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Environmental Law Principles in India

India's modern environmental regulatory framework is founded on certain universal principles that have emanated from a creative reading of the Constitution of India, international treaties, and judicial precedents. The precautionary principle and the principles of absolute liability and polluter pays have played a significant role in the development of environmental laws, the assignment of responsibility for environmental restoration to polluters, and the providing of guidance to courts and enforcement agencies for the handling of complex issues concerning pollution and the exploitation of natural resources.

This article explores certain significant environmental principles, their origins, and their relevance to the Indian regulatory framework. Notably, most of these principles do not find clear mention in environmental statutes and regulations, but these principles can be easily read into the regulations as well as higher courts' orders and directions.

Precautionary Principle

The origin of the precautionary principle can be traced to the 1992 United Nations Conference on Environment and Development, informally known as the Earth Summit. Principle 15 of the Rio Declaration developed at the conference states: "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." The precautionary principle was introduced in supersession of the "assimilative principle."[1] The assimilative principle is based on the belief that scientific theories are certain and adequate to predict the harm that may be caused to the environment and also to take remedial action for ecological restoration whenever pollution occurs. The assimilative principle suffered a setback with the revelation of inadequacies in science, especially when seen in the context of the environment.

It is the inadequacies of science that have led to the origin of the precautionary principle. It is based on the theory that it is better to err on the side of caution and prevent environmental harm that may indeed become irreversible. The principle involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity.[2] This principle underlines the importance of taking precautionary measures, despite scientific uncertainty, to preempt any anticipated damage to the environment. Notably, this principle would apply where clear scientific data is lacking. Thus, there is a presumption that where the studies clearly establish the link between an activity and its detrimental impact on the environment, such activity would be undoubtedly avoided.

In India, the precautionary principle has come to be accepted as an integral part of our domestic law and policy as a result of judicial pronouncements. First, in *Vellore Citizens' Welfare Forum v. Union of India and Others*,[3] the Supreme Court not only applied the precautionary principle, but also introduced the idea that the burden of proof is placed on the developer or the industry to prove that the proposed activity is environmentally benign. Thereafter, in *A.P. Pollution Control Board v. M.V. Nayudu*, this principle was emphatically upheld by the Supreme Court.[4]

In *Narmada Bachao Andolan v. Union of India*, the Court explained:

> When there is a state of uncertainty due to the lack of data or material about the extent of damage or pollution likely to be caused, then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution.[5]

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ELR India Update™

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The goal of this service from the Environmental Law Institute (ELI) is to report on these developments and analyze their implications. The *Update* will also identify and analyze potential future developments for readers, so that they have advanced warning of risks and opportunities. The service will cover environmental legal and policy developments at the national and state level regarding climate and energy policy, manufacturing, importation and exportation, natural resources, product safety, worker safety, and other major environmental issues, such as water quality and supply.

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This principle has been widely accepted in India. It has been providing guidance to the enforcement agencies in deciding upon complex environmental matters where the threat to the environment and health is evident but the scientific data to determine its extent may be missing. In February 2010, adopting a precautionary principle-based approach, the Ministry of Environment and Forests imposed a moratorium on the release of Bt brinjal until there are independent scientific studies that establish the safety of the product from the point of view of its long-term impact on human health and environment.[6] Similarly, the Department of Telecommunications in India recently issued stringent norms on the electromagnetic frequency radiation (EMR) of mobile towers and handsets in the absence of definitive scientific data on the impact of EMR on the environment and human health (see next article in this issue).

Polluter Pays

"Polluter pays" is an elementary principle of environmental jurisprudence. It has remained largely undisputed. The cost of environmental restoration and remediation must be borne by the one who is responsible for causing the damage to the environment. For application of the polluter-pays principle, it is immaterial whether the environmental damage has been caused as a result of any fault on the part of the polluter or not. This principle is based on the premise that potentially hazardous activity impacts not only the individuals and property, but also the environment at large. Thus, when the polluter is clearly responsible for compensating the victims for loss of life or property, the cost of restoring the environment cannot be left to the government.

