, (1985) 3 SCC 614, (1986) Supp SCC 517, (1987) Supp SCC 487, (1989) Supp 1 SCC 504, (1989) Supp 1 SCC 537, (1989) Supp 2 SCC 384 and (1991) 3 SCC 347

water both for drinking as well as for irrigation. All this was naturally a matter of grave concern and required somber reflection.

The Supreme Court was called upon, under these circumstances and in the absence of any legal framework or any precedent, to perform a creative but delicate exercise and come out with novel solutions and ideas to tackle the crisis. This was achieved by setting up enquiry committees from time to time. Various committees appointed by the Supreme Court included

- The Bhargava Committee to look into the question whether safety standards were met by the mines, the possibility of land slides due to quarrying and any other danger to the individuals, cattle and agricultural lands due to mining operations.
- An Expert Committee called the Valdia Committee to look into the disturbance of the ecology, air, water and environmental pollution due to quarrying and the use of stone crushers.
- A High Powered Committee headed by Mr. Bandopadhyay to look into some of the aspects mentioned above and also a Monitoring Committee called the Geetakrishnan Committee to monitor the directions issued by the Supreme Court.

The Supreme Court did not simply accept the reports of these Committees but invited objections to them, which were required to be filed within a reasonable time. These objections were considered, and as and when necessary, mining activity and stone quarrying were prohibited. The stoppage of industrial activity necessarily led to the closure of mines and several workers were rendered jobless. The Supreme Court realized the difficulties that would be faced by the mine lessees as well as by workmen and, therefore, directed steps to be taken for the rehabilitation of the displaced mine lessees and the setting up of an Eco Task Force by the

Government of India to take over and reclaim land and engage workers in the task of afforestation and soil conservation.

All this was obviously not achieved in a single day but took several years. The results achieved, with the intervention of the Supreme Court, were more than satisfactory and the Musoorie Hills have now been restored to their pristine glory.

Around this time, a somewhat dramatic event occurred in Delhi on 4th and 6th December 1985. There was a leak of oleum gas from the factory premises of Shriram Foods and Fertilizer Industries. The gas leak affected a large number of persons and one lawyer practicing in the District Courts in Delhi died. Memories of the Bhopal Gas Disaster that had occurred a year earlier were instantly revived.

An activist lawyer immediately initiated proceedings in the Supreme Court⁹ bringing out the problem caused by the leakage of oleum gas. It transpired during the course of proceedings that earlier in March that year, a Committee called the Manmohan Singh Committee had gone into the safety and pollution control aspects of Shriram Foods and Fertilizer Industries with a view to eliminating community risk. The Supreme Court appointed a team of experts to look into these recommendations. The team reported that the recommendations of the Manmohan Singh Committee were being complied with. However, this Expert Committee also pointed out various inadequacies in the plant and opined that it was not possible to eliminate hazards to the public so long as the plant remained in its present location in Delhi. In view of the conflicting reports received by it, the Supreme Court appointed a Committee of Experts called the Nilay Chaudhry Committee.

⁹ M.C. Mehta v. Union of India, (1986) 2 SCC 176, (1986) 2 SCC 325 and (1987) 1 SCC 395

A consideration of the reports of all these committees showed that they were unanimous in concluding that the element of risk to workmen and the public could only be minimized, but not totally eliminated.

In this background, the Supreme Court suggested that the Government evolve a National Policy for the location of toxic and hazardous industries and that it should set up an independent centre with professionally competent and public-spirited experts to provide scientific and technological inputs. The reason for this was that the Supreme Court found it difficult to get proper advice and expertise to enable it to arrive at a correct decision. The Supreme Court also recommended the setting up of Environmental Courts to deal with situations of this kind.

The importance of this case lies in the conclusion arrived at by the Supreme Court that an enterprise engaged in a hazardous or inherently dangerous industry which poses a threat to the health and safety of its workmen and the residents of nearby areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of its activity. If any harm does result, then the enterprise is absolutely liable to compensate for such harm and it is no answer to say that it had taken all reasonable care or that the harm occurred without any negligence on its part. In other words, the Supreme Court evolved a principle of absolute liability and did not accept any of the exceptions in such a case as mentioned in *Rylands v. Fletcher*¹⁰.

The trend of activist intervention having been set by the Supreme Court, and some important steps relating to protection of the environment having been taken, a large number of cases in public interest then came to be filed in the Supreme Court which passed various orders in these cases from time to time. It is not necessary to discuss all these decisions, as indeed it is

¹⁰ (1868) LR 3 HL 330

not presently possible, except those in which there was a significant development of the law or a significant contribution to the environmental jurisprudence of India.

