

# Analysis of Criminal Law application in Environmental Offences

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## ABSTRACT

India is one of the most polluted countries in the world. India has developed legislations and jurisprudence in the field of Environmental law. However, the offences keep on increasing and becoming graver. The paper discusses the role of criminal law in administering environmental offences. It discusses the various reasons to bring it further into application from a social and an economic angle. It also throws light upon the hurdles involved in the application of the same and why criminal law has not yet practiced frequently. The paper further suggests the various methods and alternatives in the forms of punishment that can be granted in criminal law to make it more effective and deterring.

*Key words* : Criminal law, Environmental offences, Environmental law

## Introduction

Environmental problems remain the most challenging problem across the globe and so in India. There have been several efforts taken during the pre-independence and post independent period in India to combat the problem. However, since India is a developing country major focus has been industrialization and economic development and that remained the only focus in the earlier five year plans. Environmental development and protection only came into picture in the eleventh five year plan (2007-2012) as a core goal.

The requisite of conservation and preservation of environment is also seen in the Constitution of India under Part IVA (Art 51A-Fundamental Duties) which casts a duty on every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures. Further, the Constitution of India under Part IV (Art 48A-Directive Principles of State Policies) stipulates that the State shall

endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

The essentiality of environment dawned upon the world after the Stockholm Conference (UN Conference on the Human Environment, 1972). Keeping in mind its international commitments, India set up the Ministry of Environment and Forests in the year 1970 and came out with various legislations such as The Air (Prevention and Control of Pollution) Act, 1981, The Water (Prevention and Control of Pollution) Act, 1974, The Environment Protection Act, 1986, The Hazardous Waste Management Regulations, etc.

The Indian Judiciary has contributed a lot in the growing and expanding field of environmental law and has gone further and held that the right to life under Article 21 of the Constitution is a fundamental right and includes the rights to free water and free air from pollution for the full enjoyment of life in the case of **Subhash Kumar v. State of Bihar**<sup>2</sup>. If anything endangers or impairs that quality of life in

derogation of laws a citizen has recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to life.

### **Environmental Legislations in India**

The Indian Penal Code, 1860 has laid down offences and punishment in relation to environmental wrongs. The first is, Section 268, which deals with "public nuisance" which does not have the necessity of proving mens rea. Moreover, there is Section 277, 278, 284 and 286 dealing with voluntary causing harm to water, air, negligent use of poisonous substances and explosive substances respectively.

There are other Sections in the Indian Penal Code which indirectly deal with Environmental laws. They include- Section 336 (n who does an act so rashly or negligently as to endanger human life or the personal safety of other), Section 337 (causing hurt by act endangering life or personal safety of others), Section 304A (causing death by rash or negligent act) can also be used. All these sections require mens rea.

### **Reasons for High Level of Pollution in India**

Though India came out with a lot of legislation, it looks that it was only to fulfil its international commitments. The penalty provisions in all these environmental protection acts are a meagre fine.

After the liberalization of the Indian economy in 1991, it opened the gateway for foreign direct investments. India being an unexplored resource rich country with huge labour attracts a lot of Multinational Companies (MNC). This is not the only reason that brings them here, Indian pollution laws are soft and the amount they have to pay as fine for violation of any norm in India as compared to their home/host country was very less. Thus, they knowingly break the pollution norms and the fine they have to pay for doing so just becomes an Operational Cost for this companies. The main motive for one to commit an environmental crime is financial gain. The United Nations Convention on Corruption seeks to identify the links between corruption, organised crime, money laundering and economic crime.<sup>10</sup>

Further, the enforcement of environment norms in India is very less. The cost of compensation paid to the labour that dies or suffer injuries due to the occupational hazards during the process of work is very less. Moreover, it is very difficult to win a case against the abuse of norms by MNC's or more ac-

countability of the activities of MNC's as states generally collude with these industries for their own economic gain, or MNC's care exempted from the national legal system.

In the light of this, regulatory bodies which derive their funding from and are largely dependent on government are less aggressive in monitoring and enforcing laws against these companies (Emeseh, 2005)

Often, however, the problem is that government departments (at all levels) are assigned administrative responsibilities in respect of environmental legislation without being given any guidance as to how to implement, administer or enforce the law (Jayanta Basu, 2018).

Further, there is division of administrative responsibility. A circumstance might arise that multiple government agency is involved in the administration of a particular law and each one thinks that the other is responsible for problems that arise.

All these reasons have contributed to increasing levels of pollution and thus grows importance of legislations preventing the same.

### **Low Acceptability of Criminal Law Application in Environmental Offences**

Usually the victims or survivors of the environmental disasters are the very poor people of poor developing country. The environmental concern in this class of society is least as they are involved way too much in their daily struggles of existence. Therefore, whenever an environment disaster this sector will only be interested in compensation.

Since these victims do not have resources to proceed for a trial, they generally go for out of court settlements that are way too meagre to the actual sum needed to address the damage done (Fekumoh, 1990).

