



## The effectiveness of supreme court in dealing with the environmental law violations: Individuals vs. corporations

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### Abstract

Every day, we face new challenges and strive to improve ourselves. However, in order to keep up with this rapid expansion, we neglected the environmental challenges that are right in front of us. Climate change has been in the spotlight for over a decade due to melting ice caps at the poles, rising ocean levels around the world, harmful effects on flora and fauna risking the extinction of many species, and a slew of other factors that, if not addressed now, could render our planet uninhabitable. The Apex Court of India has the authority to bring the change required to reality. This paper will analyse the effectiveness of the Supreme Court while dealing with environmental matters and its inability to hold an individual liable while hunting down the corporations deteriorating the environment. Further, this paper will briefly analyse the consequence of the Environmental Impact Assessment Policy, 2020 on the Judiciary.

**Keywords:** environment, environmental violations, individual and corporate liability, supremecourt and volkswagen emission scandal

### Introduction

In these times of advancement, we are living a life full of luxuries. We are running behind comfort, while at the same time corporations are pushing their limits to create and profit from anything they can sell. With all these technological advancements we keep adding more to these comforts. Blinded by these luxuries, we fail to look at the flip side i.e. the harm inflicted by these corporations and industries upon the environment. Ever since the Environment (Protection) Act, 1986<sup>[1]</sup> (hereinafter referred to as the Act) was passed after the Bhopal Gas Tragedy, the legislature had been continuously amending and passing new laws and the Supreme Court had heard abundance of related cases. In spite of this the legal system of our country, intentionally or unintentionally, is unable to take on the situation with full force. In this paper, I will examine some of the issues with the effectiveness of the Supreme Courts in environmental law matters and how the fixing of individual liability would help tackling such situation in a better way rather than penalising the corporations.

The Supreme Court was broadening the horizons of the Article 21 of the Constitution and it was the case of *Municipal Council, Ratlam v. Shri Vardhichand & Ors.*<sup>[2]</sup>, where the Supreme Court interpreted the Right to Life to include Right to Wholesome Environment. This could be construed as the first step towards preserving of the environment, prior to the Act. And acknowledging the facts in *Olga Tellis v. Bombay Municipal Corporation*<sup>[3]</sup> and relaxing the Locus Standi rule for the filing of Public Interest Litigation (PIL), the Supreme Court portrayed their concern towards environment protection and establishing an effective legal system or at least litigation process to curb the existing problems.

The Judiciary, being considered as an independent body under the constitution, have some overlaps in its functioning due to the asymmetric federal nature of the Constitution.

From the enactment of the Act till the early 2000's, there were plethora of case and the Supreme Court dealt with them in an uncompromising manner.<sup>[4]</sup> But ever since the Environmental Impact Assessment Policy of 2006<sup>[5]</sup>, this effectiveness is in a down trend and the recent EIA Notification 2020 is further tying the hand of Judiciary. The Judiciary is dependent on the Legislative to pass law and on the Executive for their enforcement after interpretation by them. After the LPG policies of 1991, corporations from all around the world have seen Indian market as an opportunity and these corporations employ huge lobbying efforts to make these regulation less stringent upon them as it increases their cost in short run and reduces the profit. It is possible that these lobbying efforts are the major reason that the EIA regulations have been diluted constantly. In 2006 policy, two categories of projects were introduced and one of the subheads under these two doesn't require any governmental clearance, which was blatantly abused by the state governments to pass those projects that didn't even classify under this category. The circumstance got worst in the 2020 policy as it allowed for the Post-Facto approval of projects and bypassing the EIA easier with government deeming it as 'strategic' project. The Constitution of has blessed the Supreme Court with the power to take suo moto cognisance of matters where they can see, *prima facie*, legal violations and no engagement from the government or the public. "The Court has over time developed into a 'policy evolution forum', a role it is ill equipped to play."<sup>[6]</sup> The active lobbying efforts by corporations and dependence of Judiciary on the Executive for the enforcement, costed them their effectiveness as "the Executive fails to enforce judicial decisions either because it does have the resources to do so or because it believes that the political and economic costs of enforcement far outweigh the benefits"<sup>[7]</sup>. This involvement of political cost analysis effect the real interests of masses for the greed of few. And the Judiciary tactically

balancing this situation, decides for selective enforcement and compensatory regulations.

While deciding upon any of the environmental law case the court relies on the established principles and doctrines such as Inter-generational Equity, Polluter Pays Principle, Precautionary Principle and Public Trust Doctrine. The decision of this court in *AP Control Pollution Board v. Prof. M. V. Nayadu* <sup>[8]</sup> was exemplary. Based on the futuristic approach of the Precautionary principle it was held that the precautions must be taken to preserve the environment irrespective of the availability of scientific evidence and not to wait for the negative impact to materialize and surface to initiate any precautionary measures in this aspect. The same level of scrutiny was involved while implementing the Public Trust Doctrine in *M. C. Mehta v. Kamal Nath* <sup>[9]</sup>, where the court barred the attempted diversion of the river flow to support commercial activities, causing detriment to the public and environment in the course of action. All these principles are preventive principles somewhat based on the compensatory scheme of the Polluter Pay Principle. But the real question here is that whether this principle adopted by the Supreme Court is enough to curb the environmental degradation and restrict the corporations from repeating the same thing in future.