GUIDING PRINCIPLES

The mid nineties saw the Supreme Court recognize some internationally accepted and important principles in matters pertaining to the environment. This period also saw the Supreme Court rely more and more on Article 21 of the Constitution¹¹ and give an expansive meaning to 'environment' taking within its fold the quality of life¹² as distinguished from a mere animal existence.¹³ This is really the period when environmental jurisprudence began to come into its own.

In *Indian Council for Enviro-Legal Action*¹⁴ the Supreme Court accepted the Polluter Pays principle.¹⁵ In this case, some chemical factories in Bichhri (Udaipur District) produced hazardous chemicals like oleum etc. These industries did not have the requisite clearances, licences, etc. nor did they have necessary equipment for the treatment of discharged toxic effluents. Toxic sludge and untreated waste waters resulted in the percolation of toxic substances into the bowels of the Earth. Aquifers and subterranean supplies of water got polluted; wells and streams turned dark and dirty; water not only became unfit for human consumption but also unfit for cattle to drink and for irrigation of land. So much so, even the soil

¹¹ **Protection of life and personal liberty.** – No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹² *Chhetriya Pardushan Mukti Sangarsh Samiti v. State of U.P.*, (1990) 4 SCC 449

¹³ *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni*, (1983) 1 SCC 124

¹⁴ *Indian Council for Enviro-legal Action & Ors v. Union of India*, (1996) 3 SCC 212.

¹⁵ In 1972, the Organization for Economic Cooperation and Development adopted this principle as a recommendable method for pollution cost allocation.

became unfit for cultivation. Death, disease and other disasters gradually resulted and the villagers in the area revolted as a result of this enormous environmental degradation. The District Magistrate of the area had to resort to Section 144 of the Criminal Procedure Code¹⁶ to avoid any untoward incident.

A writ petition under Article 32 of the Constitution was filed in the Supreme Court and the Court asked for a report to be prepared by the National Environmental Engineering Research Institute (NEERI) as to the choice and scale of available remedial alternatives. NEERI suggested the application of the Polluter Pays principle inasmuch as “the incident involved deliberate release of untreated acidic process waste water and negligent handling of waste sludge knowing fully well the implication of such acts.” The cost of restoration was expected to be in the region of Rs. 40 crores. The Supreme Court examined all the available material and concluded that the industries alone were responsible for the damage to the soil, underground water and the village in general.

The Supreme Court held that as per the Polluter Pays principle

“... once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity *irrespective* of the fact whether he took reasonable care while carrying on his activity. The rule is premised on the very nature of the activity carried on.”

The Supreme Court cited with approval the following passage¹⁷ pertaining to the Polluter Pays principle: -

¹⁶ Power to issue order in urgent cases of nuisance or apprehended danger.

¹⁷ Historic Pollution – Does the Polluter Pay? By Carolyn Shelbourn – Journal of Planning and Environmental Law, August 1974.

“The Polluter Pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution. Under the principle it is not the role of Government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer.”

Adopting this principle, the Supreme Court directed that “The task of determining the amount required for carrying out the remedial measures, its recovery/realization and the task of undertaking the remedial measures is placed upon the Central Government.” It was directed that the amount so determined should be recovered from the polluting industries.

The villagers were permitted to file suits for recovery of damages, but more importantly, the Supreme Court accepted the principle of absolute liability laid down in the *Oleum Gas Leak* case and also approved the suggestion for setting up Environmental Courts.

While applying the principle of Polluter Pays, the Supreme Court later expressed the view¹⁸ that compensation to be awarded must have some correlation not only with the magnitude and capacity of the enterprise but also the harm caused by it. The applicability of the principle of Polluter Pays should be practical, simple and easy in application. In *Deepak Nitrite*, while remanding the matter to the High Court for reconsideration, the Supreme Court expressed the view that the possibility of 1% of the turnover of the enterprise may be adequate compensation.

¹⁸ *Deepak Nitrite v. State of Gujarat & ors*, (2004) 6 SCC 402

The concept of Sustainable Development was articulated and given effect to by the Supreme Court in *Vellore Citizens Welfare Forum*¹⁹. This concept first came to be acknowledged in the Stockholm Declaration of 1972. It was subsequently given definite shape in 1987 by the World Commission on Environment and Development in its report called “Our Common Future” chaired by Ms. Brundtland, the then Prime Minister of Norway. This report defined sustainable development as

“Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.”