Further, even the general population who can pay for these criminal trials does not proceed with it because these corporations serve as their bread earner. These corporations get the loyalty of the people in the given area of the environment disaster as they provide employment opportunities to them (Frate and Noberry, 1993).

The filing of cases for civil proceedings is much easier as compared to the criminal proceedings which are cumbersome as can be seen in the legislations passed in India, such as the S. 49 (1) (b) & (2) of the Water Pollution Act <sup>15</sup>for the procedure to be followed before a private person can prosecute.

### Importance of Criminal Law usage in Environmental Offences

Although there are arguments that non command and control measures are more effective tools of environmental regulation (Fischel and Sykes, 2001) yet criminal liability is used as a regulatory tool in the national laws of several countries the world over and also under international law (Kubasek, 2000). As Lofton argues, *"in every society, there are those who will have a hard time complying with the laws unless coercion, or threat of coercion, is involved. Even with a cooperative approach, the ultimate recourse is sanction"* (Lofton, 2001).

The environmental disasters are happening all across the world and many developed countries have been successful in reducing it through criminal actions. Environmental laws were enacted because of similar flaws in the tort system, which is far better at compensating injury than preventing it (Lazarus, 2001). Tort law only focuses on compensation and does not go beyond that to address the problem of deterrence and retribution which can only be dealt with criminal law.

According to Henry Hart, 'what distinguishes a criminal sanction from a civil sanction and all that distinguishes it ... is the judgment of community condemnation which accompanies and justifies its imposition' (Hart, 1958). A crime, therefore, is 'conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community' (Robinson, 1994).

According to many commentators, criminal law not only reflects public morality and norms, but can also be used to contribute to the fashioning of norms (Hedman, 1991).

Chambliss suggests, based on observation of different types of offences, that 'instrumental' offences – those where the offender commits the offence as a means to an end, rather than as an end in itself (an 'expressive' offence) – are more likely to be deterred by punishment (Chambliss, 1967). Many environmental offences would be instrumental – pollution often occurs, for example, as a side effect of production and to save costs.

Moreover, laws that are not enforced promote 'cynicism and disrespect for the law, particularly the criminal law' (Kadish, 1967).

Smith expresses this point aptly when she states, 'Criminal prosecutions can have a profound educa-

tive or preference-shaping effect - reinforcing public values that equate deliberate environmental offences with serious offences against persons - and thus creating a corporate and public environmental ethic that promotes voluntary compliance.'

### Economic Angle of Criminal Law's Application

There is an economic angle to the usage of criminal law - the best known exposition of economic theory is that posited by Richard Posner, who argues that the major function of criminal law in a capitalist society is to prevent people from bypassing the system of 'the market' (Posner, 1985). Many instances of bypassing the market could be deterred by the law of delict/ civil law, but 'the optimal damages (compensation) that would be required for deterrence would so frequently exceed the offender's ability to pay that public enforcement and non-monetary sanctions such as imprisonment are required' (Posner, 1985).

The significance of this view is that the criminal sanction should be reserved for only those cases where non-criminal modes of enforcement (including delict and interdicts) are inadequate. The economic approach has great relevance to environmental offences, which are often the by-products of socially-beneficial activities.

### Negatives of Criminal Law Application

The Criminal law works to give deterrence however it cannot be a tool standing alone in isolation. The civil liability is essential to be taken into consideration as a compliance mechanisms. The judiciary authority has a strong bargaining power in cases of compliance and failure of which the officials involved in the violation of environmental norms can be threatened by criminal prosecution. – the carrot has not worked, which means that the stick must be used (Robinson, 1990).

Burden of time and cost- Criminal prosecutions involve significant costs to the state and there is a considerable time delay between the commission of the offence and the conclusion of the trial. The delay may be even lengthier in respect of environmental crimes because of the necessity of carrying out scientific analysis. Costs are higher than common law trials due to expert advice and scientific analysis. Witnesses and other people involved in the prosecution face a lot of problem.

Law and economics put forward that generally fines that are charged is much less as compared to

the cost of prosecuting, thus inefficient distribution of resources.

The delay in resolution of a matter may well delay the remediation of the harm for which liability is being determined in the court proceedings (Nicola Pain, 1995).

Secondly, the criminal law reacts to the damages caused and does not focus on the restoration of the environment which is the primary aim of the environmental law. The maximum aid of criminal law in this case is the deterrence and thus prevention of future such violations.

Thirdly, the criminal laws are more stringent when it comes to standard of proof than they are in civil law. The civil laws work with the balance of probability principle but in criminal laws it is necessary to identify the offender, prove mens rea if it is not a strict liability offence.

In environmental law many cases are just regulatory and morally neutral thus the offenders cannot be called as criminals. There is a moral dilemma faced by officials prosecuting such offenders as these offenders maybe morally upright people (SA Kadish, 1993).

