VOLUME 4 | ISSUE 3

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

DEVELOPMENT OF ENVIRONMENTAL COMPENSATORY JURISPRUDENCE IN INDIA: ANALYTICAL STUDY OF JUDICIAL PRONOUNCMENTS FOR METHODS OF GRANT OF COMPENSATION FOR ENVIRONMENTAL HARM IN INDIA

- Gautam Sanjay[1]

Pavan Guru Pani Pita Mata Dharat Mahat

पवनगुरुपानीपितामाताधरतमहत्

- Guru Nanak Ji

This shalok from Shri Guru Nanak Ji shows how the environment should be seen as a trinity of our primary relationships of father, mother, and Guru. The sholak means *"Air is the Guru, Water is the Father, and Earth is the Great Mother of all."* However, lately, humans have taken the environment for granted and, blinded by the goal of hyper-economic growth,have caused damage to the environment at an unprecedented level. The challenges of developing meaningful environmental regulations to protect communities and the environment have never been more significant than they are now.[2]

The development of Compensatory Jurisprudence for environmental harm in India could be traced back to the Stockholm Conference in 1972, whichpicked up pace after the infamous Bhopal Gas Tragedy.Afterward, a series of other international conferences were held, including the Earth Summit at Rio (1992), the Kyoto Protocol (1997), and the recently held COP21 Paris

[1] LL.M

[2]Miranda Forsyth, D. Cleland, F. Tepper, D. Hollingworth. M. Soares, A. Nairn and C. Wilkinson A future agenda for environmental restorative justice?, Vol. 4(1) THE INTERNATIONAL JOURNAL OF RESTORATIVE JUSTICE, pp.17-40, 2021

conference. The Judgments for grant of compensation for breach of environmental laws in the early 1980s in India were based on the principles enunciated under the law of torts. In the case titled ***M.C. Mehta v. Union of India[3](Ganga Action Plan),*** the Apex Court has taken into consideration the deleterious effect of industrialization and held that sustainable development has to be blended with non-degradation of environmental concerns and that damages must be awarded for such wrongs. The 1990s saw the rise of PIL litigation for grants of compensation for ecological damage. Still, to some extent, these decisions were derived from the principles evolved under tort jurisprudence. A consistent method for compensating for environmental harm has yet to be present.

It would be prudent first to discuss the meaning of the term compensation and how it has been used in the Indian context to relieve the victims of environmental catastrophes. According to Black's Law Dictionary, compensation is defined as "Payment of damages, or any other act that a court orders *to be done by a person who has caused the injury to another."* In theory, compensation makes the injured person whole. However, the term compensation should not be restricted to monetary damages alone but should include other remedial measures that would be the basis for considering the compensation to be awarded.

The term compensation could even partake "restorative justice." Restorative justice is a method for resolving environmental problems comprisingthe victim, the offender, their social networks, justice agencies, and the community. Beneficial justice programs are based on the fundamental axiom that criminal behavior is contrary to the law and causes injuries to the victims and the community. Restorative justice refers to a process for resolving the damage by redressing the harm done to the victims, holding offenders accountable for their actions, and, often, engaging the community in resolving that conflict. Participation of the parties is an essential part of the process that emphasizes relationship building, reconciliation, and the development of agreements around a desired outcome between victims and offenders.[4]

[3]AIR 1988 SC 1037 & 1115

[4]YVON DANDURAND and CURT T. GRIFFITHS , HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES, (United Nations Office on Drugs and Crime 2006)

Another form in which compensation could be awarded for environmental damages is the grant of injunction. However, the remedy for an injunction shouldbe restored when necessary. If restoration is impossible, damages should be determined according to the harm done to the environment or person, nominal, substantial, or exemplary.

Regarding environmental damages, until 1995, except for the writ jurisdiction, the remedies for seeking compensation for ecological harm were very sparse. The legislation related to the environment was more focused on criminality than providing compensation. The interpretation of the Constitution by the judiciary and the Government was primarily predicated on striking a balance between the fundamental rights and directive principles of state policy. The Indian Constitution was invoked to address environmental harm. As observed by the Apex Court, the victims of ecological crimes were also neglected. As early as 1980, in ***Rattan Singh v. State of Punjab,***[5] the Apex Court held as follows:

"It is a weakness of our jurisdiction that the victims of the crime and the distress of the dependents of the prisoner do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law. This is a deficiency in the system which the Legislature must rectify. We can only draw attention to this matter."