In *Vellore Citizens' Welfare Forum v. Union of India* <sup>[10]</sup>, the court adopted the 1972 <sup>[11]</sup> Polluter Pays Principle to contend with the situation. Similar to the absolute liability in Torts law, an absolute liability was imposed on the polluter to compensate the affected people for the damage caused. They went a step ahead and extended the scope of this liability to bring within its ambit the cost of restoration of the environment for the harm inflicted by the polluter. The same principle was upheld in the case of *Indian Council for Enviro Legal Action v. Union of India* <sup>[12]</sup> and a fine of INR 10 Lakh was imposed on HACL for prolongment of the proceedings. The noticeable point here is that the principle used by the courts to decide environmental law violation case is almost 50 years old. Though it was ahead of its time, but the actual effects of the environmental degradation can only be seen in a long term and have started surfacing recently. It would be abysmal for the environment if we ignore the recent globalisation trends and stay in denial regarding the influence of multi-national corporation on the legal system of a country. One such example is of the Adani Power Limited, a huge corporation whose projects were approved by the government, is now fighting a class action suit in United States of America for its detrimental environmental practices in Gujarat, while the case is still pending in India. This calls for the alteration of the age-old principle that was being followed all around the world.

Any corporation is considered as a separate being form its owners and has its own legal existence as laid down in *Salomon v. A. Salomon* <sup>[13]</sup>, but that does not imply that the management can't be considered liable for its action. Though having a legal existence, the corporation works through the actions of its Board of Directors and the Executive Management. Relying on the observations from the above-mentioned cases, whenever a corporation is sued for environmental violations, they undergo years of litigation and if there is no out of court settlement and they are found guilty, they are finned to compensate the victims, environment and sometimes the future generations under the Inter-generational Equity rule. Moreover, the court prohibits them from conducting any such activity in future. This

might seem very progressive but, in such situations, seeing beyond the obvious is very crucial. This had not prevented the corporations from continuing their operations at the cost of the environment as the amount of profits they generate from such activities, keeping in mind the prolonged and arduous process of litigation and delayed surfacing of environmental degradation, outperforms the fees and the fines paid by these companies. Another page to this is that the corporations are managed by the board along with executive management who get hefty salaries, fixed salaries, while the fees and fines paid by the corporations are actually paid out of the profits and reserves, which otherwise would have been distributed among the shareholders. Though being in its infant stage of discussions under Good Corporate Practices, it is violation of the duties of a director towards its shareholders under S. 166 of The Companies Act, 2013 <sup>[14]</sup>. And in a way these individuals get away with their mischief using someone else's money.

One of the most recent environment related scandal is the Volkswagen Emission Scandal. It first came to light in August of 2015 in USA, led to opening of floodgate for litigation all around the world. This resulted to a freefall in the share prices and the company's reputation was on the verge of collapsing. Due to this rising pressure, the CEO Martin Winterkorn resigned in September 2015. After investigations began, the same results were found around the world. Thought there were emails exchanged between Winterkorn and the management agreeing to this, he denied having any knowledge in his deposition by US authorities. <sup>[15]</sup> There was nothing to point the liability over him and other directors as either there is no law in that regard and even if there is, then in that company and shareholders are put above the interest of the environment. Thus, the company was just charged with cheating on the emission results. In USA, Volkswagen was fined for \$4.7 billion for environmental violation <sup>[16]</sup> and to give buyback option to all 475000 customers ranging from \$12475-\$44176 <sup>[17]</sup>, while when the car was launched its starting price was \$38000 ranging all the way up to \$76000. In Australia it was \$125 million <sup>[18]</sup>, INR 500 crore in India, £90 million in UK but all this was a small fraction of what they made. The Securities and Exchange Commission of USA <sup>[19]</sup> indicted Winterkorn for fraud in 2019 following which Germany did to same and filled case against him and four other executives <sup>[20]</sup>, thus becoming the closest any country came to levy individual liability. If during the current situation of pandemic, it is not feasible then at least the same individual liability must be fixed under the Companies Act <sup>[21]</sup> and eventually the Supreme Court must broaden its ambit to include the same under environmental law violations.

Having a healthy environment is crucial for our survival on earth and the same is also a part of Article 21 i.e. Right to Life. Having a short-term perspective in mind, we chase comforts and take environment for granted. I hope that the Supreme Court get its autonomy back to deal with environmental law violations like the did post the Bhopal Gas Tragedy till 2000's. Moreover, it is not possible to rule out the existence and involvement of giant corporations in the law making via lobbying, establishing individual liability of the executive management of such corporations, would drive them to scrutinize the projects with higher threshold. Going hand in hand with this, would be implementation of property rule i.e. penal provisions rather than compensatory ones. This would be a tough journey for

the Supreme Court Justices, given the current political-social-economic scenario. Apart from the individual efforts, the effective involvement of the Supreme Court is our only hope to secure a bright future with healthy environment.

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