The Evolution of Tort Law and Related Developments in India after the Bhopal Gas Leak: An Assessment

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History and development of tort law

Historically, under the English Common Law, the area of tort has always been dynamic. From being used in a very generic sense to denote a wrong, it had been expanded to denote a class of wrongs. In its most widely used sense, tort had always denoted a set of wrongs where the basis of liability was fault.

Originally, the word tort was a French word (meaning twisting out) which was introduced into the English glossary in a generic sense by the French speaking lawyers and judges of the Courts of Norman and Angevin Courts of England after the Norman Conquest when French became the spoken language of the Courts.[1] The French word 'tort' was used synonymously with the English word 'wrong'.[2] The practice of using the word 'tort' began in the seventeenth century in courts of common law, to denote actions for wrongs other than breaches of contracts.[3] With time, tort lost the generic sense of wrong and came to signify those class of wrongs for which an action in tort in common law was recognized by courts of common law as a remedy.[4] Here, an interesting

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[1] A. Lakshminath& M. Sridhar (Ed.) Ramaswamy Iyer's Law of Torts, 10thEd, (Lexis Nexis Butterworth Wadhwa., 2007) P.2

[2] *Id.*

[3] *Id.*

[4] Ibid

development took place. Tort also came to signify the liability of a person who did not commit any wrong or tort; for example, liability of a master for the actions of his servant where the master has to pay damages, although he hasn't committed any wrong.[5] This was found from studies by Oliver Wendell Holmes which revealed that the basis of tort liability was fault or failure to exercise due care.[6] Morton J. Horwitz also revealed from his examination of the history of negligence that negligence meant "failure to perform a pre-existing duty whether imposed by a contract, statute or common law status".[7] He argues that the original standard was not fault but strict liability. In fact, the fault theory was not established till the nineteenth century by judges to create immunities from legal liabilities along with providing substantial subsidies to those who undertook schemes for economic development.[8] Negligence, in its modern sense, was imported by business minded judges.[9] The English law of torts which was tailored to attract litigants to King's Court, was developed in a completely different context than in India.[10] However, in the name of justice, equity and good conscience they were implanted in India.[11]In India, Acts by British Parliament and Indian enactments were followed during the British rule. British law shaped the system of Indian legal system. Indian courts were to act according to justice, equity and good conscience.[12] Although matters related to property or marriages were to be governed by personal laws, suit for damages in torts were governed by English common law so far as it was in consonance with justice, equity and good conscience.[13] Departure was made when rules were found to be unreasonable to the Indian conditions. For example, rules requiring proof of special damage for actions for slander and doctrine for common employment.[14] This area in India was largely uncodified. Till date, some aspects of tort law have been codified.[15]

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[5] Ibid

[6]Holmes, Jr., The Common Law 111 (1881).

[7] M. Horwitz, The Transformation Of American Law 1780-1860 85-101 (1977). P. 87

[8] Ibid P. 100

[9] Ibid

[10] Special Problems of Law of Torts in India

[11] Special Problems of Law of Torts in India

[12]Iyer, 26

[13] Ibid, follow footnote

[14] Ibid

[15] For example, Motor Vehicles Act

It may be aptly said that the advent of tort laws in India was largely a product of the colonial leverage and linkage of the country[16]. Mayoral courts were established in the presidency towns of Bombay, Madras and Calcutta. Common law system was introduced in India, thus, as a handmaiden of colonial rule. "Justice" and "right" were the two essential norms that the courts had to base their judgements on. Gradually the judicial system in India started molding from a simple system to a more complex one. Though the hierarchically higher courts were mandated to follow the common law system, lower courts had no such requirement and had to give decisions, in absence of any specific or customary law, on principles of justice, equity and good conscience.

Development of tort law in India was not a speedy one. Rather, it took a long time to evolve. Certain causes may be identified for the same. One of the causes may be the uncertainty of tort law because of its largely uncodified nature there was hardly the desired uniformity and certainty in the rules and doctrines of tort law. This coupled with the fact that as a polity, the Indian masses were backward, which led to the slothful development for the law of torts in India. Monetary incentives received by filing tort cases were also not satisfactory to serve as a lever for growth of tort law in India[17].

An imprint of the English system was borne by the Indian system also. The Crown in England could not be sued in tort[18], even if the action is that of its servants. Until the passage of the Crown Proceedings Act, 1947, that position remained vastly unaltered. When the Constitution of India cameinto being, Article 300 contained the provision relating to the liability of the State. This was a refurbished version of Section 65 of the Government of India Act, 1858, and Section 32 of the Government of India Act, 1935.

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[16] J.N. Pandey, *"Law of Torts with Consumer Protection and Motor Vehicles Act, Central Law House"*, Eighth Edition (2011)

[17]J.N. Pandey, "Law of Torts with Consumer Protection and Motor Vehicles Act, Central Law House", Eighth Edition (2011)

[18]J.N. Pandey, "Law of Torts with Consumer Protection and Motor Vehicles Act, Central Law House", Eighth Edition (2011)

For tracing the development of tort law in post-colonial India, it is wise to look at its development through a conspectus of case laws. In *Peninsular and Oriental Steam Navigation Company* case[19]the plaintiff's servant was travelling in a horse-driven carriage through a government property. The horse got seriously injured due to the act of negligence of the defendant's servants. Suit was filed against the Secretary of State for India in Council for the damages caused due to the servants of the defendant. The court tried to draw a distinction between what are sovereign functions and what are non-sovereign functions, the former making the Government not liable and the latter incurring it with liability. As maintenance of the dockyard was considered to be a non-sovereign function, the East India Company was held liable. The aforesaid case has been approved and applied in the cases of *Vidyawati*[20] and *Kasturi Lal*[21].

In *State of Rajasthan v. Vidyawati*[22], the driver of a jeep, kept specifically for the purposes of use of the Collector of a district, drove the same rashly, while bringing it back from repairs. It caused a pedestrian to be knocked down and injured fatally. The widow of the pedestrian sued the State. The Supreme Court reasoned, and which is the most significant thing, that the task of bringing the car back from repairs could not be held to be an exercise of sovereign powers

In *Kasturi Lal v. State of U.P.*[23], a suspect of stolen property possession was taken to the police station. His property, gold and silver, were taken away from him, which was later misappropriated by a police constable. The State was sued either for return of the gold and silver or for damages. As the court reasoned that the act had been done by the police officers in exercise of their sovereign powers, no action could lie against them.

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[19](1861) 5 Bom. H.C.R. App. I, p.1

[20]AIR 1962 SC 933

[21]AIR 1965 SC 1039

[22]AIR 1962 SC 933

[23]AIR 1965 SC 1039

An interesting case in this regard is the case of *Union of India v. Sugrabai*[24], a military truck was engaged to carry a machine to the School of Artillery for repairs. The machine was meant for training military officers. It was argued that training of the military officers is an exercise of sovereign function, and hence, the machines and the repair works needed to keep them in proper condition was nothing but an exercise of the sovereign power. Court rejected this argument holding that many of the aforesaid acts could have been performed – like transportation of the machines could have been done in the truck of a private person. Though the court accepted that in certain circumstances, such carrying of machines may be an attribute of sovereign power- like when the same is being carried on for the immediate use of the army, in this case it was not.

The rule of law laid down in the *Peninsular and Oriental Steam Navigation Company* cases was however becoming very out-modeled in view of the emergent activities of the State. This rule faced a challenge in the case of *N. Nagendra Rao v. State of A.P.*[25] The Supreme Court went on to hold that if due to the action of the State, citizens had to suffer, then there was liability fixed on the State to make good to the citizens. The appellant in this case was carrying food and fertilizer business with proper licenses. The Police Inspector, Vigilance Cell visited the premises and huge stocks of fertilizers, food grains and non-essential goods were seized. The fertilizers were ordered to be placed under the Assistant Agricultural Officer for distribution to the *ryots* in need. The Officer failed to take any steps to distribute the same. When the proceeding terminated in favour of the appellant and the confiscation order was quashed, the Collector directed release of stocks. But the Assistant Agricultural Officer again failed to release the stocks. Though he asked the appellant to take delivery of the stocks, when he reached for the same, he found them to be spoilt. He sought compensation which again was rejected. In the suit filed by the appellant, the defence of sovereign immunity was contended. Court held that the state was liable for the negligence committed by its officers in discharge of public duty. Also,

[24] AIR1967 Del 98

[25](1994) 6 SCC 205

the court, emphasizing the *jure imperii and jure gestionis* activities, held that sovereign immunity was never available for *jure gestionis*.