Supreme Court and Environmental Compensation:

The Apex Court has relied on the provisions of the Constitution of India and various principles of tort to determine liability in case of environmental harm.

Expandingthe applicability of Article 21 of the Constitution of India gave rise to filing public interest litigation on various issues, including the environment. This has culminated in the Supreme Court and High Court enforcing the earlier non-justifiable directive principles and fundamental duties embodied in parts IV and IVA of the Constitution of India.

The environmental rights and the fundamental duties are now made justiciable under Article 21 of the Constitution by invoking writ jurisdiction, and the Supreme Court and high courts in India grant remedial reliefs. In various decisions pronounced by the Apex Court, such as Ramsharan

[5]AIR 1980 SC 84

Autyanuprasi v. Union of India,***M/s. Shantistar Builders v. Narayan Khimalal Totame***[6]and ***Subhashkumar v. State of Bihar*** *the Court has held that the right to food, clothing,* and a decent environment are enforceable rights and can be enforced by filing writs. The Court has further granted compensation by blending Article 21 of the Constitution with the aid of tort law where fundamental rights are breached.

The principle of sustainable development combined with Article 21 of the Constitution has also aided the Courtin compensating for environmental harms. The applicability of the doctrine of sustainable development with environmental concern and grant of restorative relief has been considered by the Apex Courtin the case ***M.C. Mehta v. Kamal Nath,***[7]which was decided in the year 1996 and after that deciding curative petitions in the years 2000 and 2022[8], where the Court prescribed Article 21 of Constitution forgrant of compensation to be paid for harm caused based on principles of law of tort based on public nuisance.However, at first, the court decided that a fine could not be imposed under Article 142 of the Constitution; later on, it directed Kamal Nath to deposit a sum of Rs. 10 lakhs as damages. The decision was affirmed in ***TataHousing Development Co. Ltd v. Aalok Jagga.***[9]

In ***Vellore Citizens Welfare Forum vs. Union of India***[10]**,**the Courthas held that the guiding rule for sustainable development is that humanity must take no more from nature than man can replenish and that people must adopt lifestyles and development paths that work within nature's limit. It was explained that environmental measures by the State Government and Statutory authorities must anticipate, prevent, and attack the causes of ecological degradation. This view was reiterated in ***Karnataka Industrial Areas Development Board vs. C. Kenchappa & Ors.***[11]

The Apex Court considered the issue of the use of fire-crackers causing air pollution, whether it should be allowed or not in Delhi and NCR area in ***Arjun Gopal & Others vs. Union of India & Others;*** *the* Court referred to a decision of National Green Tribunal in ***Vardhaman Kaushik vs. Union of India***and restated the earlier observations that right to breathe clean air is a recognized

[6] AIR 1990 SC 630
[7]1996 JT 11 SC 467
[8]2000 (6) SCC 213
[9]2020 (15) SCC 784
[10] AIR 1996 SC 2715
[11](2006)6SCC383

right under the Constitution. Consequently, the Court issued several directions in the judgment but did not consider either remediation or how compensation could be calculated.

The Apex Court has relied mainly on the *polluter pays principle*for calculating the compensation to be awarded.The first significant reference to the Polluter Pays Principle appeared in 1972 by the Organisation for Economic Co-operation and Development (OECD) member countries. The OECD defines the polluter pays principle as *"a means for allocating the cost of pollution prevention and control measures."* The polluter pays principle has been recognized and applied internationally[12]. The polluter pays principle has been identified through the landmark judgment of the ***Indian Council for Enviro-Legal Action v. U.O.I; in*** this case, the Apex Court held that *"The Polluter pays Principle means that absolute liability of harm to the environment extends not only to compensate the victims of the pollution but also to the cost of restoring environmental degradation. Remediation of damaged environment is part of the process of sustainable development."*

In ***Deepak Nitrite v. State of Gujarat,***[13]the Supreme Courtemphasized that it is essential that the damages be evaluated and "compensation to be awarded must have some broad correlation not only with the magnitude and capacity of the enterprise but also with the harm caused by it."The judgment made it abundantly clear that for compensation to be awarded by the Court, there must be a clear indication of environmental harm.