In *Vellore Citizens Welfare Forum*, about 900 tanneries in five districts of the State of Tamil Nadu were discharging enormous amount of untreated effluent consisting of about 170 different types of chemicals into agricultural fields, roadside, waterways and open land. About 35,000 hectares of land became partially or totally unfit for cultivation. The water in the area became unfit for consumption and irrigation purposes.

One of the significant directions given by the Supreme Court in this litigation was contained in an order passed in 1995 whereby some of the industries were required to set up effluent treatment plants. In another order passed in 1996, the Supreme Court issued notices to some of the tanneries to show cause why they should not be asked to pay a pollution fine.

The Supreme Court also recognized the Precautionary Principle, which is one of the principles of sustainable development. It was said that in the context of municipal law, the Precautionary Principle means: -

- (1) Environmental measures - to anticipate, prevent and attack the causes of environmental degradation.

¹⁹ *Vellore Citizens Welfare Forum v. Union of India & Ors*, (1996) 5 SCC 647

- (2) Lack of scientific enquiry should not be used to postpone measures for prevention of environmental degradation.
- (3) The onus of proof is on the actor, developer or industrialist to show that his action is environmentally benign.

The introduction of the ‘onus of proof’ as a factor relevant for environmental protection was developed for the first time in this case.

The Supreme Court endorsed the Polluter Pays principle, which was earlier recognized in *Indian Council for Enviro-Legal Action*. It was said,

“The Polluter Pays Principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation.”

Resultantly, the Supreme Court recognized Sustainable Development, the Precautionary Principle and the Polluter Pays principle as a part of our environmental jurisprudence.

The Supreme Court passed two significant orders in this case. One was for setting up an Environment Protection Fund. Each of the tanneries who were asked to pay a pollution fine in this case were asked to deposit the amount in the Environment Protection Fund. The other significant direction given by the Supreme Court was to set up “Green Benches” in the High Courts.

In the *Calcutta Tanneries Case*²⁰, the Polluter Pays principle relating to relocation of industries was applied with a direction to those relocated industries to pay 25% of the cost of land. Those who did not pay for the cost of land were directed to be closed. The Supreme Court again resorted to directions earlier given in *Vellore Citizens Welfare Forum* for setting up effluent treatment plants.

²⁰ M.C. Mehta v. Union of India & Ors, (1997) 2 SCC 411

It needs to be mentioned that a strict interpretation of the Polluter Pays principle requires that the polluter should pay for causing the pollution and consequential costs for any general deterioration of the environment while another view is that the polluter is only responsible for paying the costs of pollution control measures. Generally speaking, 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.

A more than helpful discussion on the Polluter Pays principle and the Precautionary Principle is to be found in the *A.P. Pollution Control Board cases*.²¹ In this case, the Supreme Court made a reference to the Stockholm Declaration and the U.N. General Assembly Resolution on World Charter for Nature, 1982. The principle has recently been extended and quite significantly so, in a case pertaining to the import of hazardous waste, to include the cost not only of avoiding pollution, but also remedying the damage.²² Reference was made to Principles 15 and 16 of the Rio Declaration and it was said, “The nature and extent of cost and the circumstances in which the principle will apply may differ from case to case.”

The Stockholm Declaration accepted the “assimilative capacity” rule which assumed that the environment could assimilate impacts and science could provide the necessary information and technology to deal with environmental degradation. The World Charter for Nature shifted the emphasis, which came to be known and accepted in the Rio Declaration on Environment and Development, 1992 as the Precautionary Principle. This

²¹ A.P. Pollution Control Board v. Prof. M.V. Nayudu, (1999) 2 SCC 718 and (2001) 2 SCC 62.

²² Research Foundation for Science v. Union of India, (2005) 13 SCC 186.

principle is based on the ‘lack of full scientific certainty’. The basic idea behind this principle is that it is better “to err on the side of caution and prevent activities that may cause serious or irreversible harm. An informed decision can be made at a later stage when additional data is available or resources permit further research.”²³

Significantly, the Supreme Court recognized that environmental concerns are as important as human rights concerns. It was said,

“In fact, both are to be traced to Article 21 which deals with the fundamental right to life and liberty. While environmental aspects concern “life”, human rights aspects concern “liberty”. In our view, in the context of emerging jurisprudence relating to environmental matters, - as is the case in matters relating to human rights, - it is the duty of this Court to render justice by taking all aspects into consideration.”

