Personification of the Environment: A Fiction of Law

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ABSTRACT:

It is the fundamental duty of mankind to protect the environment that nurtures us within the warm embrace of its biosphere. It is most unfortunate, that the human race has devoted its intelligent efforts in systematically devastating nature and depleting the natural resources that have, since time immemorial, caressed us with its natural ways. The Industrial age has mercilessly shattered the branches of the biosphere and the fragile arms of the flora and fauna. Mankind, realizing the state of urgency to protect the environment for its own selfish needs, has developed lofty ideals and a voluminous literature on rules, regulations and laws. Mankind boastfully proclaims to have unleashed a wave of environmental consciousness by virtue of constitutional provisions, penal safeguards and civil ideologies in the sphere of Indian jurisprudence. However, with the rapid explosion in the incidents of environmental crimes, it can be deduced that such preventive measures are emblematic of a pompous exercise rooted in futility. The environment can be protected only when it is personified and regarded as a being that has a compendium of rights of its own. Hence, an efficacious solution to check the alarming levels of environmental crimes is to confer upon the environment a legal personality so that its claims, rights and duties can be delineated. The Human Race, should in turn consider the environment as an animate being that can get injured by deforestation, that can sense pain by the discharge of noxious gases and fumes and that needs to be healed and nursed when industries trample it down.

The contemporary age has witnessed serious environmental fallouts in the shadow of unhindered industrial growth and its concomitant polluters. Major atmospheric setbacks as a consequence of biospheric degradation and pollution have spelled disaster on the health and vitality of Mother Earth and her inhabitants. The worsening health of the biosphere in the backdrop of indiscriminate and callous use of environmentally dangerous machines and technology warrants legal intervention and reform. Civil societies, quasi-judicial organizations and statutory enactments seem inept at mitigating the ill effects of environmental terrorism, thereby prompting legal authorities to step in and assume the role of bulwarks of environmental safety. Interestingly, if legal researchers were to gauge the degree of solemnity in tackling environmental terrorism by taking recourse to studying the development of weapons in the form of statutes and quasi-judicial organizations, they would emphatically opine that the jurisprudence of environmental law is heading in the right direction, however, the actual canvas presents a sorry state of affairs for its growth as these developments proved to be superficial, inefficacious and mere rubberstamps in containing environmental degradation and pollution having practical application on seldom occasions.

The indispensability of environmental law can be traced from the importance assigned to it since the primitive era which presents a thoughtful picture that mirrors the solicitous attitude of the jurists of those times in protecting the environment from the brutalities of the processes of industrialization and modernization.

The process of Historical evolution of environmental law can be traced from the ancient Hindu theological scriptures, *Vedas*, *Puranas* and *Upanishadas* in which the biosphere comprising the flora and fauna was highly revered and united with the human family. The *Rigveda* highlighted that nature contributes enormously in bettering human life by controlling the climate, enhancing fertility and providing for a healthy and secure environment to live and prosper. In the *Atharvaveda*, nature acquired a spiritual significance as various species of trees came to be identified as the abode of various Gods and Goddesses in the Hindu pantheon. The *Yajurveda* fiercely negated the idea of a relationship that man shares with nature premised on the notion of dominium or an attitude of subjugation. The didactic precepts instead asserted for a sacrosanct bond of kindness and respect. In ancient Hindu society, environmental breaches like deforestation were condemned and offenders were penalized. Congruous to *Yajurveda*, the *Yajnavalkya* Smriti prescribed penalty for the practice of deforestation and the use and maintenance of water were regulated by the *Charak Samhita*.

Environment-friendliness has been a long cherished ideal of the Hindu way of life. The civilization of Harappa and Mohenjodaro functioned and thrived in harmony with the environment followed by Kautilya's *Arthashastra*, a watershed document in the history of environmental protection as it concretely defined legal provisions in the sphere of environmental reforms that revolved around essential aspects like forest administration, regulation of forest produce and protection of wildlife during the Mauryan regime.