In ***Karnataka Industrial Areas Development Board vs. C. Kenchappa & Ors.[14]***Apex Courtrelied on the principle of Strict Liability. It held thatcompensation is the money awarded to the plaintiff to restore themto the position they would be in if the environmental harm had not occurred.

In the recent case of ***M/s Pahwa Plastics Pvt. Ltd. v. Dastak NGO[15]***, the Supreme Court applied the principles of Sustainable Development to its most total sense, and environmental protection was finely balanced with the right to sustainable industry development. Although the judgment did not mainly deal with environmental compensation, it focused on the broader principles to govern liability concerningecologicalharm.

[12]NAWNEET VIBHAW, ENVIRONMENT, ENERGY AND CLIMATE CHANGE (LexisNexis2020)
[13] (2004) 6 SCC 402
[14](2006)6SCC383
[15] 2022 SCC SC 362

Under the law of torts, the victims can claim compensation for their injury to the person or property. It is taking decades for the victims to get a decree for damages or compensation through civil courts, resulting in so much hardship.[16]

National Green Tribunal and environmental compensation:

The Judicial Activism in the 1980s and the judgments, more particularly MC Mehta v. Union of India, Indian Council for Enviro-Legal Action v. Union of India, and A P Pollution Control Board v. M. V. Nayudu spelled out that there should be a specialized environmental Court. The Parliament partially accepted the concerns and enacted the National Environment Tribunal Act of 1995 (NETA) and, thereafter, the National Environment Appellate Authority Act of 1997 (NEAA). However, these two tribunals could have been more effective. NETA was never brought into force; consequently, the National Environment Tribunal was never established. The NEAA barely functioned; it had little work about its limited appellate jurisdiction and was disabled by the inordinate delay in appointing a chairperson[17].

In 1999, the Supreme Court, in the case of the AP Pollution Control Board, opined that there should be specialized Courts for dealing with theenvironment. The Law Commission, in its 186th Report, recommended the establishment of Environmental Courts in every state with an underlying objective to look into the environmental problems by a specialized tribunal. Later, in 2010, the National Green Tribunal Act was enacted. The NGT Act and its contours determined the scope of power of the National Green Tribunal, which was meant to give relief and compensation for damages to persons and property that dealt with environmental issues. In the judgment of Municipal Corporation of Greater Bombay v. Ankita Sinha, the Apex Court held that NGT would be categorized asTribunals to safeguard rights under Article 21,"*creating a compelling proposition for wielding much broader powers as delineated by the statute*." However, difficulties that came after the enactment of the Act was that the High Courts started rejecting writ petitions on the grounds of alternative remedy. A recent opinion by Dr. Sairam

[16]Justice G. Yethirajulu,*Article 32 and the remedy of Compensation*, (2004) 7 SCC (J) 49

[17]SHIVAM DIVAN& ARMIN ROSENCRANZ, ENVIRONMENTAL LAW AND POLICY IN INDIA(3rd Edition Oxford 2021)

Bhat and Lianne D'souza is that 'it seems that just when the NGT has prepared to soar, its wings have been clipped.'

One of the main setbacks for NGT is that there needs to be aformula for determining compensation for environmental harm, as provided in the 2010 Act. According to***Section 20***, the tribunal is only bound by the principles of Sustainable Development, Precautionary Principle, and Polluter Pays Principle forcalculating environmental compensation. However, the Tribunal accepted a formula for calculating ecological compensation in the Paryavaran Suraksha Samiti & Anr. v. Union of India & Ors case**.**[18] The formula is as follows:

EC = PI x N x R x S x LF

In the above-stated formula, EC stands for Environmental Compensation in INR, PI stands for Pollution Index of the industrial sector, N stands for the Number of days the violation took place, R stands for a factor in INR (₹) for compensation for the environmental harm caused by the industry, S stands for factor for the scale of operation, and LF stands for location factor.

