ENVIRONMENTAL TORTS: A STEP TOWARDS THE LEGAL REVAMPING POLICY RELATED TO ENVIRONMENTAL PROTECTION

Anshuman Mozumdar*, Kartikey Mahajan and Krithika Ashok
National Law University, Jodhpur (INDIA)

Received August 7, 2007    Accepted December 14, 2007

ABSTRACT

Environment, a subject matter of utmost importance, has, undoubtedly, attracted a great deal of deliberation in the past. However, several issues remain unanswered till date. The environmental policy of the country remains full of loopholes failing to provide an appropriate forum for environment protection, especially against private individuals. The need of the hour is legislative policy based on tort law as an easy method to redress grievances against violating the Constitutional mandate of clean and healthy environment. The aim of the paper is to highlight the importance of the policy based on tort law and discussion of the present enactments for enviro-justice and other procedures and remedies for the same.

Key Words: Alternative remedy, New legal policy, Environmental protection, Tort law, Absolute liability; Strict liability, PIL.

INTRODUCTION

Environment – An issue that has been perpetually juxtaposed with the existence of all life forms on Earth. It is this Nature under whose watchful eyes human beings have evolved. But such has been the magnanimity of man’s evolution that it has brought him in a position where he stands face to face with Nature and challenges her divine powers to alter the world. So expeditious are man’s endeavours that he has completely outstripped his biological development by his technological advancements. In nearly every region, air is being befouled, waterways polluted, soil washed away, the land desiccated and wildlife destroyed. Rivers, lakes and oceans have become so polluted that in many places they can no longer support life.1

However, Indian Environmental Law has seen considerable development in the last two decades, with the constitutional courts laying down the basic principles on which the environmental justice system stands.

The Indian Legal System began to draw its reins on the polluters after attaining independence beginning with the 4th plan2 of the Planning Commission of India that took cognizance of the problems of pollution, even before the Stockholm Conference on the Human Environment that saw an active participation of India in pollution curbing maneuvers. Since then, India has seen a plethora of legislations covering various aspects of the environment to ensure its conservation. However, due to loopholes in the laws or perhaps, the slack of the authorities imposing
the laws, these legislations have merely remained a compendium of powerless phrases that have lost their teeth during the course of time. There is no excuse good enough, no obstacle obtrusive enough, and no circumstance restrictive enough to exonerate the government from failing to perform its statutory duty to arrest environmental decline.

Constitutional and legislative mandate for a right to healthy environment

The SC has interpreted the right to life and personal liberty as under Article 21 to mean a right to have pollution free environment³ Article 48 A, added by the 42nd Amendment, 1978 provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life sanctuary of the country while Article 51 A (g) imposes a duty on the citizens of the country to protect and improve the natural environment. All of which is borne in mind when an environmental matter is brought before the Court.⁴

PILs – boon or bane

Public-interest litigation, a brainchild of judicial activism has played a critical role in expanding environmental jurisprudence in India over the last twenty-five years. It was the procedural mechanism that allowed for citizens’ claims against the government and polluters, and the tool that the Court continues to use to protect our fundamental constitutional rights.⁵

There are a few limitations to PILs. Firstly, the use of judicial independence, so far one of the benefits of PILs, is slowly becoming its key limitation because if a PIL appears before a judge who is hostile to the idea of PIL writ petitions, it can immediately be dismissed. Secondly, PILs and PIELs can only be filed against the government or government agencies. They cannot be filed against private industries or private landowners, limiting the extent of environmental protection that can be implemented.⁶

Of late, many of the PIL activists in the country have found the PIL as a handy tool of harassment.⁷ Frivolous cases can be filed without investment of heavy court fees as required in private civil litigation and deals can then be negotiated with the victims of stay orders obtained in the so-called PILs.⁸ The lowering of the locus standi requirement has behaved as a double-edged sword and has permitted privately motivated interests to pose as public interests. The abuse of PIL has become more rampant than its use and genuine causes have either receded to the background or are being viewed with suspicion owing to the spurious causes being mooted by privately motivated interests. Over the years, PIL has degenerated into Private Interest Litigation, Political Interest Litigation, and above all, Publicity Interest Litigation. This prompted the SC to issue guidelines to restrain abuse of PIL, however, this has only resulted in PILs with a genuine cause being dismissed on the pretext of it being used as a measure of settling private interests.⁹

It goes without saying that the environmental challenges which the country will be facing in the coming years shall be far greater than anything witnessed so far. To suggest that a solution for every conceivable environmental problem could be worked out through PILs is expecting too much.

Futility of existing legislations

There is no novelty in the flak and criticism that environmental laws in India have received in the past. The N.D. Tiwari Committee in the 1980s picked apart all the various legislations governing environmental laws in India for their insufficiency and their inability to address all environment related problems.