The polluter-pays principle was promoted by the Organization for Economic Cooperation and Development (OECD) during the 1970s. During this time, there were demands on government and other institutions to introduce policies and mechanisms for the protection of the environment and the public from the threats posed by pollution in a modern industrialized society.

In *M.C. Mehta v. Union of India*,[7] the Supreme Court observed that the polluter-pays principle demands that the financial costs of preventing or remedying the damage caused by pollution should lie with the undertakings that cause the pollution or produce the goods that cause the pollution. Under this principle, it is not the role of the government to meet the costs involved in either preventing 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.[8]

The Supreme Court endorsed the polluter-pays principle in *Indian Council for Enviro-Legal v. Union of India & Others*,[9] in which the polluting industry involved in the use of harmful chemicals was required to compensate for the removal of sludge lying in and around their manufacturing plant. The Court 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. Remediation of damaged environment is part of the process of sustainable development."

This principle is also embodied in the Environment (Protection) Act of 1986, which provides that in case of the discharge of environmental pollutants in excess of the prescribed standards or pollution, the cost of remedial measures to be taken by the government toward environmental restoration should be recovered from the polluter.[10]

Absolute Liability

The Supreme Court of India conceived of the absolute liability principle in the case of *M.C. Mehta v. Union of India* by enlarging the scope of strict liability principle.[11] In this case, the leak of oleum gas from a factory injured several Delhi citizens. Justice Bhagawati used this opportunity to extend the concept of strict liability to that of absolute liability. The principle of strict liability is based on the premise that if a person collects and keeps on his lands anything likely to cause harm if it escapes, he must keep it at his peril, and if he does not do so, he is prima facie answerable for all the damage that is the natural consequence of its escape. However, this person can be excused by showing that the escape was not due to any act or omission on his part or was the consequence of *vis major*, or an act of god. The underlying rationale for absolute liability is the same as for strict liability, but the principle of absolute liability does not provide any exemptions from liability.

The court in the above landmark judgment observed that the strict liability principle was promulgated in the 19th century and stressed, "the law has to grow in order to satisfy the need of the fast-changing society and keep abreast of the economic developments taking place in the country." In this judgment, the court did not feel constrained by the limited liability principle, which was universally accepted at that point of time, and felt the

need to go beyond strict liability. In a remarkably assertive manner, the Court stated, "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."

The Supreme Court held,

> 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 components of the absolute liability principle are:

- It applies to an enterprise that is engaged in inherently dangerous or hazardous activities.
- The duty of care is absolute.
- The exception to the strict liability developed in *Ryland v. Fletcher* is not applicable.[12]
- The larger and greater the industry, the greater should be the compensation payable.

Sustainable Development and Intergenerational Equity

The concept of sustainable development was first discussed at the international level in the Stockholm Declaration of 1972, where the complex relationship between environment and development was highlighted. But this concept was given a definite shape and clarity in the World Commission on Environment Report, "Our Common Future," which defined sustainable development as "development which meets the needs of the present without compromising the ability of future generations to meet their own needs."

A more comprehensive blueprint toward achieving sustainable development was laid down in the Rio Declaration of 1992. The Rio Conference declared that human beings are at the center of concerns for sustainable development. Human beings are entitled to a healthy and productive life in harmony with nature. The Rio Declaration further emphasized that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

It is pertinent to note that the concept of sustainable development is "human-centric" rather than "environment-centric" and aims at meeting human needs in a sustainable manner. However, there is an underlying assumption that natural resources should be used in such a manner that the needs of future generations are not compromised. The United Nations 2005 World Summit Outcome Document considers economic development, social development, and environmental protection as the interdependent and mutually reinforcing pillars of sustainable development. However, as pointed out by Justice B.N. Kripal:

> different levels of societies have their own concept of sustainable development and the object that is to be achieved by it. For instance, for rich countries, sustainable development may mean steady reductions in wasteful levels of consumption of energy and other natural resources through improvements in efficiency, and through changes in life style, while in poorer countries, sustainable development would mean the commitment of resources toward continued improvement in living standards.[13]

This principle holds special relevance for a developing economy like India's. The government often finds it challenging to balance ecological as well as developmental needs. Though the industry is no longer viewed as being opposed to the environment, any unplanned and unscientific development activity can cause irreversible damage to ecology. Therefore, there is a need to plan developmental activities in a manner that does not create excessive pressure on natural resources, thereby avoiding compromising the needs of future generations. This concept has come to be recognized as an integral part of life under Article 21 of the Constitution of India.

This principle has been recognized by the Supreme Court of India in *M.C. Mehta* v. *Union of India*, noted above. In *State of Himachal Pradesh v. Ganesh Wood Products*, the Supreme Court invalidated forest-based industries, recognizing the principle of intergenerational equity as being central to the conservation of forest resources and sustainable development.[14] In *N.D Jayal v. Union of India*, the Supreme Court declared that "the adherence to sustainable development is a *sine qua non* for the maintenance of symbiotic balance between the right to development and development."[15]

The Doctrine of Public Trust

In India, private ownership of natural resources, such as forests and water bodies, is very uncommon. The state is the trustee of all natural resources. In *M.C. Mehta v. Kamal Nath*, the Supreme Court held that the state, as a trustee,

was under a legal duty to protect natural resources.[16] The court further held that the resources were meant for public use and could not be transferred to private ownership.

Conclusion

Environmental jurisprudence evolves and strengthens in an environment that is dynamic, responsive, and open. The regulatory framework should not only be built on robust principles for environmental governance, but also should have the capacity to adapt to changing times. The Indian environmental justice system owes a lot to the proactive higher judiciary, which contributed significantly to the growth and evolution of sound and strong environmental principles and provided guidance on their adoption. The developments taking place at the international level have also been reflected in the judicial pronouncements. However, what has largely been lacking is the specific legislative intent when it comes to incorporating the principles of environmental jurisprudence in the applicable laws, administrative decisions, and effective enforcement, without which these principles would remain just theory.

Endnotes

1 U.N. General Assembly Resolution on the World Charter for Nature, 1982. Principle 6 contains the assimilative capacity principle, which assumes that science could provide policymakers with the necessary information and means to avoid encroaching upon the capacity of the environment to assimilate impacts, and it presumes that relevant technical expertise would be available when environmental harm is predicted and there would be sufficient time to act in order to avoid such harm.
2 A.P. Pollution Control Board v. M.V. Nayudu (India Jan. 27, 1999).
3 1996 (5) SCC 647.
4 AIR 1999 SC 812.
5 Narmada Bachao Andolan v. Union of India, AIR 2000 SC 3751.
6 *See Bt. Brinjal and Questions on Policy and Practice*, ELR India Update, Apr.-June 2010, at 5.
7 AIR 1987 SC 1086.
8 *Id.*
9 Indian Council for Enviro-Legal v. Union of India & Others, AIR 1996 SC 1446.
10 Section 9(3), *available at* http://envfor.nic.in/legis/env/env1.html.
11 1987 SCR (1) 819.
12 *Rylands v. Fletcher* was the 1868 English case (L.R. 3 H.L. 330) that was the progenitor of the doctrine of Strict Liability for abnormally dangerous conditions and activities.
13 Justice B.N. Kirpal, *Developments in India Relating to Environmental Justice,* http://pre.docdat.com/docs/index-19264.html.
14 AIR 1996 SC 149.
15 (2004) 9 SCC 362.
16 (1997) 1 SCC 388.

