

# Precautionary Principal in Environmental Law

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**Abstract:** Man is a social animal and its whole existence is based on interdependence whether it is of man to man or with nature. The best creature of the earth is slightly different from the other creature which believes in natural cycle and dependency. He is the only one, who thinks that he protects the nature, when the reality is that, he himself is because of nature. It is the general tendency of human being that he only takes care or protects what he earns and not what he get freely. He has nothing to develop, only to protect. But being greedy of material things he starts destroying his roots. And badly wounded the five most precious elements of his existence and Perseverance i.e. Earth, Water, Air, Fire and Sky. And when slowly and steadily it becoming difficult for him to survive, he then started preserving all these by entering into social contract theory which begins the era of manmade laws, their formulation, interpretation and their execution.

**Keywords:** Environmental Law

## I. INTRODUCTION

Sooner or later, we will have to recognize that the Earth has rights, too, to live without pollution. What mankind must know is that human beings cannot live without Mother Earth, but the planet can live without humans. Evo Morales

The main object behind these manmade laws is simply the sensibility of pain and pleasure. Thereafter various other theories have been propounded, such as the Natural law, society, customs, command, sovereignty, rights and duties.

## II. CONSTITUTION AND ENVIRONMENTAL PROTECTION.

In a welfare state where there is written supreme law in form of "Constitution" like India, where all other laws derived their shape as per its frame work provides right to life or personal liberty.<sup>1</sup> As well as caste a duty upon each citizen of the nation with a fundamental duty to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;<sup>2</sup> Though this Article 21 of the Constitution on India does not explicitly mention the environment, the Supreme Court and the various high courts of the country have given a wider interpretation to the word "life" in this Article. According to the courts, the right to life includes the right to a living environment congenial to human existence. The Supreme Court in **Subhas Kumar v. State of Bihar**,<sup>3</sup> held that right to environment is a fundamental right of every citizen of India and is included in the "right to life" guaranteed under Article 21 of the Constitution of India. A Public

Interest Litigation (PIL) is maintainable in the High Court or Supreme Court at the instance of affected persons or even by a group of social workers or journalists for prevention of pollution. The **Maneka Gandhi v. Union of India**<sup>4</sup> has added new dimensions to the concept of personal liberty of an individual. It laid down that a law affecting life and liberty of a person has to stand the scrutiny of Articles 14 and 19 of the Constitution. Also the Forty- Second Amendment Act: Environmental protection and improvement were explicitly incorporated into the Constitution by the Constitution (Forty- Second Amendment) Act of 1976. Article 48A was added to the Directive Principles of State Policy. It declares that the State shall endeavor to protect and improve the environment and to safeguard the forest and wildlife of the country. In a wake a number of national and international legislative frameworks have been introduced to protect the environment. In the line the legislature in India had enacted:-

1. Wildlife Protection Act, 1972
2. Water (Prevention & Control ) Act, 1974
3. The Forest (Conservation) Act, 1980
4. Air (Prevention and Control of Pollution) Act, 1981
5. Environmental (Protection) Act, 1986
6. Ozone depleting substances (Regulation and Control) Rules, 2000
7. The Biological Diversity Act, 2002
8. Hazardous Wastes (Management and Handling) Amendment Rules, 2003

## III. THE PRECAUTIONARY PRINCIPLE

<sup>1</sup> Article 21. The Constitution of India, 1950.

<sup>2</sup> Article 51A (g). The Constitution of India, 1950.

<sup>3</sup> AIR 1991 SC 420

<sup>4</sup> AIR 1978 SC 597

The Precautionary Principle has not been explicitly mentioned in any environmental laws in India. It is one of the most contentious principles in contemporary International legal developments. It continues to be applied widely across sectors both internationally and nationally. The nature and scope and its application has varied widely according to the context and sector within which it has been applied.