In the light of the Bhopal Gas tragedy the Environmental Protection Act, 1986 was enacted and was claimed to be the mother of all acts associated with environment. The proviso of the Act mandated that the Central
Government would be authorized to take necessary measures in furtherance of fighting pollution of the environment which includes water, air, and also the inter relationship between humans and animals and devise appropriate machinery to the same effect. A remarkable approach taken by the Legislature was that under the afore-mentioned act, the system of *locus standi* was done away with and it enabled every citizen to approach the court provided he had given a notice of not less than 60 days.

This Act may appear to be self sufficient on the face of it but the loopholes in it are gaping and astonishing. The radical approach to the system of *locus standi* is dissolved by the requirement of a sixty day notice which allows the offender ample time to annihilate all kinds of evidences or follies on his part.

The threats to the environment are numerous. Man’s uncontrolled activities are breeding new kinds of menaces to the environmental tranquility. Hence the Act lacks in mandating for the formation of a research and planning body that may enquire into new kinds of threats to the environment and devise measures to nullify their onslaught on nature.

Also if we consider the compendium of environment laws passed before the Environment Protection Act, 1986, it can be easily seen that though this act may be the potent successor of all the preceding acts, but their coexistence ensure that the individual can get a lesser punishment by coming under the ambit of the preceding laws even though the Act in question can override all other laws.

The National Environment Tribunal Act, 1995 was passed mainly for the setting up of a National Environment Tribunal for the effective disposal of disputes arising from damages to persons and property, the environment and all such ancillary matters. The Act follows the principle of strict liability for the punishment of offenders. However the Act draws flak due to the observance of the strict liability principle which brings the burden of proof on the tort feator. It is well known how difficult and cumbersome it is to get proof in cases of environment pollution. If an individual is filing a complaint for the pollution caused by an industry, it cannot be expected of him to provide ample proof for the same.

There is no dearth of laws governing the “Indian Environment” but there is dearth of the regulatory stick to implement the same. It has to be seen in the light of the complete bureaucratisation of the Ministry of Environment and Forests (MoEF) in the last two decades.

Regulatory failure may occur at the time of passing the legislation when private interest groups and influence and power blocks mar the recommendations of the team of analysts whose suggestions are to form the bedrock of the law. It can also be a result of ex-post failure, an example of which is corruption.

**HYPOTHESIS**

The primary aim of our paper was to devise a forum for speedy redressal of environmental issues. By comparing various systems of restitution and various schools of jurisprudence, we found that pecuniary liability arising from principles of tort law is apt for the same. We found support of our view in the principles of Strict and Absolute liability and Polluter Pays Principle as envisaged by the Indian Judiciary and which are principles of tort law as well.

**METHODOLOGY**

The issue of incorporation of the right to a healthy environment in the Constitution of India has been addressed with impetus on the role of Public Interest Litigations (PIL) for filing claims against polluters of the environment. The main laws regarding environmental protection were also reviewed. Finally a balance between tort law as envisaged by the English common law system and the present situation of environmental claims in India was
drawn with enquiry into the supportive nature of civil suits or claims in cases of environmental claims.

RESULTS AND DISCUSSION

The Supreme Court, in the case of *Indian Council for Enviro-legal Action vs. Union of India*\(^\text{16}\) laid down the polluter pays principle as “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 Polluter Pays Principle, a principle of international law, has been incorporated in the Indian Judicial system in matters related to environmental justice\(^\text{17}\) and has also been recognized as a fundamental objective of government policy to prevent and control pollution.\(^\text{18}\) The object of the above principle was to make the polluter liable not only for the compensation to the victims but also for the cost of restoring of environmental degradation irrespective of the fact whether he is involved or not.

The principle of strict liability (or the ‘no fault’ principle) incorporated in Sec. 3 of the National Environmental Tribunal Act, 1995 says that if a person brings onto his land, anything that is likely to cause damage or mischief and that thing escapes, he is prima facie liable for the damage caused by it. For several years the European Environmental Bureau has argued for a strict environmental liability system.\(^\text{19}\) However their policy was criticized on the basis that it required the plaintiff to prove the offence and once it was proved, a rebuttable charge was set against the offender which is the rationale of strict liability.

Hence, in *M.C. Mehta vs. Union of India and Others*\(^\text{20}\) the Supreme Court established a new concept of ‘absolute and non-delegable’ liability for disasters arising from the storage or use of hazardous materials from their factories.\(^\text{21}\) Thus, the enterprise must ensure that no harm results to anyone irrespective of the fact that it was negligent or not. Justice Bhagwati, who developed the concept of Absolute liability to replace the rule in *Rylands vs. Fletcher*, showed the judicial activism of the highest order by holding that strict liability is insufficient and that law has to grow in order to satisfy the fast changing society and keep abreast of the economic developments taking place in the country.\(^\text{22}\) He goes on to say “we no longer need the crutches of a foreign legal order… we in India, cannot hold back our hands and I venture to evolve new principles of liability which English courts have not done”\(^\text{23}\). The larger and more prosperous the enterprise, greater must be the amount of the compensation payable for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.\(^\text{24}\)

In the field of administration of enviro-justice, the Constitutional courts have stood the tallest not only before the other two branches of our Constitution-the legislature and the executive-but also, before its other counterparts, age old or young in the developed and developing countries. However in light of the principles reviewed above it is suggested that the most appropriate panacea for environmental claims lie in tort law.