In *Common Cause, a Registered Society v. Union of India*[26], the Supreme Court rejected the sovereign immunity rule. In *PUDR v. Union of India*[27], a labourer was taken to the police station for some work, and on demanding payment, was severely beaten up and ultimately succumbed to injuries. The State was held liable to pay Rs. 75,000 as compensation. In *State of A.P. v. Challa Ramakrishna Reddy*[28], it was held that the process of judicial advancement led by the Kasturi Lal case had paled into insignificance.

The development of tort law in India received a major boost with the occurrence of the Bhopal Gas Tragedy. The event gave rise to complex questions of liability which in some aspects defined the tort regime of India. The next section consists of an elaborate discussion on the questions of tort which rose in Bhopal.

The Bhopal Case and Tort Law

The Bhopal gas leak that occurred at midnight on 2nd December, 1984, due to the escape of deadly chemical fumes from the appellant's pesticide factory was a horrifying industrial mass disaster, unparalleled in its magnitude and devastation and remains a ghastly monument to the de-humanizing influence of inherently dangerous technologies.[29]

In March 1985, the Parliament of India enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act[30]. The Act conferred an exclusive right on the Indian Government to represent all claimants both within and outside India, and directed the government to organize a plan

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[26]AIR 1999 SC 2979

[27](1989) 4 SCC 730

[28]AIR 2000 SC 2083

[29] The Tragedy Took An Immediate Toll Of 2660 Innocent Human Lives And Left Tens Of Thousands Of Innocent Citizens Of Bhopal Physically Impaired Or Affected In Various Degrees. See – *Judgement Today,* Vol.2, 1989(Sc), P. 457

[30] Popularly Known As The Bhopal Act, Which Received The Assent Of The President On March 29, 1985. The Act Replaced An Ordinance Which The President Had Promulgated On February 20, 1985.

for the registration and processing of the victims' claims[31]. Later, the Indian government sued the Union Carbide in the United States. But then, the American Court declined to try the case on the ground that India was a more appropriate forum.

Judge Keenan's Court in New York expressed the view that to retain litigation in the American forum would be yet another example of imperialism-a situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. The court declared further that, "…the Union of India is a world power in 1986 and its courts have proven the capacity to meet out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged"[32].

After this decision, the Indian government sued Union Carbide in the Court of District judge, Bhopal for Rs. 3,900 crores. From there, the matter went before the M.P High Court. In April 1988, Justice Seth of the Madhya Pradesh High Court awarded interim damages of Rs. 250 crores (US $192 million). Both the Union Carbide and the Government of India appealed to the Supreme Court. Union Carbide appealed on the ground that the judgement of Judge Seth of M.P High Court was unsustainable because it was delivered without trial. The Indian government appealed because Judge Seth had reduced by 30 percent of judge Deo's (District Judge) earlier interim payment award of Rs. 350 crores.

On February 1989, the Supreme Court induced the Indian government and the Union Carbide to accept its suggestion for an overall

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[31] Armin Rosencranz, Shyam Divan And Martha L. Noble, *Environmental Law And Policy In India(Bombay : N.M. Tripathi Pvt Ltd., 1991), Pp. 344-45*

[32] Before Judge Keenan's Court, The Plaintiffs, Including The Union Of India, Have Argued That The Courts In India Are Not Up To The Task Of Conducting The Litigation. They Argued That The Indian Judiciary Has Yet To Reach Full Maturity Due To Restraints Placed Upon It By British Colonial Rulers Who Shaped The Indian Legal System To Meet Their Own Ends. Further, The Indian Justice System Has Not Yet Cast Off The Burden Of Colonialism To Meet The Emerging Needs Of A Democratic People. See Upendra Baxi, *Inconvenient Forum And Convenient Catastrophe: The Bhopal Case(Bombay:N.M Tripathi Pvt. Ltd.,1986) Pp. 68-69*

settlement of the claims arising from the Bhopal disaster. In the settlement that was reached, Union Carbide agreed to pay US $470 million to the Indian government to settle the past, present and future claims arising from the Bhopal incident. The Supreme Court, in order to facilitate the settlement exercised its extraordinary jurisdiction and terminated all the civil, criminal and contempt of court proceedings that had arisen out of the Bhopal disaster and which were filed in lower courts. In December 1989, the Supreme Court in a long-worded judgement[33], upheld the constitutional validity of the Bhopal Act.

Until the Bhopal case, the Indian Tort Law had never been confronted with the dilemmas posed by mass disaster situations,[34] This is mainly because the Indian common law system inherited from the British was designed to serve the interest of Rulers rather than to respond to the needs of the people[35]. The Indian Supreme Court has addressed only a handful of tort cases since its establishment in 1950. There are only 132 negligence cases reported in the All India Reporter from 1914 to 1965[36].

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[33]Charan Lal Sahu V. Union of India, Writ Petition No. 268 of 1989, dated 22-12-1989. This is a 239 page opinion expressed by the Supreme Court upholding the constitutional validity of the Bhopal Act.

[34] The early charters, which established the courts in India under the British rule, required judges to act according to "Justice, equity and good conscience", in deciding civil disputes if no source of law for most part. See, Ramaswamy Iyer, *The Law of Torts (1975)* p.221. The law was modified and departed from the English law only when the peculiar conditions that prevailed in India required this. For example, some aspects of the law of torts in India have already been codified in the form of special statutes. Relevant provisions of the Motor Vehicles Act. 1939, Workmen's Compensation Act, 1933, Employer's Liability Act, 1938, the Indian Railways Act, 1890, The Indian Carriage by Air Act, 1954, and the Carriage of Goods by Sea Act, 1925 are standing examples. Se C.M Abraham and Sushila Abraham, "The Bhopal Gas and the Development of Environmental Law in India", *International and Comparative Law Quarterly. Vol. 40, No. 2, 1991, p. 353.*

[35] Upendra Baxi, *The Crisis of the Indian Legal System, 1981";* Sharma "The Lack of Tort Law in India", *AIR* (Journal) 1966 p. 7. Also…Some Aspects of Indian Law Today", *International Comparative Law Quarterly, 1964 No. 8.m*

[36]Ratna Kapoor, " From Human Tragedy to human Right: The Accountability of Multinational Corporations for Human Rights violations," *Boston College Third World Law Journal,* Vol. 10 No. 1, 1990 p. 80; Ramamoorthy, " Difficulties of Tort Litigants in India" *Journal of Indian Law Institute Vol. 12, 1970 P. 320.*

These cases involved neither injuries related to industrial premises, nor the use of any hazardous chemical substances, nor complex technology[37].

Perhaps for the first time that the Supreme Court in *Ratnam Municipality v.. Vardichand*[38] sounded a futuristic note towards a new development of tort law when it observed that, "the dynamics of the judicial process has new 'enforcement' dimensions, nor merely through some of the provisions of the Code of Criminal Procedure, but also through activated tort consciousness"[39].

The Bhopal disaster raised complex legal questions about the liability of parent companies for the acts of their subsidiaries, the responsibilities of multinational companies engaged in hazardous activities, the transfer of hazardous technologies, and applicable principle of liability[40]. The general tortious liability are clear in stating that, "tortious liability arises from a breach of duty primarily fixes by the law, such duty is towards persons generally and its breach is redressable by an action for unliquidated damages"[41]. The liability for a tort may arise from international wrongdoing, negligence or out of an absolute liability imposed without any fault. It may be vicarious liability as that of a master for a servant's tort or breach of duty under a statute, for example, a duty of an employer under the Factories Act[42].

The District Court of Bhopal, presided by Judge Deo in the Union Carbide case declared that the substance handled at the plant (MIC) was one of the most dangerous substances and that exposure to even a small concentration would pose an immediate danger to living beings and the environment. In addition, the complex corporate structure of the multinational corporation with a network of subsidiaries and divisions throughout the world confused the whole issue to pinpoint responsibility for the damages caused by the enterprise. In such a situation, the only

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[37] Most of the cases that were filed were on subjects like traffic injuries, to claim relief under the provisions of the Motor Vehicles Act.

[38] AIR 1980(SC)P. 1629

[39] *Ibid p. 1631*

[40] Armin Rosencranz and others, n.? p. 346

[41] Winfield, *Province of the Law of Tort* (London: Sweet and Maxwell, 1990 p. 32)

[42] M.C Setalvad, *Common Law in India (*Hamlyn Lectures 1970) p. 114

way left is to make the monolithic Union Carbide responsible for its conduct.