In view of certain technical matters involved in this case, the Supreme Court resorted to the provisions of the National Environmental Appellate Authority Act, 1997 and referred two questions for its opinion. After obtaining the report of the Appellate Authority and considering it along with two other reports, the Supreme Court applied the Precautionary Principle and passed appropriate orders.

The Precautionary Principle led to the evolution of the special principle of burden of proof mentioned in *Vellore Citizens Welfare Forum*. As per this special principle, the burden is on the person wanting to change the status quo to show that the actions proposed will not have an injurious effect, the presumption operating in favour of environmental protection. This concept of ‘reverse onus’ requires that the burden of proof for safety rests on

²³ Charmion Barton: The Status of the Precautionary Principle in Australia (Vol.22) (1998) Harvard Environment Law Review.

the proponent of a technology and not on the general public – a new technology should be considered dangerous unless proved otherwise.

The Precautionary Principle is relatable to risk assessment and environmental impact assessment. Broadly, it postulates that decisions that may have an impact on the environment need to allow for and recognize conditions of uncertainty, particularly with respect to the possible environmental consequences of those decisions. Under the circumstances, it is essential to take preventive action or avoid effects, which may be damaging even if this cannot be proven.

Another major principle accepted by the Supreme Court is the public trust doctrine. This doctrine came up for consideration in the *Kamal Nath case*.²⁴

A rather unusual situation had arisen in this case. The flow of the river Beas was deliberately diverted because it used to flood Span Motels in the Kulu Manali valley in which a prominent politician's family had a direct interest. The motel was also allotted protected forestland by the State Government and had also encroached on protected forestland, which encroachment was subsequently regularized.

The Supreme Court used the public trust doctrine in this case to restore the environment to its original condition. Briefly, this doctrine postulates that the public has a right to expect that certain lands and natural areas will retain their natural characteristics.

Roman law recognized the public trust doctrine whereby common properties such as rivers, seashore, forests and the air were held by the Government in trust for free and unimpeded use of the public. These

²⁴ M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388, (1999) 1 SCC 702, (2000) 6 SCC 213 and (2002) 3 SCC 653

resources were either owned by no one (*res nullious*) or by everyone in common (*res communious*).

In English law, the public trust doctrine is more or less the same but with an emphasis on certain interests such as navigation, commerce and fishing which are sought to be preserved for the public. There is, however, some lack of clarity in this regard on the question whether the public has an enforceable right to prevent the infringement of the interests in common properties like the seashore, highways and running water.

Professor Joseph L. Sax²⁵ imposes three restrictions on governmental authorities as noted by the Supreme Court. These are:

- 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.
- The property may not be sold, even for a fair cash equivalent.
- The property must be maintained for particular types of uses.

It was noted that American Courts have also accepted the public trust doctrine and applied it in their case law and, the Supreme Court observed, it has now become a part of our environmental jurisprudence also.

Applying the public trust doctrine, the Supreme Court cancelled the lease of forestland granted in favour of Span Motels and the State Government was directed to take over the area and restore it to its original condition. The motel was directed to pay compensation (damages for restitution of the environment and ecology of the area). It was also asked to show cause why a pollution fine be not imposed.

While deciding the show cause notice regarding imposition of a pollution fine, the Supreme Court held that in law the fine could not be

²⁵ Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, Michigan Law Review, Vo. 68 Part 1 p.473

imposed without a trial and a finding that the motel is guilty of an offence under the Water (Prevention and Control of Pollution) Act, 1974. Accordingly, no pollution fine was imposed on Span Motels but it was asked to show cause why it should not pay exemplary damages. After considering the reply of Span Motels, exemplary damages of Rs.10 lakhs were imposed.

SPECIFIC INTERVENTIONS

AIR POLLUTION

Perhaps the most important decision given by the Supreme Court and one that has affected the over all quality of air in Delhi is in connection with the *Vehicular Pollution cases*.²⁶ This is really a great success story, which began with a White Paper issued by the Government of India which revealed that vehicular pollution contributes 70% of the air pollution as compared to 20% in 1970. Information obtained by the Supreme Court during the pendency of the case showed that air pollution related diseases in India include acute respiratory disease causing 12% of deaths (largest fraction in the world), chronic obstructive pulmonary disease, lung cancer, asthma, tuberculosis (8% of deaths, largest fraction in the world), perinatal (6% of deaths, largest fraction in the world) and cardiovascular disease (17% of deaths) and blindness. There has been a considerable increase in respiratory diseases especially amongst children. There are nine other cities in India where the air quality is critical. These include Agra, Lucknow, Kanpur, Faridabad, Kanpur, Patna and Jodhpur.