Stricter Norms on Electromagnetic Frequency Radiation in India

With the implementation of new norms on electromagnetic frequency radiation (EMR) issued by the Department of Telecommunications (DoT), India will be among a small group of countries in the world to have extremely stringent EMR standards for mobile towers and handsets.[1] According to the DoT, the new Indian standards, which entered into force in September 2012, are 10 times more stringent than those in 90% of countries in the world.[2] Simultaneous with the issuance of these norms, the Ministry of Environment and Forests (MoEF) issued an advisory report on the harmful impact of mobile towers on wildlife and the steps to be taken for minimizing harm.[3] Though there is no clear scientific evidence establishing a cause-and-effect relationship between EMR and health, the Indian government appears to be moving cautiously in matters relating to human health and the environment.

The international safety guidelines for radio frequency exposure developed by the International Commission on Non-Ionizing Radiation Protection (ICNIRP) were adopted by India in 2006. Thereafter, on November 4, 2008, the DoT decided to make adherence to ICNIRP standards mandatory for all telecom operators. Accordingly, the licenses granted to telecom operators were amended to include conditions regarding implementation of ICNIRP guidelines and regulation of emissions by base transmitting stations (BTS). All telecom service providers were mandated to submit self-certificates confirming compliance of ICNIRP guidelines with the respective Telecom Enforcement, Resource and Monitoring (TERM) Cells established by the DoT.[4] The TERM Cells also audit emissions from the BTS sites randomly or upon receipt of public complaints. If a site fails to meet the EMR criteria, the DoT may levy a monetary penalty of 500,000 rupees and, in certain extreme cases, order closure of the site.

However, the concerns regarding the harmful impact of EMR on the environment and human health were growing, and with a view to analyze and address the same in a scientific and holistic manner, the government established an Inter-Ministerial Committee. The committee consisted of representatives from the DoT, the Indian Council of Medical Research (Ministry of Health and Family Welfare), the Department of Biotechnology, and the MoEF. It was mandated to examine the effects of EMR from base stations and mobile phones. The committee examined various international and national studies and reference papers related to EMR before finalizing its report. The committee observed that most of the laboratory studies were unable to find a direct link between exposure to radio frequency radiation and health. It further noted that the effect of emissions from cell phone towers is not known yet with certainty.

Nonetheless, the committee recommended lowering the mobile towers' EMR exposure limits to one-tenth of the existing prescribed limit as a matter of abundant precaution. The government accepted the recommendations of the committee and announced the new norms in April 2012. Mobile operators were given five to six months to adjust their network to ensure conformity with the new norms.[5]

Around the same time, the MoEF also convened an expert committee to study the possible impacts of mobile towers on wildlife. Accordingly, an advisory report was issued on the use of mobile towers based on the recommendations given by the expert committee. This advisory report sets out the actions to be undertaken by various agencies involved in providing, regulating, and dealing with EMR-based services, with a view to mitigate their impact. According to the advisory report, local and state bodies should be responsible for regular auditing and monitoring of EMR in urban localities and educational, medical, industrial, residential, and ecologically sensitive areas. Towers having an adverse EMR impact should be removed or suitably relocated. Further, before according any permission for the construction of towers, ecological impact assessments must be conducted and the forest department should be consulted before the installation of a cell phone tower in forests or protected areas.

The DoT has been advised not to permit the installation of a new tower within a one-kilometer-radius of an existing tower. With a view to minimize the need for having additional towers, the sharing of passive infrastructure by telecom service providers is recommended. The advisory report also stresses the development of Indian standards on safe limits of exposure to EMR and making information related to EMR impacts available in the public domain.

Endnotes

1 DoT letter No. 800-15/2010-VAS (pt.) (Oct. 4, 2012).

2 A summary of the new standards can be found at http://pib.nic.in/newsite/erelease.aspx?relid=87152.

3 Office Memorandum, No. 15-11/2010/WL-1 (Aug. 9, 2012).

4 Vide letter No. 800-15/2010-VAS (Apr. 8, 2010).

5 DoT, Safeguarding Public Health, Steps Taken for Regulating EMF Radiation From BTS Towers, http://www.dot.gov.in/Security/EMF%20radiation%20mobile%20tower%20-web%20site%20note.doc.pdf.