1. Hence for its part, the defendant Union Carbide is absolutely liable for all the damages caused or contributed to by the escape of the lethal MIC from its Bhopal plant.
2. Furthermore, Union Carbide is under a duty to design, construct, maintain and operate its Bhopal plant is such a manner as to prevent the escape of the lethal MIC from the plant and to protect persons from unreasonably dangerous and defective conditions and to warn persons of the dangers and risks associated with the plant and its manufacturing processes[43]. There was clear and convincing evidence that the Union Carbide breached this duty.
3. Most important of all is a duty to design, construct, maintain and operate the Bhopal plant with reasonable care so as to protect persons from unreasonable dangers and to use reasonable dangers and to use reasonable care to warn persons of the dangers and risks associated with the plant and its manufacturing processes[44]. Union Carbide breached this duty and the massive escape of lethal MIC gas occurred as the proximate result of this negligence[45].
4. Defendant Union Carbide expressly and impliedly warranted that the design, construction, operation and maintenance of its Bhopal plant were undertaken with the best available information and skill in order to insure safety. These warranties were untrue in that the Bhopal plant was, in fact, defective and unsafe and the technical services and information provided by the defendant Union Carbide and the resulting plant operating practices were defective in numerous respects.

On these counts the District Court of Bhopal ordered Union Carbide to pay interim compensation of Rs. 350 crores to the union of India (US $ 270 million) for distribution to the gas victims.

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[43] Armin Rosencranz and others, n.? p. 353. This is under the doctrine of strict liability.

[44] Ibid. p. 353

[45] Ibid.

The Union Carbide filed a petition before the High Court of MP under Section 115 of the Code of Civil Procedure, against above order of the District Court[46]. The High Court partly allowed the petition by upholding the trial court's order to make interim payment to the plaintiff Union of India representing the gas victims. However, the Court declared further that the payment to be made by the Union Carbide is not a payment of interim relief[47] without reference to the merits of the case as held by the trial court but is payment as damages under the substantive law of torts on the basis of more than *prima facie* case having been made out in favour of the plaintiff Union of India to receive such payment. The High Court reduced the interim payment from Rs. 350 crores to 250 crores[48]

Then the issue as discussed earlier came before the Supreme Court of India[49]. The Bhopal Settlement[50] is elaborated in four documents: 1. The Supreme Court's principal Order dated 14th February 1989; 2. A supplemental rider of the court issued on 15th February; 3. A consequential memorandum of the terms of settlement signed by the Carbide's and the Indian government lawyers and tendered to the court on 15th February and 4. An 'Order' of 4th May 1989, setting forth the

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[46] On 17-12-1987. Regular Civil Suit No. 1113 of 1986

[47] The court gave two months time from the date of its Order to deposit the amount of Rs. 250 crores into the trial court and the Commissioner functioning under the scheme is directed through the plaintiff Union of India to have the work of registration of claim in respect of death and personal injuries completed within a period of four months from the date of deposit of the above said amount by the Union Carbide.

[48] Justice Seth rejected the reasoning given by justice Deo of the District Court that the court had inherent power to order interim payment. According to the learned judge of the High Court the inherent power of the Court under section 151 of the C.P.C related only to procedures followed by a court and could not be used to affect the party's substantive rights. See Divan and Rosencranz" Bhopal Victims-Twisting slowly in the wind," *Environmental Policy and the Law,* without reference to the case's merits and hence could not be enforced as a decree.

[49] The Union of India filed a special leave petition before the Supreme Court because Justice Seth of the MP High Court reduced the District Court's interim award by Rs. 100 crores.

[50] The Bhopal settlement, February 14, 1989

Supreme Court's reasons for urging the settlement.[51]. The Supreme Court in its order observed:

> *In particular the enormity of human suffering occasioned by the Bhopal Gas disaster and the pressing urgency to provide immediate and substantial relief to victims of the disaster, we are of opinion that the case is pre-eminently fit for an overall settlement between the parties covering all litigations, claims, rights and liabilities related to and arising out of the disaster…*[52]

In *Charan Lal Sahu v.. Union of India*[53] a case dealing with the constitutional validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 relating to the power of the government to represent the victims, the Supreme Court observed:

> *"In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48A and 5l(g), it is the duty of the State to take effective steps to protect the guaranteed constitutional rights. These rights must be integrated and illumined by the evolving international dimensions and standards, having regard to*

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[51] 23 Armin Rosencranz and others, n? p. 384, also Union Carbide Corporation V. Union of India- Civil Appeal Nos. 3187 and 3188 of 1988 with special leave petition (Civil) No. 13080 of 1988 see-*Judgements Today Vol. 2 1989 SC p. 454-65*

[52]*Judgements Today, Vol. 2 1989 (SC) p. 458* (para 31); Justice Bhagwati (by then retired from the Supreme Court) while commenting on the order of the Supreme Court observed….."the order is, to say the least, breathtaking in its sweep . it quashes all criminal proceedings, present as well as future. It defied compensation how criminal proceedings pending against UCC officers can be quashed without even examining if there is a *prima facie* case. Can immunity from the prosecution be bought by paying compensation? What happened is totally contrary to all principles of criminal jurisprudence. Further, the Court Order places of the Indian life at a ridiculously low figure. In the US $ 2.5 billion was paid by a John Manville Corporation to 60,000 claimants for asbestos related injuries and
$ 520 million by A.H Robins Company to settle 9450 injury claims by users of Dalkon Shield Contraceptives. In comparison Bhopal victims have got 'peanuts'. See Bhagwati ``Travesty of Justice" India *Today (New Delhi,* 15th March 1989, p. 45*)*

[53] Writ petition No. 268 of 1989, dated 22-12-1989. See *Judgements Today* Vol. 4, 1989 p. 586

> *our sovereignty, as highlighted by Clauses 9 and 13 of U.N. Code of conduct on Transnational Corporations. The evolving standards of international obligations need to be respected, maintaining dignity and sovereignty of our people, the State must take effective steps to safeguard the constitutional rights of citizens by enacting laws."*[54]

The above Para underlines the commitment of the Apex Court to honour and respect the national law as well as the evolving standards of international obligation covering hazardous substances. But then, the application of the principles of strict liability under the tort law for abnormally dangerous activities proved totally inadequate.

Developments in The Post Bhopal Era: The Shriram Gas Leak Case[55]

On 4th December 1985, a major leakage of oleum gas took place from one of the units of *Shriram's* Caustic Chlorine and Sulphuric Acid plants of Delhi. The leakage affected a large number of persons both amongst the workmen and the public. The petitioner sought to close and relocate the acid plants, which were located in a thickly populated section of Delhi. The Inspector of Factories and the Assistant Commissioner (factories) in their separate Orders[56]asked for the shutting down of the plants[57]. *Shriram* challenged these prohibitory orders issued under the Factories Act of 1948 by a writ petition[58] and sought interim permission to reopen the caustic chlorine plant.

Shriram complied with the Orders of the Supreme Court and deposited money to finance the Court's exercise of seemingly executive

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54 Observation made by Justice K.N Singh (Para 7) N.? p. 586

55 The case came before the Supreme Court of India in the form of writ petition (No.12739 of 1985) filed by M.C Mehta, a Public Interest Litigation. The gas leaked out from the sulfuric acid plant one month after filing this petition.

56 Passed on December 7 and 24, 1985

57 To cease carrying on the occupation of manufacturing and processing hazardous and lethal chemicals and gases including chlorine, oleum, super chlorine, phosphate etc.