It appears that NGT has primarily adopted two methods for the imposition of environmental compensation: a) levying 5-10% of the project cost as environmental compensation if it finds the industry to be defaulting,orb) using a percentage of the annual turnover of the industry as the method for determining environmental compensation[19].

The determination of compensation is significant as it compensates affected stakeholders and reflects the quality of the scientific analysis undertaken by the Tribunal. It demonstrates the accuracy of the Tribunal's assessment of environmental damage in a case and how effectively it dealt with scientific uncertainty.

The NGT recently in ***Nehal Galvanizer (India) Private Ltd. vs. West Bengal Pollution Control Board and Others,***[20] was called upon to quash the order issued by West Bengal Pollution Control

[18]Original Applicatio No. 593/2017
[19]Goel Ganga Developers India Pvt. Ltd. v. Union of India, (2018) 18 SCC 257; M. C. Mehta v. Union of India, (1987) 1 SCC 395; Sterlite Industries (India) Ltd. v. Union of India, (2013) 4 SCC 575
[20]MANU/GT/0029/2023

Board directing the appellant to submit Environmental Compensation of Rs3,15,500/- and also execute a Bank Guarantee of Rs. 5,00,000/- valid for 12 months in favor of West Bengal Pollution Control Board. The Tribunal held that the inspection report and other relevant information of 2019 and 2021 opined that the unit had to rectify, and the company contended that the air pollution control device and the effluent treatment plan were in working condition. The board computed the environmental compensation assuming violation for a period of 63 days, i.e., from 27.10.2021 till the hearing date. The Tribunal held that prima facie, the appellant's unit had not taken any remedial steps to stop the environmental violations till the 2nd inspection, which was carried out on 27.10.2021. The 2nd Inspection also mentioned violation.

The Tribunal directed as follows:

"20. Therefore, we are of the view that the West Bengal Pollution Control Board needs to re-examine the issue in light of the observations made herein above by us and compute Environmental Compensation from 22.10.2019 till 27.10.2021. This exercise shall be carried out after giving due notice to the Appellant's Unit and the opportunity of being heard. The judgment of the Delhi High Court in the Public Works Department GNCTD (Supra) would also be applicable. The West Bengal Pollution Control Board shall also conduct a fresh inspection of the site within ten days and prepare a fresh Report. If violations of Environmental Norms are found, the same shall also be considered while computing EnvironmentalCompensation. The West Bengal Pollution Control Board shall pass a fresh order by law. The impugned order dated 06.05.2022 is accordingly set aside."

This judgment of NGT shows that the Tribunal missed the opportunity to confirm the order even though, in its finding, the Tribunal has categorically come to a finding that there is pollution.

The lack of a proper framework for the calculation of compensation for environmental harm or damage has been observed by a principal bench of the National Green Tribunal in its recent order in a matter taken suo moto in ***"Suo motu action in illegal mining for excavation of Morrumat Araji no. 824 kha (khand 3 and 4)in area 16.194 and 12.368 hectares, respectively At village Agori Khas, tehsil Obra, district Sonbhadra Versus Union of India and others"***[21], where the

[21]Original Application no. 818/2022 (I.A. no. 74/2023) the National Green Tribunal, Principal Bench, New Delhi

National Green Tribunal observed:

"158. Thus, broad principles of environmental laws are given, but the Statute does not provide the methodology for assessing/determining compensation. Even Rules framed under the NGT Act 2010 are silent on this aspect. Determining environmental compensation is significant in that it should be proportionate to or bear a reasonable nexus with the environmental damage and its remediation/restoration. Similarly, in case of compensation to be determined for a victim, it needs to co-relate to injury caused or damage suffered by such person as also cost incurred for treatment/remediation."

In this case, after considering various decisions, the tribunal has opined that there is still a need for a methodology for the grant of compensation, which must be provided in statutes concerning the grant of monetary damages. The observation made by the tribunal spells this hard reality even 14 years after the National Green Tribunal Act of 2010 came into force.

In a time when Climate change is seen as a significant crisis for humanity, there is an urgent need for statutory reforms to provide a method or formula for compensation for environmental harm.