²⁶ M.C Mehta v. Union of India, (1998) 6 SCC 60, (1998) 6 SCC 63, (1998) 8 SCC 648, (1999) 6 SCC 14, (2000) 9 SCC 519, (2001) 3 SCC 756, (2001) 3 SCC 763, (2001) 3 SCC 767, (2002) 4 SCC 352, (2002) 4 SCC 356 and (2003) 10 SCC 560

Taking all these factors into consideration, the Supreme Court relied on the Precautionary Principle and issued directions from time to time for controlling pollution to some extent. Some of these directions include:

- Lowering of sulphur content in diesel, first to 0.50% and then to 0.05%.
- Ensuring supply of only lead-free petrol.
- Requiring the fitting of catalytic converters in vehicles.
- Directing the supply of pre-mix 2T oil for lubrication of engines of two-wheelers and three-wheelers.
- Directing the phasing out of grossly polluting old vehicles.
- Directing the lowering of benzene content in petrol.
- Ensuring that new vehicles, petrol and diesel, meet Euro II standards.

As a result of various orders of this kind passed by the Supreme Court, an authority called the Environment Pollution (Prevention & Control) Authority has now been set up to monitor, *inter alia*, pollution levels in Delhi and other cities and take remedial steps.

Strict enforcement of orders passed by the Supreme Court has ensured that Compressed Natural Gas (CNG) is introduced in all forms of public transport in Delhi including buses, taxis and auto-rickshaws. All these vehicles have been converted to a single fuel mode on CNG, the time frame having expired on 31st March 2001. Authorities dealing with the production of CNG have also been directed to ensure that its supply is available and steady. The result of all this has been that the quality of air in Delhi has considerably and visibly improved over the years, as any frequent visitor to Delhi would certify. In so far as air pollution control is concerned, the

Vehicular Pollution cases have shown how to effectively monitor a clean up of the environment and thereby achieve success in the venture.

WATER POLLUTION

In 1977, the United Nations Water Conference passed the following unanimous Resolution:-

“All people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs.”

The Supreme Court relied upon this Resolution²⁷ while observing that water is a basic need for the survival of human beings and is a part of the right to life and human rights as enshrined in Article 21 of the Constitution.

A news item had appeared in a national daily pointing out that the river Yamuna, which flows through Delhi is highly polluted.²⁸ The cause of pollution is two-fold: due to discharge of domestic waste and industrial effluents. The quality of water before the river enters Delhi is not unsatisfactory, but by the time the river leaves Delhi after traversing a distance of 22 km., the water quality undergoes steep and rapid deterioration.

The Supreme Court passed an order²⁹ to the effect that pollution of the river should be stopped with effect from 1st November 1999. However, a report given by the Central Pollution Control Board (CPCB), which the Supreme Court considered in January 2000 showed that the situation

²⁷ Narmada Bachao Andolan v. Union of India & ors, (2000) 10 SCC 664

²⁸ News Item “Hindustan Times” A.Q.F.M. Yamuna v. Central Pollution Control Board & anr, (2000) 9 SCC 440, (2000) 10 SCC 587, (2004) 8 SCC 638, (2004) 9 SCC 569

²⁹ The order is not reported but is referred to in one of the reported decisions.

continued to be alarming. The Attorney General was then requested to take effective steps to achieve the 'desired result' and in the meanwhile, industries located in Delhi were restrained from discharging their effluents into the river.

The Supreme Court later looked into the matter again and found that the parameters laid down by the Government in respect of water quality were not being adhered to. The Delhi Administration was directed to file an affidavit indicating what steps it proposes to take to reduce the pollution level so as to ensure that by March 2003 no untreated sewage enters river Yamuna.

As recently as August 2004, the matter again came up for consideration before the Supreme Court and it was noted that although the Court had directed its attention to cleaning up the river almost a decade ago, there has been no improvement, but the water quality had in fact deteriorated during the last about five years on a comparison of reports filed by the CPCB.

The Supreme Court then set up a High Powered Committee chaired by the Secretary, Ministry of Urban Development and including several governmental authorities to monitor the situation.