58 No. 26 of 1986

and legislative functions with a view to adducing evidence in the case[59]. Later, the Supreme Court decided to permit *Shriram* to restart its plant temporarily and suspended the operation of the two orders on certain conditions. The Court was clear in saying that any non-compliance of the conditions would result in the withdrawal of the permission so granted. Among the many conditions laid down by the Supreme Court, the following needs to be examined for our purpose:

a) The management of Shriram was asked to deposit in this Court a sum of Rs. 20 lakhs as security for payment of compensation claims made by or on behalf of the victims of oleum gas leakage;

b) The Supreme Court asked *Shriram* to ensure that workers use safety devices like helmets, gas masks or safety belts etc, and was also asked to provide regular medical check-up of the workers;

c) *Shriram* was directed to install loudspeakers to alert neighboring population in the event of a chlorine leak;

d) *Shriram* was further directed to instruct and train its workers in plant safety through special audio visual programs;

e) *Shriram* was asked to publicize the effects of chlorine and the approximate post exposure treatments through charts placed at the gate of the premises and within the plant;

f) The Chief Inspector of Factories was directed to inspect the caustic chlorine plant at least once a week;

g) Additionally, The Central Pollution Control Board was asked to depute an inspector to visit the *Shriram* plants at least once a week to ascertain *Shriram's* compliance with affluent discharge and emission standards prescribed in the consent orders under the Water and Air Act;

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[59] Two committees were set up by the Supreme Court- the Manmohan Singh Committee and the Nikey Chowdhary Committee. In addition, another Committee was set up by the government. All the three committees were unanimous in emphasizing the danger to the community living in the vicinity of the caustic chlorine plant in the event of an exposure to the chlorine gas through an accidental release which may take place on account of negligence or other unforeseen events.

h) The court also asked *Shriram* to designate one operator and make him personally responsible for each safety device in the caustic chlorine plant; and

i) The court constituted an expert committee to monitor *Shriram's* compliance with the recommendations of the input committees.[60]

In addition to the above guidelines, the Supreme Court suggested to the Government of India to evolve a national policy for location of chemical and hazardous industries in areas where population is scarce and hazard or risk to the community is very little. Further, it urged upon the Government of India to set up an Ecological Sciences Research Group consisting of independent, professionally competent experts in different branches of science and technology, who could act as an information bank for the court and the government departments, and generate new information according to the particular requirements of the Court or the concerned department. Significantly, the Court also suggested setting up environmental courts on a regional basis since cases involving issues of environmental pollution, ecological destruction and conflicts over natural resources were noticed to be on the rise. The Supreme Court opined that these environmental courts should consist of one professional judge and two experts drawn from the Ecological Sciences Research Group, keeping in view of the nature of the case and the expertise required for its adjudication.[61]

It is interesting to note that the Kerala High Court in equally affirmative terms in *Nellika Achuthan v. Deshabhimani Printing and Publishing House Ltd*[62]advocated for the establishment of special courts

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[60]*ibid*

[61] See the Court's order of 17th February 1986 air 1986 (sc) p. 176

[62] Although the case relates to the enforcement of the Wildlife Protection Act and the Forest Act, the observation is interesting: "an effective organization with the officers of proven integrity and well tested dedication and devotion is indispensable, if the greater objectives underlying the act are to be achieved, at least in limited measure. Perhaps the establishment of the special court in relation to offences relating to forest laws and wildlife laws could be thought of; and a special section manned by able officers with specialized skill and guided by an expert head like the director of public prosecutions may be a satisfactory arrangement…. The government should consider this aspect with all the seriousness and urgency which the matter demands. See Nellika Achutan. V. Deshabhimani Printing and Publishing House Ltd.AIR 1986 (Kerala) PP. 41-47

and special sections manned by able officers with specialized skill to tackle problems of this kind.

In the second phase,[63] *Shriram* Foods and Fertilizers sought some clarifications from the Supreme Court in respect of certain conditions set out by it, in its order of 17th February 1986[64]. The Court having heard this case slightly modified two of the conditions laid down by it[65] stating that "*no liability shall attach to the Chairman and or Managing Director if he can show that the escape of chlorine gas was due to an act of god or vis major or sabotage. But in all other cases the Chairman or Managing Director must hold himself liable to pay compensation."*

M.C Mehta v. Union of India[66]

The writ petition as part of the litigation process in *Shriram* came before the Supreme Court under Article 32 of the Constitution on a reference made by a bench of three judges. The reference was made because certain important questions of constitutional law were raised when the writ petition was originally heard.[67]

The Supreme Court, in this case, confronted the problem of attributing intention to corporate entities by conferring an absolute non-delegable duty on entities engaged in ultra-hazardous activities. It said:

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[63] AIR 1987 (SC) 1086

[64] Application for clarification, AIR 1987(SC) 1965

[65] Condition No. 2 and 6 in the original order

[66] AIR 1987 (SC) 1086

[67] When the original writ petition filed by M.C. Mehta (No. 12739 of 1985) was pending the leakage of oleum gas from one of the main units of the Shriram took place (December 4 and 6). Later, applications were filed by the Delhi Legal Aid and Advice Board and Delhi Bar Association for award of compensation to victims who had suffered as a result of the leakage of the oleum gas. These applications (compensation) did raise a number of constitutional issues. With the result the bench of three judges formulated these issues and asked M.C.Mehta and others supporting him as well as Shriram to file their written submissions. When these applications(for compensation) came up for hearing, the Supreme Court felt that since the issues raised involved substantial questions of law relating to the interpretation of Article 21 and 32 of the Indian Constitution, the case should be referred to a larger Bench of 5 judges and hence the case.

"an enterprise which is engaged in hazardous or inherently dangerous industry which poses a threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to insure that no harm results to anyone on account of hazardous or inherently dangerous nature of activity it has undertaken."

Furthermore, such an enterprise, 'must be held to be under an obligation to provide that the hazardous or inherently dangerous activity' must be conducted with the highest standards of safety and if any harm results, the enterprise must be absolutely liable to compensate for such harm and it should not defend its actions on the ground that it had taken all reasonable care and that the harm occurred was without any negligence on its part.

The Supreme Court set out the following principle of liability to govern enterprises engaged in ultra-hazardous or inherently dangerous activities:

> *We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in Rylands v. Fletcher.*[68]

The court justified this absolute liability principle on three grounds.

a) Legal authorization or permission to carry on a hazardous or inherently dangerous activity for engaged in such activity for profit entails the condition that the "the enterprise indemnifies all those who suffer on account of such activity regardless of whether it is carried out successfully or not";

[68] AIR 1987 (SC) P. 1099

b) Persons who are harmed as a result of such hazardous or inherently dangerous activity "would not be in a position to isolate the process of operation from the hazardous operations of substance or any other related element that caused harm". The enterprise must be "held strictly liable for causing such harm as a part of the social cost" for carrying on such activity;

c) The enterprise alone "has the resource to discover and guard against such hazardous or inherently dangerous activity"[69]

Furthermore, the Court found that the rule in *Rylands v. Fletcher*[70] was not designed to deal with a modern industrial society. This rule did not contemplate the consequences and was, thus, inappropriate in a society where hazardous or inherently dangerous industries had become an integral aspect of the process of development. Therefore, the Court could not afford any guidance in creating a standard of liability which was consistent with constitutional norms and needs of present-day socio-economic structure[71].

The Supreme Court has also formulated the appropriate standards for the measure of damages. The object of imposing damages by way of compensation is to have a "deterrent effect" on the responsible party. With this in view, the measure of damages must be "co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect". While elucidating the point, the Supreme Court reiterated*, "The large and more prosperous the enterprise, the greater must be the amount of compensation payable by it, for the harm*

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[69] Upendra Baxi, "Environmental Protection Act, an Agenda for Implementation", (Bombay) N.M Tripathi, 1987 p.48

[70] A decision of the English court 1868. See W. Prosser, Law of Torts (4th ed 1971) pp 50-56

[71] AIR 1987(SC) P. 1098. For comments see M.C Mehta, "Environmental cases-what the judiciary can do", the Hindu Survey of the Environment, 1992, Madras, pp 161-63. Ratna Kapoor, "From Human Tragedy to Human Right", the Accountability of Multinational Corporations for Human Rights Violations" Boston College Third World Law Journal Vol. 10 No. 1 1990 p.33

caused on account of accident in the carrying of the hazardous or inherently dangerous activity by the enterprise"[72]

The above discussion especially the *Shriram Gas Leak* case proves beyond doubt the leading role played by the Supreme Court of India in providing relief to gas victims. While doing so, the Supreme Court assumed legislative and executive functions to adduce evidence. Further, the judgement makes clear that the Court's writ jurisdiction under Article 32 and a demand for compensation can be made only in cases of "gross violation" of fundamental rights where the magnitude was such as to shock the conscience of the Court.[73] *Shriram* is the first case wherein a petition under Article 32 was made to seek compensation from a private company.

The above discussion highlights that the judgement in *Shriram Gas Leak* case had a far-reaching impact on the future development of the principle of liability relating to ultra-hazardous activities in India. The Supreme Court in a series of latter decisions consistently endorsed the following basic principles in the area of environmental law relating to ultra-hazardous activities.

1. The polluter pays principle which requires that a polluter bear the remedial or clean-up costs as well as the amounts payable to compensate the victims of pollution[74];
2. The precautionary principle which requires government authority to anticipate, prevent and attack the causes of environmental pollution;[75]
3. Government development agencies charged with the decisions making ought to give due regard to ecological factors including a) Environmental policy of the central government and the state government b) sustainable development and utilization of natural

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[72] Accordingly, entities including industries run for profit, state enterprises, scientific research institutions under or outside the auspices of the state are liable to absolute liability.