With the advent of British rule, the systematic management of forest resources started with the appointment of first Inspector General of Forest in 1864.The task of forest department under the Inspector General was that of exploration of resources, demarcation of reserves, protection of forests etc. The objective of management of forests thus changed from obtaining timber to protection and improvement of forests which was further regulated by the Forest Act, 1865 and first Forest Policy, 1884. The British Government also enacted several acts for the protection of air and wildlife like, Bengal Smoke Nuisance Act (1905), Bombay Smoke Nuisance Act (1912), The Elephant's Preservation Act (1879), The Wild Birds and Animals Protection (1912) aimed at the conservation of Bio-diversity, respectively. Though enacted with ulterior motives of earning revenue, these legislations were not only regarded as the primordial step towards conservation of natural resources but have contributed immensely to the growth of environmental jurisprudence in India.

The Post-Independence era witnessed a metamorphosis in the outlook of the Government with respect to environmental conservation. The Constitution of India that came into force on 26thJanuary, 1950 had few provisions regarding environmental management. Articles 39(b)[1],47[2],48[3] and 49[4] enshrined in Part IV,

[1] Article 39(b), Constitution of India, 1950,"that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good."

[2] Article 47, Constitution of India, 1950, Duty of the State to raise the level of nutrition and the standard of living and to improve public health The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of

constituting the Directive Principles of States Policy clearly indicate that the present Constitution is not environmentally blind, though the word environment was not expressly envisaged in the nascent stages Constitution. The year 1976 heralded a new era which marked the assimilation two new articles in Part IV and part IV- A of the Constitution.[5] The newly incorporated Article 48A directed that the State shall endeavor to protect and replenish the deteriorating environment and to safeguard the forests and wild life of the country.

The eighties witnessed the creation of many judicious organizations like, the Botanical Survey of India, National Museum of Natural History and Zoological Survey of India. In 1981, the Air (Prevention and Control of Pollution) Act was enacted to regulate the menace of air pollution. In January 1985, the Department of Environment transformed into the Ministry of Environment and Forests. It consisted of two departments, *viz.*, the Department of Environment and the Department of Forests and Wildlife. In 1986, the Environment (Protection) Act was made to empower the Central Government to take all necessary measures to shield the environment and to prevent hazards to biosphere.In1987, the government formulated the 'National Water Policy' with the object to develop, conserve, utilize and manage the water resource. In 1988, the 'National Forest Policy' was formulated with the aim of ensuring environmental stability and maintenance of ecological equilibrium. In 1995, the National Environment Tribunal Act was enacted to give a fillip for strict liability for damage arising out of any accident occurring while handling any hazardous substance. In 2000,the Central Government by virtue of powers conferred on it by the Environment(Protection) Act, 1986 made the following rules; Ozone Depleting Substances (Regulation and Control) Rules, 2000, The Municipal Solid Wastes (Management and Handling) Rules, 2000; The Noise Pollution (Regulation and Control) Rules, 2000 and Batteries (Management and Handling) Rules, 2001.In addition to the above legislations, realizing that there are no comprehensive enactments dealing with bio-diversity in India, and to fulfil its international obligation under Convention on Bio-Diversity(CBD), the Biological Diversity Act, 2002 was enacted by the Government of India.

It can, therefore, be deduced that laws pertaining to the environment in the Ancient era were marked by stringency and substance as the ancient texts echoed the existence of a neatly cultivated perception animating respect for nature and an entailing obligation to safeguard it by accepting the policy of non-interference and abstaining from vitiating the atmospheric equilibrium. However, with a rise in the graph of human progress, it

public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

[3]Article, 48, Constitution of India, 1950,Organization of agriculture and animal husbandry The State shall endeavour to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

[4]Article 49, Constitution of India, 1950,Protection of monuments and places and objects of national importance It shall be the obligation of the State to protect every monument or place or object of artistic or historic interests, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

[5] 42nd Amendment Act, 1976, Constitution of India, 1950.

can beremarked that as human intelligence took giant strides propelling technological development, novel ways and methods were devised to circumvent existing laws pertaining to the environment. The chasm between existing laws and rapid technological developments pioneered by the British government could be closed by modern and progressive statutes which were, despite being prevalent during the post- independence period did not sub serve any social good. It is a paradox that despite the presence of such diverse laws, the pollution rate crossed the dead line, probably because experts were unable to realize the intricacies of law owing to its complexity and vagueness.