Generally socio-economic crime is associated with upper class people. Generally crimes were associated with lower class of people which they indulged in due to necessity. However, these new forms of crime are done by privileged classes of people who are prosperous in trade, industry in furtherance of their own material interest. Thus, penalty and fines do not deter their activities to a great extent.

There is a lack of public awareness about the environmental laws so the reporting of offences is not adequate, thus majority of the population is unconcerned with the violation of these environmental standards as they do not categorize it as offences.

Taking into consideration the Indian legislation, there are inadequate penalties provided for by the legislation namely under air, water and environment protection act.

#### **Alternate Punishments in Criminal Law**

In order to overcome the negatives reasons of the application of Criminal law in environmental offences, there are alternate approaches analysed and when they can be suitable-

**Imprisonment, Fine, Public Censure, Closure of Industry** - are all subpoints so please change the

fonts or number them to indicate the same.

The main aim of environmental laws is to restore the harm that is done and repair the environmental harmony. The defaulters can be asked to restore the loss they have caused while violating the environmental laws and norms. This is better than imposing fines as one cannot be sure if the fines will be used to restore the harm, but community service can ensure that and it can be complemented in a given time.

If the harm is such which is non-restorable then community service can be used for other society welfare activities. It will instil in the defaulters a sense of responsibility and will give back to society.

It can be used for individual defaulters as well. It particularly benefits people from the lower economic strata. Further, for companies that default courts can even increase their Corporate Social Responsibility percentage as a part of their budget.

#### **Imprisonment**

The statutes provide for imprisonment or fine or both. Thus giving courts wide array of options to decide the punishment.

The punishment should be given by courts after taking into consideration the deliberation shown by the offender, necessity of the act, gravity of the harm caused, however these and many more concepts seems to lack before giving punishment.

Prison sentences have certain advantages over financial sanctions, especially in cases where the offender has a limited wealth, or where there is possibility for fines to be passed on to customers or shareholders of the said. Prison sentences at the same time carry additional social weight due to loss of status and stigma.

While prison sentences do not occur frequently as can be seen throughout the world, they should be implemented occasionally to deter criminals and retain the credibility of the threat. This is important, as the effectiveness of other enforcement practices hinges on the presence of this 'ultimate threat'.

#### **Fines**

These offences generally arise out of greed and result in huge financial gains. Thus, fines should ideally be charged in a way so that no offender can profit or pocket any gains out of such a transaction (Latham, 2016). Thus, it should be made sure that fines should be more than the profits made out of such transaction.

It should also be ensured that other alternatives should be used if the party paying the compensation is too economically advantaged that the compensation becomes a minimal and has no significant impact on their functioning. The law in England and South Wales state that financial burden of the fine should affect both management and shareholders. In the case of Thames Water, one of the biggest water sewage company in the England, resulting in a  $\leq 1$  million fine plus additional costs. The Other alternatives should also be explored if the person paying is economically disadvantaged and can later escape fine.

### Public Censure

As the environmental crimes that occur in MNC's are associated with the upper class, their reputation and in the cases of corporate their goodwill is of high value and thus public censure is an effective tool to reduce their reputation and act as deterrence. This will also affect the trust of shareholders and the company will see a financial downside without having any affect on the non defaulting third parties.

### Closure of Industry

It has been laid down in the case of State Pollution Control Board ... vs M/S Swastik Ispat Pvt. Ltd. Anr<sup>35</sup> that the courts are empowered in the closing down of defaulting industries through disconnection of electricity & water supply. There The Hon'ble Supreme Court of India, while dealing with different public interest litigations on environmental matter, has laid down different principles in order to pressurise the industries to control pollution or to restore the environmental degradation caused by them through "Polluter to Pay" principle.

This has been done rarely in India, however it is an important tool to deter the others and thus should be practiced once in a while.

### Proper Sentencing

A proper sentence is a composite of many factors, which includes the nature of the offence, the circumstances in which the offence occurred, the prior criminal record of the defaulter, the age of the offender, the professional and social record of the defaulter, the background of the offender with reference to education, home-life, sobriety a social adjustment, the emotional and mental condition of the offender, prospects for the rehabilitation of the offender, the possibility of a return of the offender to

a normal life in the community, the possibility of treatment or training of the offender, the possibility of treatment or of training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the present community need Law Commission of India Report, 1972.

### Conclusion

India has strong legislations that have the potential to prevent pollution. India's jurisprudence in relation to the environment law has much developed. It has been developed so far that at times there are conflicting precedents and application of it has become a problem. Further, there are way too many bodies that administer environmental which is causing confusion.

The end goal of preserving the environment and restoring the harm caused has not been made possible yet in India. The criminal law has the potential through alternative ways to not only restore the environment but also deter such activities in the future. However, there is a need of evolving criminal law and alternate punishments as suggested in the precedents so as to enforce them and set a stable law. This is not to say that criminal law can stand alone, it has to be the combined application of civil and criminal law on a case to case basis. Thus, a balanced use of criminal law combining it with administrative law for minor or moderately serious crimes is more efficient than relying solely on criminal law.

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