#### IV. ORIGIN OF PRECAUTIONARY PRINCIPLE.

The term 'Precautionary Principle' had its origin in the German word Vorsorgeprinzip<sup>5</sup>. In Germany the precautionary Principle may be traced back to the first draft of a bill (1970) aimed at securing clean air. The law was passed in 1974 and covered all potential sources of air pollution, noise, vibrations and similar processes. The most unambiguous elaboration of the Precautionary Principle in German environmental policy is from a later date and reads: 'Responsibility towards future generation's commands that the natural foundations of life are preserved and that irreversible types of damage, such as the decline of forests, must be avoided.'<sup>6</sup> Thus the principle of precaution commands that the damages done to the natural world (which surrounds us all) should be avoided in advance and in accordance with opportunity and possibility. This principle was first formally acknowledged internationally in the Preamble to the 1985 Vienna Convention for the Protection of the Ozone Layer; The Vienna Convention for the Protection of the Ozone Layer was adopted in 1985 and entered into force on 22 Sep 1988. In 2009, the Vienna Convention became the first Convention of any kind to achieve universal ratification. The objectives of the Convention were for Parties to promote cooperation by means of systematic observations, research and information exchange on the effects of human activities on the ozone layer and to adopt legislative or administrative measures against activities likely to have adverse effects on the ozone layer. The Vienna Convention did not require countries to take concrete actions to control ozone-depleting substances. Instead, in accordance with the provisions of the Convention, the countries of the world agreed The Montreal Protocol on Substance that Deplete the Ozone Layer under the Convention to advance that goal.<sup>7</sup> The precautionary principle, or precautionary approach, is

used in a variety of ways, and a wide range of formulations exists.

#### V. CONCEPT OF PRECAUTION

The core concept of precaution can be viewed as a mechanism to counter a widespread regulatory presumption in favor of allowing development/economic activity to proceed when there is a lack of clear evidence about its impacts. The precautionary principle can be viewed as related to an evolving from the principle of 'prevention' and also the well - established principle of 'polluter-pays principle' for environmental management.<sup>8</sup>

#### VI. JUDICIARY & THE PRECAUTIONARY PRINCIPLE

Precautionary Principle does not find any place in judicial decisions in India before **Vellore Citizens Welfare Forum v. Union of India**,<sup>9</sup> where Supreme Court referred the Brundtland Report and other international documents in addition to Articles 21, 48A and 51A(g) of the Constitution of India. And also taken into account the legislative mandate "to protect and improve the environment" as found in enactments like the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981, and the Environment (Protection) Act, 1986.

In, **Mc Mehta (Taj Trapezium Matter) v. Union of India**,<sup>10</sup> the Supreme Court was dealing with the problem of protecting the 'Taj Mahal' from the pollution of nearby industries. The Court applied the 'Precautionary Principle' as explained by it in Vellore case and observed – The environmental measures must anticipate, prevent and attack the causes of environmental degradation. The 'onus of proof' is on an industry to show that its operation with the aid of coke/coal is environmentally benign. It is rather, proved beyond doubt that the emissions generated by the use of coke/coal by the industries in Taj Trapezium are the main polluters of the ambient air. The court ordered the industries to change over to the natural gas as an industrial-fuel or stop functioning with the aid of coke/coal in the Taj trapezium and relocate themselves as per the directions of the Court.

In **M.C. Mehta v. Union of India and Ors**,<sup>11</sup> (Calcutta Tanneries Case) applying the Precautionary Principle Court ordered the polluting tanneries operating in the city of Calcutta (about 550 in numbers) to relocate themselves from their present location and shift to the new leather

<sup>5</sup> Beth Beloff, Marianne Lines, Dickson Tanzil, et. al, Transforming Sustainability Strategy into Action, 47, (A John & Sons, INC., Publication, 2005)

<sup>6</sup> Kate Davies, The Rise of U.S Environmental Health Movement, 162, Chapter 7 (Rowman & Little field Publication, U.K, 2013)

<sup>7</sup> The Vienna Convention for the Protection of the Ozone Layer, (UNEP) available at:

<http://ozone.unep.org/en/treaties-and-decisions/vienna-convention-protection-ozone-layer>  
<sup>8</sup> K.S. Kavi Kumar, 'Precautionary Principle', 6 (Centre of Excellence in Environmental Economics, Madras School of Economics, Chennai).

<sup>9</sup> AIR 1996 SC 2715.

<sup>10</sup> AIR 2002 SC 3696.

<sup>11</sup> (1997) 2 SCC 411.

complex set-up by the West Bengal Government. Again in **M.C. Mehta v. Union of India & Ors**,<sup>12</sup> (Badkhal & Surajkund Lakes Case), the Supreme Court held that the 'Precautionary Principle' made it mandatory for the State Government to anticipate, prevent and attack the causes of environmental degradation. The Court has no hesitation in holding that in order to protect the two lakes from environmental degradation it was necessary to limit the construction activity in the close vicinity of the lakes.

In **Narmada Bachao Andolan v. Union of India**,<sup>13</sup> precautionary principle came to be considered by the majority of judges. The Court also took the view that the doctrine is to be employed only in cases of pollution when its impact is uncertain and non-negligible.

In **S. Jagannath v. Union of India**,<sup>14</sup> the Supreme Court held that sea beaches and sea coasts are gifts of nature and any activity polluting the same cannot be permitted. The intensified shrimp (prawn) farming culture industry by modern method in coastal areas was causing degradation of mangrove ecosystem, depletion of plantation discharge of highly polluting effluents and pollution of potable as well as ground water.