Despite painstaking researches relating to the amelioration of environmental conditions being conducted, data and statistics being meticulously compiled, methodical enactments of statutory law and establishment of quasi-judicial organizations, instances of violations of environmental law soared in an unabashed and impetuous fashion. A straight and simple reason for the failure of such opulent efforts was that these organizations and statutes were inevitably embroiled in a maze of administrative drama intertwined with red-tapism, corruption and bureaucratic lethargy.

Environmental crimes were continued with gross impunity frequently marked by pervasive and uncontrollable incidents of offences vitiating and abusing the environment when finally, the Honorable Supreme Court in its landmark decision of *M.C. Mehta v. Union of India*[6], expanded the horizon of strict liability to absolute liability, considering the enterprise liable for any harm caused on account of its activity without being subject to any exception thus, not only embracing the tortuous principle of strict liability under the rule of *Rylands v. Fletcher*[7] but, also determining a rule of proportionate compensation for the harm caused.

The philosophy of compensatory jurisprudence constitutes an essential and exclusive part of our civil law which has time and again been endorsed in several judgements of environmental pollution but, proves to be in effectual to the ideal of actively safeguarding and protecting the environment due to its lackadaisical approach that regards only the idea of compensation and the claims of the victim as of ultimate importance.

In *M.C. Mehta v. Union of India*[8], the Court adopted a forthcoming approach but to little avail. The enthusiasm in the verdict specifically revolved around the mere aspect of compensation and not on the devising of measures to curtail environmental pollution,

"The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be

[6] AIR 1987 SC 1086.
[7] (1968) LR 3 HL 330.
[8] *supra* note 6.

no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part."

In *Union Carbide Corporation v. Union of India*[9], "The Court examined the prima facie material as to the basis of quantification of a sum which, having regard to all the circumstances including the prospect of delays inherent in the judicial-process in India and thereafter in the matter of domestication of the decree in the United States for the purpose of execution and directed that 470 million US dollars, which upon immediate payment and with interest over a reasonable period, pending actual distribution amongst the claimants, would aggregate very nearly to 500 million US dollars or its rupee equivalent of approximately Rs.750 crores."

The remedial approach relied exclusively on the notion of quantifying compensation and not on devising a strategy to deter the occurrence of such chemical disasters.

In the instant case, the environment was not even considered to be an incidental beneficiary. The prime emphasis was laid on the rights and claims of the animate human beings letting alone the ailing environment to flounder.

"The matter concerns the interests of a large number of victims of a mass disaster. The Court directed the settlement with the earnest hope that it would do them good and bring them immediate relief, for, tomorrow might be too late for many of them."

In *Environment Education* Case[10], the Court resorted to an overt action directing the Information and Broadcasting Ministry to screen short films on protection of environment in order to educate the masses about the need to protect and safeguard the environment.

However, even though, the Court broke free from the shackles of lethargy and inactivity, the mere overt step of screening films about environmental education resembled a superficial cosmetic surgery that solved the crisis at hand only on the surface levels.

"The Ministry of Information and Broadcasting of the Government of India should without delay start producing information films of short duration as is being done now on various aspects of environment and pollution bringing out the benefits for society on the environment being protected and the hazards involved in the environment being polluted. Mind catching aspects should be made the central theme of such short films. One such film should be shown, as far as practicable in one show every day by the cinema halls"

Therefore, a conventional flaw of civil law in the arena of environmental law has been to consider the animate individuals solely as victims of environment pollution and hazards thus, committing the blunder of abandoning

[9] (1991) 4 SCC 548.
[10] *M.C. Mehta v. Union of India*, 1992 AIR 382.

the prime victim and ignoring its plight and suffering i.e. the Environment.