However, newspaper reports³⁰ have since indicated that despite an expenditure of Rs.87 crores on what is called the Yamuna Action Plans I and II, the river continues to remain as dirty as it was about a decade ago (perhaps more) and most people believe it to be nothing more than a sewer.

One of the chief reasons for this state of affairs is that there has been no effective monitoring, unlike in *Vehicular Pollution cases*. The result is that orders passed by the Court are not implemented and deadlines set in the various orders are not met. The second reason is that the focus of the case

³⁰ Hindustan Times, The Tribune, The Times of India and The Hindu all dated 13th April 2005

seems to have got partially diverted. This is clear from at least three orders passed by the Supreme Court which go to show that apart from the question of cleaning up the river Yamuna and treating the matter as a purely environmental issue, the Supreme Court has drawn within its ambit the question of unauthorized construction in Delhi and the revision of the Unified Building Bye-laws for Delhi. It is because of such a lack of focus that undivided attention has not been paid to the grave environmental issue pending in the Court.

FORESTS

The issue of illegal felling of timber in forests in India, particularly in the North-East Region came up for consideration before the Supreme Court in a public interest litigation initiated at the instance of one T.N. Godavarman Thirumulpad.³¹

The initial step taken by the Supreme Court in 1997 was to explain that a 'forest' for the purposes of the Forest (Conservation) Act, 1980 must be understood according to its dictionary meaning and included all forests, irrespective of the ownership or classification thereof, whether designated or reserved, protected or otherwise. Several directions relating to the timber trade, more particularly banning the felling of trees, identification and closure of saw mills were issued. Soon thereafter a High Powered Committee was set up to oversee the strict and faithful implementation of the orders of the Court in the North-East Region and for ancillary purposes.

³¹ T.N. Godavarman Thirumulpad v. Union of India, (1997) 2 SCC 267, (1997) 3 SCC 312, (1997) 5 SCC 760, (1997) 7 SCC 440, (1997) 10 SCC 775, (1998) 2 SCC 59, (1998) 2 SCC 341, (1998) 6 SCC 190, (1998) 9 SCC 632, (1998) 9 SCC 660, (1998) 9 SCC 672, AIR 1998 SC 2553, (1999) 5 SCC 736, (1999) 9 SCC 121, (1999) 9 SCC 151, (1999) 9 SCC 216, (2000) 6 SCC 413, (2000) 10 SCC 494, (2000) 10 SCC 579, (2001) 10 SCC 645, (2002) 9 SCC 502, (2002) 10 SCC 606.

The Supreme Court has since given interim directions from time to time on various issues, including for regulating the timber trade and pricing of timber, licensing of wood-based industries, forest protection, management of forests, action against erring officials, clarifying that minor forest produce is out of its purview etc. Gradually, but fortunately only for a while, illegal mining activity in forests was also included within the scope of the public interest litigation. Over a period of time more than 1000 interim applications have been filed in the case apart from a large number of contempt petitions and a massive number of interim directions have been issued. In December 1998, the Supreme Court lamented that many States have either not implemented its directions or breached them and in October 2002 it was observed that the tide of judicial considerations in environmental litigation in India symbolizes the anxiety of courts in finding out appropriate remedies for environmental maladies.

If a balance sheet of this case is drawn up, the real benefit that has come out of this litigation over the last several years has been the setting up of a Central Empowered Committee, which has checked, to the extent possible, unlicensed sawmills and helped in regulating the trade of illegal timber. Apart from this, the Committee has also considerably assisted the Supreme Court in passing several orders on environment related issues from time to time. More recently,³² the Supreme Court gave its imprimatur to what may be described as a modified approach to the Polluter Pays principle, in cases where forest land is diverted for non-forest purposes, measures must be taken by the user agency not only to compensate for the loss of forest land but also to compensate for its ecological impact.³³ This was achieved by accepting the setting up of a Compensatory Afforestation Fund Management

³² T.N. Godavarman Thirumulpad v. Union of India, (2006) 1 SCC 1.

³³ This excludes government projects like hospitals, dispensaries and schools.

and Planning Authority (CAMPA) and the Net Present Value (NPV) of forestland for compensation.