[73] M.C Mehta, n.? p. 162

[74] *Indian Council for Enviro Action V. Union of India,* AIR 1996 SC 1446 and *Vellore Citizens*

[75] *Vellore Citizens Welfare Forum V. Union of India* AIR 1996 sc 2715,2721

resources c) the obligation of the present generation to preserve natural resources and pass on to future generations an environment as intact as the one we inherited from the previous generation.[76]

4. Every person enjoys the right to a wholesome environment, which is a facet of the right to life guaranteed under Article 21 of the Constitution of India.[77]

Developments in Environmental Law in India

In 1976 the Indian Constitution was amended to include protection of the environment as a duty of the state.[78] Article 48A stated "The state shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the Country." Article 51A (g) also imposed a fundamental duty upon every citizen of India to protect the environment.[79] The recognition of the right to a healthy environment has served as a landmark in the field of environmental justice in India. However, even before the recognition of this right and the Bhopal Gas tragedy there existed a number of legislation in environmental law. In pre-colonial times the right to petition the ruler was accepted and could be applied to environmental degradation.[80] Environmental law in its current form in India mainly has its doctrinal roots in the law of nuisance, since nuisance actions could challenge every major industrial and municipal activity which today is a subject of comprehensive

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[76]*State of Himachal Pradesh V. Ganesh Wood Product;* AIR 1996 sc 14959

[77] Subhash Kumar V. State of Bihar AIR 1991 SC 420, 424; M.C Mehta v.Union of India (Delhi Stone Crushing CASE), 1992 sc 256-57 and Virendra Gaur V. State of Haryana 1995 SCC 577-81.

[78] The Indian Constitution (42nd Amendment) Act, 1976 inserted Article 48 A and 51A

[79] Article 51A(g) stated It shall be the duty of every citizen of India to protect and improve the
natural environment including forests, lakes, rivers and wildlife, and to
have compassion for living creatures.'

[80] Michael R. Anderson , "Individual Rights to Environmental Protection in India", in *Human Rights Approaches to Environmental Protection* 199 (eds. Alan Boyle and Michael Anderson, 1996) in Peggy article.

environmental legislation.[81] Nuisance can be divided into public and private nuisance. Environmental issues generally fall under public nuisance which is a crime under the Indian law under Chapter XIV of the Indian Penal Code 1860.[82] Claims of trespass and negligence related to environment are also included in Indian Penal Code.[83] Use of tort law in environmental cases is rare in India.[84] By using civil procedure, there have been successful environmental actions.[85] However since civil actions aim to provide relief rather than injunctive damages, relief under the constitution has always been a constant demand.[86]

Despite the existence of several statues about environmental protection, environmental concern in most cases was incidental to the law's principal object.[87]For instance, Indian Fisheries Act, 1897 prohibited the destruction of life by use of explosives or by poisoning water. During the 1970s this was the case.[88] Evolution of environmental policies during 1970s resulted in Parliament enacting several laws in the

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[81] William H. Rodgers, Jr., *Handbook on Environmental Law* (1977), p. 100.

[82]Act No.XXI of 1860. Chapter 14 of Indian Penal Code contained 26 provisions related to matters dealing with public nuisance amounting to environmental pollution. Moreover Under section 268 of the Indian Penal Code, a person would be 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. Section 290 prescribed the punishment in case of continuing offence rather than injunction. See Indranil Bhattacharya "Textbook of Environmental Law", 2009, Kamal Law House 1st ed p.150

[83] Section 441 and 304A of the Indian Penal Code

[84] Peggy Rodgers,p.103

[85] ibid

[86] ibid

[87] Next footnote, p.58

[88] Armin Rosencranz and Shyam Divan, Environmental Law and Policy in India, cases, materials and statutes, oxford university press 2011., p. 58

field of wildlife protection[89] and water pollution.[90] After the Stockholm Conference, India began to enact legislation to bring its environmental legislation and policy in line with the developed countries. The 1980s witnessed continuous institutional changes as India reeling under the effect of what Justice Krishna Iyer termed "Bhoposhima"[91] set out to achieve the objectives set out in the Stockholm Conference Declaration of Principles Concerning the Human Environment.

Perhaps the most significant enactment in the post Bhopal era was the Environment Protection Act under Article 253 of the Constitution. Following the Bhopal disaster the Department of Environment, coming under considerable political pressure, enacted a statute to decide on the comprehensive legislation for control of toxic and hazardous substances which led to its enactment. It is an umbrella legislation aimed to provide a framework for Central Government coordination of activities of several central and state authorities established under previous laws such as the Water Act and the Air Act.[92] It also elucidated essential legislative policy

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[89] The Wildlife (Protection) Act of 1972 was enacted pursuant to enabling resolutions of 11 states under Article 252(1) of the Constitution. It provided for state wildlife advisory boards, regulations for hunting wild animals and birds, establishment of sanctuaries and national parks, regulation for trade in wild animals, animal products and trophies along with judicially imposed penalties for violation of the Act. The Act is administered by Wildlife wardens and their staff. In 1982 it was amended to introduce provisions permitting capture and transportation of wild animals for the scientific management of animal population. The needs of tribal and forest dwellers were also recognized under the amendment. See p. 61-62

[90] Two major legislations were enacted during this period. The Water Prevention and Control of Pollution Act of 1974 and the Air Prevention and Control of Pollution Act, 1981. The former provided for establishment of State Boards and vesting regulatory authority in them. A Central Board would perform the same actions for Union territories and co-ordinate the activities of States. The Boards were to establish effluent standards for factories. They were also to control sewage and industrial effluent discharges by approving, rejecting or conditioning applications for consent to discharge. They also advised the government on appropriate sites for new factories. The Air Act expanded the authority of the Central and State Board under Water Act to include air pollution control. The Air Act mandated the practice of obtaining 'consent' by industries from such Boards. States were also to prescribe emission standards after consultation with Central Board under the Act. States without water pollution control boards were to establish air pollution control boards. See Rosencranz, p. 60-61

[91] Growth of Environmental Jurisprudence in India, p. 73 M.C Mehta

[92] Rosencranz and Divan, p. 66

on environmental protection and delegates wide powers to the executive in order to enable officials to frame required rules and regulations.[93] Under the Act, the federal government can take all measures necessary for protecting and improving the environment and can create authorities, appoint officers, issue binding directions and delegate its power to the state governments, authorities or officers. Higher penalties and emphasis on monetary sanction more than imprisonment are provided under the Act. The power to issue directions is not limited to administrative directions can go against any "person" including a juristic person and can be utilised for disciplining the erring industry. The provision for preventing or mitigating pollution by seizing any plant or machinery is a sharp and potent weapon in the hands of enforcement personnel. The Environment Act requires "environmental clearance" before undertaking a project. An environmental impact assessment is required to be undertaken before all projects under this Act and industries applying for the same are required to undertake an annual environmental audit.

Citizens suits are allowed under India's Water, Air and Environment Act. In the aftermath of the Bhopal gas leak case, these were added.[94] All three contain statutes that allow any person to initiate criminal prosecution for non-complying the statutory standards.[95]

The Public Liability Insurance Act, 1991 was another important legislation introduced in the aftermath of Bhopal. This legislation was passed with a view to providing immediate relief to the persons affected by accidents occurring while handling any hazardous substance. Under its provisions all hazardous chemical industries are required to compulsorily insure themselves and provide relief to all affected parties immediately. An indication of the fact that the growth of hazardous industries, processes and operations in India had been accompanied by the growing risks from accidents which may lead to death and injury to humans, living beings and damage to private land /public properties had been indicated in the legislative history of the act. Hence it was felt by

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[93] Rosencranz and Divan, p. 66

[94] Anderson 42

[95] Peggy Rodgers, p. 10; s. 19 of E.P, 43 of Air Act, 49 of Water Act footnote 41

the government to provide for mandatory public liability insurance for installations handling hazardous substances for providing minimum relief to the victims.