In light of the frightening portrait of the biosphere painted above, it may be inferred that we are living in a time of environmental emergency where peace and tranquility can only be achieved by picking up the gauntlet and resorting to the armors of criminal law. The Indian Penal Code watchfully guards the environment by virtue of an existing set of provisions on 'Offences Affecting Public Health, Safety and Convenience' enshrined in the fourteenth chapter of the Indian Penal Code[11]. It is however, unsettling that the subdued character and passive spirit of the wordings of these provisions have sapped the foresightedness and effectiveness of the sword of environmental protection thereby rendering it improbable to check certain concrete attacks on the environment.

Section 268 is popularly touted as the sentinel of the environment in the realm of criminal law but this provision relating to public nuisance exclusively focuses on the protection of individuals or a collection of individuals (public) from any common injury, danger or annoyance which merely regards the environment as an interposer, henceforth failing to shield the environment from a possible direct harm. This implies that unless an individual or a collective group of individuals are injured, endangered or annoyed, the environment cannot be protected under the shade of this provision as the terminologies have been designed to exclude the environment as a beneficiary of the provision. Under the ambit of criminal law, the environment does not have an apparent claim to be protected but only an incidental and indirect right which is largely dependent on the quality and degree of injury, annoyance or danger caused to an animate entity known as the individual.

Delving deeper, we have rummaged up another serious loophole in criminal jurisprudence of environmental law. The letter and spirit of Section 268[12] (Public Nuisance), Section 269 [13](Negligent act likely to spread infection of disease dangerous to life) and Section 270[14] (Malignant act likely to spread infection of disease dangerous to life) disregard the claims of environmental protection with absolute flagrancy. These provisions echo the fact that in the absence of any overt act or omission causing injury, danger, disease or annoyance, the environment would have no claim for protection which implies that the noxious residue discharged by the industries and the toxic carbon emissions emitted by the vehicles would never fall within the protective

[11]Chapter XIV, Offences Affecting the Public Health, Safety, Convenience, Decency and Morals, India Penal Code, 1860.

[12]Section 268, The Indian Penal Code, 1860, A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage.

[13]Section 269, The Indian Penal Code, 1860, Negligent act likely to spread infection of disease dangerous to life.—Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

[14]Section 270, The Indian Penal Code, 1860, Malignant act likely to spread infection of disease dangerous to life.—Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

contours of Sections 268, 269 and 270 as there is no traceable vestige of the crucial elements of 'an overt act or omission' or 'malignancy' on the part of the passive polluters. The absence of prescience and an unnerving degree of indifference adopted by the framers of the Indian Penal Code with respect to the plight of the environment provides an easy escape for the regular and usual polluters who may deftly deceive the legal authorities by proving lack of malignancy and an overt criminal act.

The cobwebs of deception and trickery can be warded off by resorting to the Polluter Pays Principle. Companies or industries that are major polluters often get off scot-free due to the non-existence of requisite legal provisions and the unavailability of a yardstick that may measure and quantify the repercussions of their contribution in polluting the environment. The polluters are allowed to discharge pollutants in the environment while the masses have to bear the brunt. The Polluter Pays Principle suggests that a company is required to either pay to prevent the pollution or pay for remedying the damage it has caused. Author Sharon Beder points out that in congruence to the Polluter Pays Principle, the government can ensure that the polluter pays by,

- "Regulating what polluters are able to discharge into the environment so that they have to install their own pollution control equipment;
- Charging taxes to cover governmental costs of protecting the environment, including the cost of sewage treatment facilities;
- Making polluters liable for the damage they cause."[15]

Hence, the Polluter Pays Principle is rooted in the theory of prevention of pollution and the concept of restoration in the event of pollution. This principle plugs-in the inadequacies of chapter fourteen of the Indian Penal Code by imposing upon the polluter the absolute liability to prevent or restore (as the case may be) environmental harmony irrespective of the fact whether there has been proven malignancy or a guilty intention or an overt act of annoyance, danger or harm on the part of the polluter.