In **KM Chinnappa, TN Godavarman Thirumalpad v. Union of India**,<sup>15</sup> the Court recognized the importance of India's treaty obligations, placing the precautionary principle in this case in the context of the Convention on Biological Diversity. Despite India's dualist legal tendencies and a lack of implementing legislation at the time, the government was held responsible for adhering to its treaty responsibilities that did not conflict with domestic statutes. In this case, mining in the Kudremukh National Park was deemed to be inconsistent with the precautionary nature of India's treaty requirements.

## VII. KEY ELEMENTS OF PRECAUTIONARY PRINCIPLE.

According to environmentalcommons.org, the Precautionary Principle represents a paradigm shift in decision-making. It allows for five key elements that can prevent irreversible damage to people and nature.<sup>16</sup>

1. **Anticipatory Action:** There is a duty to take anticipatory action to prevent harm. Government, business, and community groups, as well as the general public, share this responsibility.
2. **Right to Know:** The community has a right to know complete and accurate information on potential human health and environmental

impacts associated with the selection of products, services, operations, or plans. The burden to supply this information lies with the proponent, not with the general public.

3. **Alternatives Assessment:** An obligation exists to examine a full range of alternatives and select the alternative with the least potential impact on human health and the environment, including the alternative of doing nothing.
4. **Full Cost Accounting:** When evaluating potential alternatives, there is a duty to consider all the reasonably foreseeable costs, including raw materials, manufacturing, transportation, use, cleanup, eventual disposal, and health costs even if such costs are not reflected in the initial price. Short and long-term benefits and time thresholds should be considered when making decisions.
5. **Participatory Decision Process:** Decisions applying the Precautionary Principle must be transparent, participatory, and informed by the best available science and other relevant information.

The precautionary principle has been viewed as an important element of environmental policy since the Rio Declaration of 1992 and is widely believed to be favorable to the conservation of existing natural environments and the current stock of biodiversity including measures to avoid deterioration in these. Previously Precautionary Principle is being used only on the matter of the Environmental pollution but today this is being used to deal with the wild life protection, Biodiversity Conservation, matters related to climate change, protection of shrimps etc. The achievement of ecologically sustainable development depends on the commitment and involvement of all arms of government, the legislature, executive and judiciary as well as other relevant stakeholders. The judiciary is also a crucial partner in promoting environmental governance, upholding the rule of law and in ensuring a fair balance between environmental, social and developmental consideration through its judgments and declarations. The environmental decisions of the national / state courts and international environmental law have influenced each other.<sup>17</sup> The state courts have often developed national environmental jurisprudence by taking inspirations and helps from the international environmental laws. The resultant is the National Green Tribunal Act, 2010<sup>18</sup> is an

<sup>12</sup> 1996 AIR 1977.

<sup>13</sup> 2005(4) SCC 32

<sup>14</sup> (1997) 2 SCC 87

<sup>15</sup> 2002 (10) SCC 606.

<sup>16</sup> Precautionary Principle, (the University of Wisconsin Oshkosh) Available at:

<http://www.uwosh.edu/about-uw-oshkosh/>.

<sup>17</sup> Bodansky, Daniel and Brunnee, Jutta, "The Role of National Courts in the Field of International Environmental Law, 11-20 (Review of European Community & International Environmental Law, Vol. 7(1), 1998).

Act of the Parliament of India which enables creation of a special tribunal to handle the expeditious disposal of the cases pertaining to environmental issues. It was enacted under India's constitutional provision of Article 21, which assures the citizens of India the right to a healthy environment. The object of the, Act was that the Tribunal's is to have a dedicated jurisdiction in environmental matters which shall provide speedy environmental justice and help reduce the burden of litigation in the higher courts. The Tribunal was not bound by the procedure laid down under the Code of Civil Procedure, 1908, but should be guided by principles of natural justice. Time limit of six months was inserted to ensure speedy justice.

### VIII. CONCLUSION

The precautionary principle states that serious environmental threats and health hazards should be anticipated and that they ought to be forestalled before the realization of damage even if scientific understanding of the risks is inadequate. Legislations on environment in India have well knit provisions except for the penalty. Therefore the effects of careless and harmful activities have accumulated over the years. Humans and the rest of the natural world have a limited capacity to absorb and overcome this harm. Being a part of natural cycle self awareness on the part of individual in the matter of environment protection and its impact on human life and climate change plays a pivotal role in protecting the future generation from harmful effects of global warming. Although the principle is a subject of intense debate and academic scrutiny, its normative underpinnings have received surprisingly exiguous attention.

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