The Act seeks to mandate compulsory insurance for the purpose of providing immediate relief to the victims of an accident caused while handling any hazardous substance. The Act was passed in the backdrop of the *Oleum Gas Leak* case and *Bhopal Disaster*. It was passed to consolidate the law in relation to an enterprise's liability while handling any hazardous substance.[96] The Act's primary goal is to protect members of economically weaker sections of the society who cannot afford prolonged litigation in a court of law.[97] The Act has been built around providing immediate compensation in terms of an industrial accident and does not address the issue of preventing the accident in the first place. The Object of the Act clarifies that it is applicable only to accidents or incidents which result from handling of hazardous substances. The term 'accident' has been defined in the act as an accident which involves a fortuitous, sudden or unintentional occurrence while handling any hazardous substance resulting in continuous, intermittent or repeated exposure to death, of or injury to, any person or damage to any property.[98] As per the wordings, this definition fails to provide any remedy to the affected where even quite often, a miniscule level of exposure results in after effects, but the Act fails to provide any remedy for those situations. Moreover, the term 'accident' does not include accidents taking place due to radio-activity.[99] Since, Nuclear power in

[96]Preamble of the Act

[97] Md. A.M. Nomani, *Law Relating to Environmental Liability and Dispute Redressal: Emergence and Dimension*, XXIII (1 and 2), *IBR* 153 (1996).

[98] The Public Liability Insurance Act, 1991, § 2(a).

[99] Id.

India is controlled and regulated by Governmental Bodies[100], it can be inferred that the Act has consciously decided to exempt Government's liability in the event of any accidents involving radioactive elements.

Under the Environmental Protection Act, the Hazardous Wastes (Management and Handling) Rules were issued in 1989. It introduced a permit system to regulate handling and disposal of wastes. The fixed responsibility for proper handling, storage and disposal of such wastes on the person generating the same.[101] The Manufacture, Storage and Import of Hazardous Chemicals Rules of November 1989 was issued to lay down responsibilities of those handling hazardous substances other than hazardous wastes. In August 1996, the Chemical accidents (Emergency, Planning, Preparedness and Response) Rules were framed which required the Centre to constitute a Central Crisis Group[102] for management of chemical accidents and to set up a quick response mechanism termed as the Crisis Alert system. The body dealt with major chemical accidents and provided expert guidance to contain damages caused by such accidents.[103]

In 2010, the Civil Liability for Nuclear Damage Act[104] was passed by both houses of the Parliament which aims at providing civil liability for nuclear damages and prompt compensation to the victims of nuclear

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[100] World Nuclear Association, *Nuclear Power in India*, January 2017, available at, http://www.world-nuclear.org/information-library/country-profiles/countries-g-n/india.aspx#ECSArticleLink1 (Last visited on January 5, 2017) (The Atomic Energy Establishment was set up at Trombay, near Mumbai, in 1957 and renamed as Bhabha Atomic Research Centre (BARC) ten years later. The Indian Atomic Energy Commission is the main policy body. The Nuclear Power Corporation of India Ltd (NPCIL) is responsible for design, construction, commissioning and operation of thermal nuclear power plants. At the start of 2010 it said it had enough cash on hand for 10,000 MWe of new plant. The 1962 Atomic Energy Act prohibits private control of nuclear power generation, and 2016 amendments allowing public sector joint ventures do not extend to private sector companies, nor allow direct foreign investment in nuclear power, apart from the supply chain.).

[101] Rosencranz and Divan, p.69

[102] Rule 3

[103] Rosencranz and Divan, p. 69

[104] Act 38 of 2010

accidents. No-fault liability of the operator of the premises[105] was recognized under this act. It provided for the appointment of a Claims Commissioner and for the establishment of Nuclear Damages Claims Commission and for matters connected or incidental thereto. The act fixes the liability to a certain monetary limit. In the case of operators, the limit is Rupees 1500 crores and for the Government the cap is fixed to 300 million dollars of Special Drawing Rights of the IMF which as per the current rates comes out to be roughly 3000 crores (approx)[106].

In the same year, the National Green Tribunal Act[107] was passed for the establishment of National Green Tribunals, for the speedy effect and disposal of cases of environmental protection and to provide compensation and damages for loss to persons and properties and for matters connected or incidental thereto.

Additionally, the E-Waste (Management Rules) 2016 were also notified to provide for identification, storage, disposal of electronic waste. A principle known as the Extended Producer Responsibility (EPR) was also developed under these rules to hold accountable the producers to ensure safe disposal of such wastes. In the recent past, the Central Government replaced the pre-existing rules on Hazardous Wastes and notified the Hazardous and Other Wastes (Management and Transboundary Movement) Rules 2016, amended in 2019, to specifically align Indian rules on such wastes in line with the Basel Convention on Control of Transboundary Movements of Hazardous Wastes and its disposal

The Role of the Judiciary

The Role of the Judiciary in development of environmental jurisprudence has been probably the most significant. Initially, the

[105] Section 4

[106] Section 6

[107] Act 19 of 2010

judicial system in India was very rigid regarding the locus of the petitioner. However, a phenomenal means, by which Indian courts have acquired great significance is through the phenomenon of 'Public Interest Litigation'. PIL is a unique feature of the Indian judiciary[108], that has allowed it to stay alive to the changing needs of the day. It was born as a direct aftermath of the Emergency[109], often regarded to be an effort to undo the legacy of political capitulation of the political leaders of that period. PIL is a form of pro-bono lawyering wherein any "public-spirited individual" could agitate public causes before the appellate judiciary even if some sort of direct injury has not been suffered by them. PIL jurisdiction was linked with some sort if indigeneity, which later writers of PIL have pointed out[110]. The same was also pointed out by Bhagwati. J in his judgement in the *Oleum Gas leak case*. The Indian Judiciary laid down that even though all Indian citizens have equal rights under the Constitution, not all of them are in a position to exercise those rights owing to economic and social constraints. Consequently, the rich and the mighty can impose an unequal burden on the underprivileged[111]. This can only increase inequalities and lead to socio-economic injustice. This led to the birth of the PIL jurisdiction of the court.

Principles of "sustainable development", "polluter pays" and the "precautionary principle" have all made their way into the Indian environmental jurisprudence through judicial decisions. Some of these principles and their developments have been analyzed herein.

Public Trust Doctrine:

As per the Public Trust Doctrine, The State is the trustee of the people and holds all the property belonging to the people in trust for

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[108] Anuj Bhuwania, *"Courting the People: Public Interest Litigation in Post-Emergency India"*, Cambridge University Press (2017), p-16

[109] Anuj Bhuwania, *"Courting the People: Public Interest Litigation in Post-Emergency India"*, Cambridge University Press (2017), p- 16

[110] Anuj Bhuwania, *"Courting the People: Public Interest Litigation in Post-Emergency India"*, Cambridge University Press (2017), p-31

[111] M.C. Mehta, *"Growth of Environmental Jurisprudence in India",* Acta Juridica, (1999), p- 73

them. So, the State must hold natural resources in trust for the public at large and make equitable use of it so as to serve the larger good, and not to their detriment. This is the core idea of the doctrine of public trust. As a necessary corollary to this, these resources cannot be converted into private usage. This theory had its origin in Roman and English law.

The most significant case in this regard is *Kamal Nath*'s case[112]. (*M.C.Mehta v. Kamal Nath*, 1997). In this case it was held that the Indian legal system does include the public trust doctrine as a part of its jurisprudence. Span Motel was built in 1990 in 27.12 bighas of land, inclusive of forestlands. The land was later leased and regularised, in spite of the fact being that it was an ecologically fragile land. As a result of this, there was swelling and a change of course for the river water. The club sought to change the course of the river for the second time with the use of bulldozers. This led to widespread damages to the land nearby. Justice Kuldeep Singh held historically human beings have altered the environment for its own benefits, but the environment too has limitations on malleability. It was held that the public at large is the beneficiary of the seashore, running waters, airs, forests, ecologically fragile lands etc. And State as a trustee is thereby duty bound to protect these natural resources. The lease granted by the government to the Span Club was basically a breach of trust. The polluter, the Motel was asked to pay the recovery costs and the pollution caused by it on the banks of river Beas were ordered to be removed and reversed. The Club was held responsible on the grounds of 'precautionary principle' and 'polluter pays'.

In *Hinch Lal Tiwari*'s case[113] (*Hinch Lal Tiwari v. Kamla Devi*, 2001), Supreme Court held that material resources of the community like forests, tanks, ponds, hillocks, mountains etc, are nature's bounty and hence they need to be protected for proper and healthy environment.