CULTURAL HERITAGE

The Polluter Pays principle came to be applied in the *Taj Trapezium case*³⁴ in which it was noted that there were as many as 510 industries responsible for air pollution in and near the Taj Mahal. To protect the Taj from being damaged, one aspect of the Polluter Pays principle was applied, namely, the industries were asked to relocate. As a proactive measure to attack the causes of environmental degradation, the Supreme Court directed as many as 292 industries to run on natural gas. In any case, they were prevented from using coke/coal as an industrial fuel. Since the Taj is a World Heritage Site, the Supreme Court went to the extent of saying that it would itself monitor some issues such as air pollution, proper management of the Mathura refinery, construction of a hospital, a bypass to divert all traffic away from Agra etc.

Subsequently, a governmental Agra Mission Management Board was constituted in 1997 followed by the Taj Trapezium Zone Pollution (Prevention & Control) Authority set up in 1999, *inter alia*, to monitor progress of the implementation of various schemes for protection of the Taj Mahal and programmes for protection and improvement of the environment in the area, take all necessary steps to ensure compliance with specified emission standards by motor vehicles and ensuring compliance with fuel quality standards etc. but the Supreme Court has still retained the public interest petition on its board and continues to monitor environmental issues

³⁴ M.C. Mehta vs. Union of India & Ors, (1997) 2 SCC 353, (1998) 8 SCC 711, (1999) 6 SCC 611, (2000) 10 SCC 551, (2001) 9 SCC 235, (2002) 10 SCC 664 and (2003) 10 SCC 719.

relating to the Taj. Notwithstanding this, a rather appalling scheme was launched to divert the river Yamuna that flows next to the Taj, reclaim land and construct a 'heritage corridor' nearby. The Supreme Court, understandably, has stayed this and asked the Central Bureau of Investigation to investigate all aspects of this scheme and institute criminal proceedings wherever necessary.³⁵

The issue of protection of monuments and religious shrines due to environmental degradation came up for consideration before the Supreme Court in *Wasim Ahmed Saeed vs. Union of India and Others*³⁶. To prevent damage to protected monuments, particularly the Dargah of Moinuddin Chisti in Ajmer and the heritage city of Fatehpur Sikri, the Supreme Court directed the removal of shops within a certain distance from the monuments so that no damage is caused to them.

TOWN PLANNING

In *M.C. Mehta vs. Union of India*³⁷, the Supreme Court considered the issue of industrial activity being carried on in residential/non-conforming areas in Delhi. Earlier, the Supreme Court had directed those hazardous and noxious industries, and other heavy and large industries be shifted out of Delhi. Since 'extensive' industries were also being shifted out, the question that remained to be considered was the shifting out of light and service industries.

³⁵ M.C. Mehta v. Union of India, (2003) 8 SCC 696

³⁶ (2002) 9 SCC 472, (2004) 8 SCC 74 and (2004) 8 SCC 75

³⁷ (2004) 6 SCC 588

The facts of the case as they appear in the judgment show that while there was an earlier estimate of 93,000 industries operating in Delhi, in fact there were over a 100,000 such industries carrying on industrial activity in residential/non-conforming areas. Some time in 1996, since the Delhi Government was seriously processing a project of relocating industries, the Supreme Court left the matter for implementation by the Delhi Government but directed it to file regular progress reports.

The Supreme Court noted that unfortunately the trust reposed by the Court in the Government was belied inasmuch as industrial activity continued in the areas in question and though a progress report had been filed it was clear that appropriate steps had not been taken by the Government in right earnest.

On the contrary, Delhi Administration came up with an application seeking extension of time till March 2004 to comply with the order for shifting polluting industries. The application also stated that as many as 7000 families would face dislocation. The question placed before the Court was whether this would be adequate justification to throw to the wind the norms of environment, health and safety insofar as the residents of various localities in Delhi are concerned.

The Supreme Court noted that effectively the Delhi Government had done nothing. For as long as 5 years there was no explanation why industrial activity was continued in non-conforming areas. On the other hand, the Delhi Administration had recommended *in situ* regularization of the industries. The Supreme Court naturally disapproved all this on the ground that the bona fide residents of the area would have to suffer pollution emanating from the industrial units and this would violate their right of life enshrined in Article 21 of the Constitution. In fact not only would this be the direct impact on the residents but they would also suffer because of the

stress and strain on infrastructure facilities. It was noted that the entire planning activity had gone haywire; persons who abide by the laws are the actual sufferers and polluting industries continue in the city at the cost of health and in utter violation of the Article 21 of the Constitution. The Supreme Court observed that no serious activity had taken place over a period of over a decade since the litigation commenced.