**Tort action for environment protection—a conundrum of sufficiency**

There has always been a remedy available against the ill-effects of pollution under common law. So, it is not surprising that most developed nations, despite having developed extensive environmental regulations, continue to allow recovery in tort for any harm that can result from industrial activity because in most cases the sole option for the toxic exposure victim is to seek compensation through civil court action.\(^\text{25}\)

The Environment Statutes impose criminal liability on the wrong doer. But, Civil Law is better suited to meet the present needs of the country because unlike criminal law, ‘intent’, which paralyses the criminal justice
delivery system, doesn’t play a major role in it. Similarly, in case of pollution due to accidents, tort law is better equipped. The majority of legal remedies available for victims of catastrophic or large-scale industrial pollution fall within the tort categories of trespass, nuisance, or negligence and in recent times, strict liability and absolute liability. Even today the Indian courts still follow the English law of torts, and the ideological foundation based on justice, equity and good conscience has permitted to some extent innovation and development that are necessary to meet new challenges.

An appropriate legal solution envisaged by those affected by environmental disasters would hold the wrongdoer accountable, provide compensation to the victims, and deter future hazards. These are, indeed, the traditional promises of tort law: corrective justice, compensation, and deterrence.

An intuitive objective of the law of torts is to compensate the victims for losses due to accidents. Pecuniary liability is the heart and soul of a claim for damages under torts and hence it is necessary to look into the existing mandates that confer pecuniary liability on the tort feasor. Indian courts, in some landmark judgments have applied and explained various doctrines of law of torts that are prevalent in common law countries. The criteria of cause-in fact and foresee ability have been explained in many judgments.

**Impose pecuniary or tortuous liability on offenders**

It may be argued that penal liability incurred by a human being makes him deserving for a bodily punishment thus restricting his advancements towards crime. However the matter is to be seen differently when it comes to crimes against the environment. An unwarranted action against the environment can be considered a wrong against the society but the intention of the wrongdoer is not necessarily involved.

An essential element of punishment is corporal confinement. The rationale behind corporal punishment is either reform or deterrence to the offender. However as Salmond says, if criminals are sent to prisons for the purpose of reform, the prisons must not be less than dwelling houses, far too comfortable to serve as an effectual deterrent to those classes from which criminals are chiefly drawn. Problems arise when the criminals are of incorrigible nature. Sometimes rigorous imprisonment hardens the criminals and gives them a further incentive to commit crimes.

In a country like India which ranks 72 in the list of 180 most corrupt countries the success of penal action against offenders in cases of environment pollution is marred by the laches in the judicial process to punish the offender. Also the implementation of the punishment is either delayed or waived due to political considerations. It is also not possible for the Court to follow up the punishment for every offender. Pecuniary liability ensures immediate payment of fine by the offender and is subservient to a more efficient way of deterring him from committing such wrongs. The efficacy of the tort law regime lies in the fact that it provides direct access to damages, where in, the victims are compensated by the polluter itself, without it passing through the hands of the government.

It is well established fact that for all its rigorous efforts, the judiciary remains hamstrung when dealing with environmental problems. The service it has rendered till date though laudable, are essentially functions that ought to have been performed by other organs of the State machinery. The mere fact that such intervention is required is indicative of a malaise which afflicts all aspects of the Government. Though the judiciary as a catalyst has geared up the process, it is required that it be initiated by the public.

**CONCLUSION**

Despite existence of environmental policy, the constitutional mandate of
environment protection, flurry of legislations and administrative infrastructure of implementation, the problem of environmental pollution still remains a great cause of concern in our country. The future must be seen as a great challenge to be overcome by society as a whole, by evolving new means and mechanisms in tackling complex problems arising out of rapid Industrial advancement. The new means and mechanisms, as one proposed by us, will introduce the greatest possible transparency and accountability in the functioning of the Government and modes and measures of enforcing laws effectively in dealing with offences against environment which is the greatest wealth shared by all citizens.

REFERENCES
1. Sinha S.B. and Bhandari M.C., Memorial Lecture- Environmental Justice in India, Supreme Court Cases (J), 7(8), (2002).
22. LR3 HL 330 (1868).

---

**INSTRUCTIONS FROM PUBLISHERS**

It is a condition for publication that the authors must give an undertaking in the writing at the time of submission of papers that the manuscripts (research papers) submitted to JERAD have not been published and have not been submitted for publishing elsewhere, manuscripts are their original work. Furthermore, it should also be noted that the manuscript will not be returned in any case, whether accepted or rejected. Acceptance of research article will be communicated to authors in due course of time.