In *Intellectual forum*'s case[114] (*Intellectuals Forum, Tirupati v. State of A.P*, 2006), the Supreme Court examined the contours of the doctrine in detail. It was held that though the doctrine has been

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[112]M.C. Mehta v. Kamal Nath (1997) I SCC 388

[113]Hinch Lal Tiwari v. Kamla Devi, (2001) 6SCC 496

[114]Intellectuals Forum, Tirupati v. State of A.P. AIR 2006 SC 1350

formulated from a negative angle, it does not exactly prohibit the alienation of the property held in trust. But it provides for a high degree of judicial scrutiny upon any action of the Government that attempts to restrict such free use, irrespective of their consonance with existing laws. To scrutinise such Governmental actions, the Courts must distinguish between the governmental obligation to act for the public benefit, and the special, more demanding obligation which it may have as a trustee of certain public resources. In a later case (*Orissa Mining Corpn. Ltd v. Ministry of Environment and Forest*, 2013) it was held that even the Scheduled Tribes and other Forest Dwellers (Recognition of Forest Rights) Act, 2006 does not vest on the indigenous people the rights which the State as a trustee has over things held in trust.

In the 2G Spectrum case[115] (*Centre for Public Interest Litigation v. Union of India*, 2012), it was held that air waves/ spectrum are natural resources and the State being the trustee has power to distribute them. But the same must be in accordance with the mandate of the Constitution.

In *State of Tamil Nadu v. State of Kerala*[116] it was held that the State cannot, with recourse to public trust doctrine or precautionary principle, do something which is not in consonance with the final judgement of the Supreme Court.

In *Fomento Resorts* case[117] (*Fomento Resorts & Hotels v. Minguel Martins*), it was held that the government, being the trustee cannot convert beaches into private ownership. The same has to be made available for the benefit of the public at large, keeping in mind the interests of future generations.

The Supreme Court, with the help of the doctrine of public trust has again and again clarified the duty of the state as regards to the natural material resources of a country. They belong to the people and the State is only a trustee of those resources. The State cannot arbitrarily put them to use or convert them for private use for private benefits. The doctrine does not preclude alienation of the property held under trust. But there

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[115]Centre for Public Interest Litigation v. Union of India, AIR 2012 SC 3725

[116]State of Tamil Nadu v. State of Kerala, AIR 2014 SC 2407

[117]Fomento Resorts & Hotels v. Minguel Martins, (2009) 3 SCC 571.

must be an extra degree of scrutinising before the same can be done. This has been one of the areas whose contours and contents have been defined by the Apex Court.

Sustainable Development, Polluter Pays and Precautionary Principle:

Development must be such that can be sustained and not which is exhaustive. Development is essential for any modern State in the family of nations. The same cannot be done away with. What comes as a necessary corollary to development, as is commonly perceived, is a certain degree of threat to the environment Environmental concerns, today, is one of the most pressing issues for human beings. A question often related to the sustenance and preservation of species. The conception of sustainable development comes in to balance both these aspects and acts as a fulcrum in balancing the two. The concept of 'sustainable development' was seriously developed in the Brundtland Commission Report of 1987, though strong undercurrents were present in the Stockholm Conference of 1972 itself. The definition of sustainable development adopted in the "Our Common Future" report has been quoted with approval in a number of cases by the Supreme Court of India and the principle has been held to be an integral part of Indian jurisprudence.

In *Indian Council for Enviro-Legal Action*'s case[118], the Supreme Court upheld the formulations in the *Oleum Gas Leak* case., In this case it was held that while economic development should not be allowed at the cost of ecology, at the same time, the need to protect and preserve environment must not also be a hindrance to economic or other developments. So development should take place with due regards for the environment. In this case, an industrial complex had been developed in the village of Bicchri, Udaipur, Rajasthan. Some of the industries therein were producing chemicals like sludge phosphate and oleum. There was no valid license with the respondents and nor had they taken any steps for the treatment of those chemicals. As a result of this, water in the wells

[118]Indian Council for Enviro-Legal Action v. Union of India, 5 SCC 281 (SC 1996).

nearby became unfit for human consumption and diseases spread to the neighbouring areas affecting the local people. There was revolt from the villagers against the manufacture of the H- acid, which ultimately had to be stopped. The study conducted by the NEERI (National Environmental Engineering Research Institute) revealed that among almost 2500 tonnes of sludge phosphate, more than 700 tonnes were still there. To avoid scrutiny, the same had been spread by the respondents all over the area. This was a social action litigation by the villagers who contended infringement of their right to life and personal liberty. The Court held the respondents liable and the government was asked to fulfil its statutory obligations. The principle of liability was held to be "polluter pays".

The polluter pays principle became the part of Indian jurisprudence through decisions of the Supreme Court in between 1996 to 1997. In this case it was held that the best person to internalise the cost of the pollution they had caused was the multinational corporations who had caused pollution and were "absolutely liable" for the damages caused to the environment.

In *Vellore Citizen*'s case[119] (*Vellore Citizen's Welfare Forum v. Union of India*, 1996), Kuldeep Singh. J, delivering the judgement on behalf of the court held, that while industries are essential for a country's progress, generating foreign exchange and employment, they cause pollution too. So the court held that the concept of 'sustainable development' must be adopted as a balancing concept between the two. The court also held that the concepts of 'precautionary principle' and 'polluter pays' are essential features of sustainable development and have to be adopted.

In N.D. Jayal's case[120] (*N.D. Jayal v. Union of India*, 2004), the Court delved on the concept in great details. In the judgment delivered by S.Rajendra Babu. J the understanding of the concept of sustainable development as was held in *Vellore Citizen*'s case (*Vellore Citizen's Welfare Forum v. Union of India,* 1996) was approved and the *Samatha* judgment (*Samatha v. State of Andhra Pradesh*) wherein right to

[119]Vellore Citizen's Welfare Forum v. Union of India. (1996). 5 SCC 650.

[120]N.D.Jayal v. Union of India, 9 SCC 362 (SC 2004)

development was held to be an integral facet of right to life under Article 21, was quoted with approval. It then went on to hold that the right to development cannot be treated as a mere right to economic betterment or cannot be limited to as a misnomer to simple construction activities. The right to development encompasses much more than economic well-being. It includes within its definition the guarantee of fundamental human rights. The 'development' is not related only to the growth of Gross National Product. The court, seeking recourse to Amartya Sen's work 'Development as Freedom' and the United Nation's Declaration on the Right to Development, held that the idea of development could not be separated from the human rights framework. It was held that the right to development includes the whole spectrum of civil, political, cultural, economic and the social processes for the improvement of people's well-being and for the full realization of their potentials. The court held the principle of sustainable development to be the *sine qua non* for the symbiotic balance between the right to development and the environment. Both of them are fundamental rights and the concept of sustainable development cannot be singled out. Therefore, the concept of sustainable development is to be treated as an integral part of 'life' as envisaged under Article 21 and that the concepts of public trust, intergenerational equity and precautionary principles can only be nurtured by adopting the principle of sustainable development.

In *Guruprasad Rao*'s case[121] (*K. Guruprasad Rao v. State of Karnataka*, 2013) it was held that development and environment are not enemies and if there are adequate safeguards that have been adopted, and the principle of sustainable development has been applied, then developmental activities must be allowed to go on. But in cases of doubt, protection of the environment should have precedence over economic interests.

In *G.Sundarrajan*'s case[122] (*G. Sundarrajan v. Union of India*) it was held that sustainable development and corporate social responsibility are inseparable twins, which have been integrated into the concepts of

[121]K. Guruprasad Rao v. State of Karnataka, 8 SCC 418 (2013).

[122]G. Sundarrajan v. Union of India, 6 SCC 620 (2013).

inter and intra generational equity, not merely human-centric, but eco-centric.

In *Godavarman*[123] (T.*N. Godavarman Thirumulpad v. Union of India*, 2008), the Court, while dismissing the petition filed by M/s Vedanta Alumina Ltd seeking clearance for the 'Alumina Refinery Project' to be undertaken on the Niyamgiri Hills in Lanjigarh, which was the home to the Dongria Kondha tribe, balanced development and protection of wildlife ecology and environment with the principle of Sustainable Development.

The Court has accepted the definition of sustainable development as provided in the Brundtland Commission report "Our Common Future" and has upheld the view that many environmentalists think i.e., the term constitutes an anthropocentric bias. (*Centre for Environmental Law, World Wide Fund-India v. Union of India*, 1996)

Precautionary Principle:

Precautionary principle is basically a rule of evidence relating to the burden of proof in environmental cases. It shifts the burden of proof on the polluter to prove that his activity/ industry/ operation is environmentally benign. This principle has been incorporated into the Indian jurisprudence and is considered as an essential facet of sustainable development.