The range of activities associated with town planning is enormous. A mere shifting of industries brings with it displacement of workmen, necessity of creating new infrastructure facilities, an increase in the cost of transportation results in an increase in the cost of goods and if the goods are too highly priced, closure of uneconomical units etc. While the Supreme Court may have anticipated this, the Delhi Government found itself incapable of tackling the host of problems that would consequently arise, hence its complete apathy.

SOME CONCERNS FOR THE FUTURE

Judicial activism in environmental matters has been well documented and analyzed threadbare. Nonetheless, it seems appropriate to undertake a comprehensive evaluation, from time to time, of such activism in the development of environmental law in India. Such an evaluation is of relevance not only to India, but to most countries with functioning judiciaries in a post-modern, largely post-industrial world in the 21st century amidst a plethora of global, transboundary, national and local environmental crises.³⁸ In so far as we are concerned, it is quite clear, and unfortunately so, that the development of environmental jurisprudence has been mainly due to

³⁸ Ayesha Dias, “*Judicial Activism in the Development and Enforcement of Environmental Law: Some Comparative Insights from the Indian Experience*”, 6(2) *Journal of Environmental Law* 243 (1994).

the efforts of the Supreme Court. This is not to say that there have not been any important decisions rendered by the High Courts, but only that these have not really had any visible or major impact on environmental jurisprudence.

To a large extent, the Supreme Court has been pressed to undertake such an active role due to the inefficiency of the current environmental regime, since even though the statutes and legislation are well defined and stringent, their implementation and enforcement have not been efficient.

A major problem with the application of the environmental laws is the conflict of values and interests – the value of protection of the environment in the interest of all, versus production (industrial and otherwise) for the good of all. The right jurisprudential approach to environmental legislation would only be one that seeks a resolution to the conflict of these values. Ideally, the regulators of the environment and the producers who use natural resources must be one and the same.³⁹ Only laws which lead to this end can be said to have the right spirit. Seeking co-operation within a democratic set-up necessarily requires that we give up a “Policing the Society” theory and adopt what may be called a “Managing the Society” theory. For, clearly, the question concerning environmental problems is not how best to punish someone, but how to manage society in the best manner possible so that maximum development is attained with minimal environmental exploitation. In other words, a complete change in our jurisprudential perspective is required if we are to protect the environment and get over the exploitative mentality.

Unfortunately as mentioned above, the present struggle is being waged largely at the level of the Supreme Court, while it would, perhaps, be

³⁹ Chhatrapati Singh, “*Legal Policy for Environmental Protection*”, in *Law and Environment* (P. Leelakrishnan (ed.), Lucknow: Eastern Book Co., 1992) p. 38

more appropriate if it were to begin at the grass-root level and then proceed upwards. Otherwise, we would be faced with a situation where the Supreme Court is expected to monitor and find solutions to all the environmental problems of the country, which it cannot do, and the result of this would be that some orders passed by the Supreme Court would remain only on paper. Some live instances of this are orders passed for setting up 'Green Benches' which have not been set up in most High Courts, including Delhi. Similarly, Environmental Courts have not been set up and although a National Environment Appellate Authority Act, 1997 and National Environment Tribunal Act, 1995 have been enacted, these authorities are not functional; there is nothing to suggest that any active Environment Protection Fund actually exists. Similarly, while much attention is being paid to forest and wildlife preservation, the fact is that the tiger has disappeared from at least one national park.

It must be recognized that the district judiciary and the local populace are equally capable of dealing with environmental issues, if not more so. *Municipal Council, Ratlam* is a clear pointer to this. It must also be recognized that all citizens of various districts of the country are obliged to chip in their bit to preserve and protect the environment as a part of their fundamental duty - and in fact efforts are being made in this direction by various local interest groups and NGOs. Van Panchayats, for example, have been in existence in large parts of Uttaranchal where the local populace is managing the forests. Similarly, class actions can be initiated by NGOs working in particular districts and areas.

The focus must shift, therefore, from approaching the Supreme Court for remedial measures to involving the local people and approaching the local courts for relief, for it is they who are in a better position to appreciate the problems and requirements of the area. The Supreme Court has given us

adequate guidelines and solutions to macro problems, but we must not forget or overlook micro level problems that also need solutions. Without the active involvement of the people at the base level, solutions to environmental issues would be difficult to come by and jurisprudential concepts will remain good in theory, but having no practical utility. It is this change that we must strive for in the next couple of decades to develop environmental jurisprudence to make it more effective and people-oriented.