The existence of striking commonalities between the efficacious Polluter Pays Principle and the progressive concept of Absolute Liability evolved in several judgments that transformed the face of environmental legal reforms;

In the case, *Indian Council for Enviro-Legal Action vs. Union of India*[16], the Court reiterated the point that a statute relating to protection of environment should be so designed that it caters to the spirit of practicality, utility and reasonableness. In the present case, the Court observed that, "We are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country".

[15]Sharon Beder, Environmental Principles And Policies: An Interdisciplinary Introduction, 32 (ROUTLEDGE) (2013).

[16](1996) 3 SCC 212.

In addition to this, the fact that the polluters are under an obligation to remedy the harm, regardless of other contradictory considerations caused to the environment, was highlighted, "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 upon the very nature of the activity carried on"[17]

In an attempt to further crystalize the concept of environmental jurisprudence into a concrete structure, the Court staunchly opined,

"The polluting industries are absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas".

While pronouncing the verdict, the judges dexterously synthesized the larger objective of Sustainable Development with that of the principle of absolute liability and the Polluter Pays Principle.

In *Vellore Citizens' Welfare Forum vs. Union of India*,[18] the Court interpreted the essence of Polluter Pays Principle to be the absolute liability for the harm caused to the environment which extends not only to compensate the victims of the pollution but also entails the cost of restoring the environmental degradation. Remediation of the damaged environment is an outcome of the process of 'Sustainable Development' consequently imposing the liability upon the polluter to bear the cost of individual sufferings and damaged ecology.

In *Tirupur Dyeing* case[19], Public Interest Litigation was filed against the discharge of effluents into river which led to the suffering of a large number of farmers. They could not cultivate any crop in the affected land.

"The Pollution Control Board is directed to ensure that no pollution is caused, giving strict adherence, to the statutory provisions. The Polluters pays principle is a part and parcel of national environmental law. The appellant is bound to compensate the persons who have suffered the loss because of the activity of its members, as water of the river is neither worth for irrigation purpose nor potable. It was also reiterated that principles of "polluters-pay" and "precautionary principle" have to be read with the doctrine of "sustainable development"."

A close analysis would help us decipher the trajectory of the polluter pays principle that welcomes a revolution in the arena of environmental jurisprudence. This revolution aims at converging the principle of absolute liability and the pollution pays principle so as to strengthen the ideology of liability in proportion to contribution. This ideology would in turn dispel the trying notions of evidential politics.

[17] *Ibid.*
[18] (1996) 5 SCC 647.
[19] (2009) 9 SCC 737.

The deadlock in the fabric of environmental law can be unyoked only when 'legal personality' is conferred on environmental law and the status of the environment and its various constituents are elevated and placed on a pedestal similar to that of animate individuals. By personifying the environment, we may concretize the rights, liabilities and claims of the environment. As a consequence, the humungous entities and myriad aspects of the environment can be streamlined and brought under the protective shade of the term "individual" in Section 268. The Cloak of Legal Façade would prove to be a catalyst in the environment's recognition as a socio-legal concept that would subsequently fasten the process of its translation into a legal object capable of acting in legal affairs. The final step of victory would be achieved by its personification into a legal subject equipped to assert its rights.

As we approach the final destination of our legal voyage, we have gathered that there exists a palpable dichotomy between the tender and congenial approach adopted by the ideologies of civil law and the tactical methodologies advocated by the pillars of criminal law. The conventional face of environmental law is inextricably linked with the spirit of neutrality imbued in the character of civil law. In the wake of tectonic changes in the environmental landscape where dark noxious fumes disrupt the thin delicate layer of placid air, the state of merely being environmentally conscious and principally neutral would imply a conscious agreement to murder the environment. It is the crying need of the hour to breakout a rebellion in order to save the dying environment from the clutches of demonic industrial growth and open vistas in civil law and criminal law to introduce the principle of environmental- vigilance. The principle of environmental vigilance and the state of being environmentally-conscious can be concretized by draping the environment with a legal personality so that it becomes endowed with the protective shield of rights, claims and immunities. Fortifying the claims of environment, the Polluter Pays Principle shall guard its legal personality and ward away the polluters and evidential complexities.