In the Vellore *Citizen*'s case (*Vellore Citizen's Welfare Forum v. Union of India,* 1996), the Supreme Court held that the concept of 'sustainable development' with its concepts of 'precautionary principle' and 'polluter pays' has to be adopted as a balancing concept between development and environment. It also amplified the meaning of the principle. It means three things primarily in municipal context:

Environmental measures by the State Government and the statutory authorities must anticipate, prevent and attack the causes of environmental degradation.

[123]T.N. GodavarmanThirumulpad v. Union of India, 2 SCC 222 (SC 2008).

Where there are threats of serious and irreversible damage, lack of scientific certainty may not be used as a reason for postponing measures to prevent environmental degradation.

The 'Onus of proof" is on the actor or the developer/industrialist to show that his action is environmentally benign".

The principle was evolved as the new principle for 'burden of proof' in environmental matters. In that case, after making references to various international conferences and to the concept of sustainable development held that the concept of precautionary principle was a part of the environmental law of the country.

In A.*P. Pollution Control*'s case [124](*A.P. Pollution Control Board v. M.V.Naidu*, 1999), the Court quoted with approval the observations in the Vellore Citizen's case and held that there was no problem in holding the principle, that placed the burden of proof on the industrialist willing to alter the status quo, to be a part of domestic laws. It directed the authority to be appointed under Section 3(3) of the Environment Protection Act, 1986 to implement the precautionary principle. It was further held that the precautionary principle had replaced the principle of "assimilative capacity" and went in detailed analysis of the two principles for better amplification of their understanding so that it became intelligible and applicable for other courts. The principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. The principle is based on the edifice of scientific uncertainty. The primary consideration for environmental protection should not only be health, property and economic interest protection but also the protection of the environment for its own sake. Precautionary duties must not only be triggered by the suspicion of concrete danger but also by (Justified) concern or potentiality of risk.

In *Narmada Bachao Andolan*[125] (*Narmada Bachao Andolan v. Union of India*), the Supreme Court held that "precautionary principle" and the burden of proof rule will apply to cases where the extent of

[124]A.P. Pollution Control Board v. M.V.Naidu, AIR 1999 SC 812 (SC 1999)

[125]Narmada BachaoAndolan v. Union of India, AIR 2000 SC 3751

damage likely to be inflicted are not known. But where it is known due to sufficient availability of data or material, then imitative steps must be undertaken. Merely the reason that there will be change is no ground for the presumption that there will be ecological disaster.

In *Amarnath Shrine*'s case[126] (*Amarnath Shrine, Re*., 2013), the Court explained that the doctrine of sustainable development and precautionary principle have been applied where development was necessary, but not at the cost of the environment. It was held that the balance between the diverse activities of a State is the foundation for socio-economic safety and enjoyment of right to life.

It may be said that the Supreme Court has incorporated the principles of sustainable development, polluter pays, precautionary principle, intergenerational equity within the ambit of its jurisprudence It has played active role in the clarification, appreciation, modification and incorporation of these principles. All these principles have been fundamental to environmental governance of this country.

"Polluter Pays" and Tort Laws:

In *Indian Council for Enviro- Legal Action*'s case *(Indian Council for Enviro-Legal Action v. Union of India, 1996*), the NEERI report suggested the implementation of the principle of polluter pays. The court went on to explain the meaning of "polluter pays". If the activity carried on is inherently dangerous, the person who carries on the activity becomes burdened with the liability to make good, irrespective of reasonable care which he may have taken. The polluting industry becomes absolutely liable to compensate for environmental harm. It also becomes liable to pay the cost of restoration i.e., the cost of reversing the damaged ecology. The principle was accepted by the Court.

The principle of polluter pays has now firmly become the part of Indian Jurisprudence. The Supreme Court, in most of its subsequent decisions, has upheld this principle. This principle is based on the rationale that the cost of environmental harm caused by the industries

[126]Amarnath Shrine,re, 3 SCC 247 (SC 2013)

must be borne by them, and that the same should not fall on the taxpayers.

In *Vellore Citizen's Welfare Forum*'s case (*Vellore Citizen's Welfare Forum v. Union of India*, 1996), the court held that while industries are essential for a country's progress, the principle of sustainable development needs to be adopted. And that the "precautionary principle" and "polluter pays" are its essential features.

In *M.C. Mehta (M.C. Mehta v. Union of India*, 1996)[127]It was held that the Polluter Pays principle, as interpreted by this Court, meant absolute liability for harm to the environment extended not only to compensate the victims, but also the cost of restoration of environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development". The precautionary principle and the polluter pays principle had been accepted as part of the law of the land. It is thus settled by the Court that one who pollutes the environment must pay to reverse the damages caused by his act.

In *S. Jagannath*[128] *(S. Jagannath v. Union of India*), a writ petition was filed by an organisation for enforcement of Coastal Zone Regulation by the Government of India. It sought to stop the big business houses from prawn farming undertaken in ecologically fragile coastal land, using wasteland and wetland for prawn farming. It also sought the constitution of the National Coastal Management Authority to safeguard the marine life and coastal areas. Court held that these activities had adverse environmental impacts and hence they cannot be allowed to be carried on. Sea coast and beaches were held to be gifts of nature to mankind and the aesthetic and recreational qualities of the same had to be maintained. It was held that traditional shrimp farming was environmentally benign and pollution free, but not the modern technological way of producing which involves usage of certain chemicals to improve produce. It issued directions to regulate and control of shrimp industries in coastal areas. The Central Government was directed to set up a high-power authority to implement the 'precautionary

[127]M.C.Mehta v. Union of India, 2 SCC 411 (SC 1996).

[128]S. Jagannath v. Union of India, AIR 1997 SC 811

principle' and the 'polluter pays'. Court again held that the 'polluter pays' principle is part of the environmental law of this country.

In *Sterlite Industries* case[129] (*Sterilite Industries (India) Ltd. v. Union of India*, 2013), the Court imposed a fine of 100 crores on the concerned industry for acting without proper consent and causing air, water and soil pollution that the amount of compensation must have a deterrent effect.

In *Research Foundation*'s case[130] (*Research Foundation for Science v. Union of India*, 2012) The Court applied the polluter pays principle again. Petition had been filed by Research Foundation for Science Technology, through its Director, for issuance of a direction to the Union of India banning all imports of all hazardous/toxic wastes, and also to direct amendment of Rules in conformity with BASEL Convention and Article 21, 47 and 48A of Constitution. Declaration that without adequate protection to workers and public and without any provision of sound environment management of disposal of hazardous/ toxic wastes, the rules were violative of Fundamental Rights and, therefore, unconstitutional. On detection of various containers having toxic wastes, the Court ordered their disposal by incineration, and the same was to be recovered by the owners of the containers. Court held that the twin principles of "polluter pays" and "precautionary principle" had to be read with the principle of "sustainable development"

Continuing Mandamus:

Once a judgement is passed in a given case, it remains for the authorities to enforce this. To move away from this, the Supreme Court of India has evolved the concept of continuing mandamus. It has played a significant role in transforming environmental protection in India[131]. The Supreme Court of India made a tremendous contribution towards protection of forest cover by issuing a continuing mandamus in the case

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[129]Sterilite Industries (India) Ltd. v. Union of India, 4 SCC 575 (2013)

[130]Research Foundation for Science v. Union of India, 7 SCC 769 (SC 2012)

[131] M.K. Ramesh, "Environmental Justice: Courts and Beyond", Indian Journal of Environmental Law, Vol. 3, No.1, p. 21

of *T.N. Godavarman Thirumulpad*[132], to deal with prominent issues including conversion of forest land for non-forest purposes, illegal felling, potentially threatening mining operations, afforestation and compensation by private user agencies for using forest land.

Recent Trend of Tort Laws in India:

Liability rule has thus seen a change and metamorphosed in India. Beginning from the Indian version of liability rule evolved in the case of Oleum gas leak, rule of liability for torts has undergone changes, being impacted significantly by developments in other countries. One of the recent trends in India relating to liability in cases of medical negligence is worth noticing. The rule of "res ispa loquitur" and the test laid down in Bolam v Friern Hospital[133] has been altering the notions of tortious liability for professionals and in particular, the medical practitioners. The Bolam rule came to replace the "man on a Clapham omnibus" regarding the determination of tortious liability in general. It has been recognized in a number of cases in India, and most significantly probably, in Jacob Matthew's case[134].This has become significant in a number of cases relating to medical negligence.

[132] (1997) 2 SCC 267

[133][1957] 1 W.L.R. 582, 586

[134]Jacob Matthew v. State of Punjab AIR 2005 S.C. 3180