EXTERNALITIES AND INSTITUTIONS TO CONTROL THEM: BHOPAL GAS TRAGEDY

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ABSTRACT

Pollution has been one of the most stirring topics in the world from decades. It is not only an environmental phenomenon but an important economic change. It falls under the topic of externalities in institutional economics. It is a consequence of market failure. Institutional economics is the behavioural economics which takes many such incidents into consideration and tries to correct the market failure. India has been facing the problem of pollution due to various reasons like urbanisation and population growth and most importantly due to the developing process. During this process people were benefitting but they were paying huge opportunity cost through pollution. Bhopal gas tragedy is one such incident. This paper talks about how the government and judiciary as an institution tried to correct the market failure and reduce the damage. It further talks about the development of environmental law through the series of M.C. Mehta cases

INTRODUCTION

Externalities and public good are important sources of market failure and thus raise serious public policy questions. When externalities are present the price of a good need not reflect its social value. As a result, the firms may produce too much or too little, so that the market outcome is inefficient. There are many remedies to correct this but application of the remedies to a suitable situation brings the change. While some remedies involve government regulation, others rely primarily on bargaining among individuals or on the legal right of those adversely affected to sue those who create an externality.

EXTERNALITY

Externality is an action by either the producer or a consumer which affects other producers or consumers but is not accounted for in the market price. Externalities can arise between producers, between consumers, or between consumers and producers. They can be negative – when the action by one party imposes cost on the other party; or positive – when the action of one party benefits another party. A negative externality when a chemical factory uses a lot of water from the river beside its plant and releases harmful substances due to which the fish in the water die on which fishermen depend for their daily catch. The firm however has no incentive to account for the external costs that it imposes on fishermen when making its production decisions. Furthermore, there is no market in which these external costs can be reflected in the price of chemicals. A positive externality occurs when a home owner repaints her house and plants an attractive garden. All the neighbours benefit from this activity even though the home owner's decision to repaint and landscape probably did not take these into benefits into account.

NEGATIVE EXTERNALITY

Because externalities are not reflected in the market prices, they can be a source of economic inefficiency. When firms do not take into account the harms associated with negative externalities, the result is excess production and unnecessary social costs. In the cases of negative externality, the market output is not efficient because the optimum output level is

much lower than the actual output which means overutilization of resources leading to less quality work and inefficient output. Negative externalities encourage too many firms to remain in the industry.

WAYS TO CORRECT MARKET FAILURE (INSTITUTIONS)

How can the inefficiency resulting from an externality be remedied? If the firm that generates the externality has a fixed proportions production technology, the externality can be reduced only by encouraging the firm to produce less. This goal can be achieved through an output tax or change in technology like ass a scrubber to reduce emissions. Some of the most common institutions to correct negative externalities are

1. An emission standard: An emission standard is a legal limit on how much pollutant can be released or a firm can emit. If the firm exceeds the limit, it can face monetary and even criminal penalties.
2. An emission fee: An emissions fee is a charge levied on each unit of a firm's emissions.
3. Trade able emission permits: System of marketable permits, allocated among firms, specifying the maximum level of emissions that can be generated.[i]

UCC v. UOI:[ii]

In the year 1934 American industrial giant Union Carbide with the Union of India incorporated Union Carbide India Limited (hereinafter UCIL) in India for the manufacture of batteries, chemicals, pesticides and other industrial products. The Union Carbide was the majority stakeholder (51%) in the company. In 1970, a new pesticide plant was set up by UCIL in a densely populated area of Bhopal (Madhya Pradesh). Despite repetitive complaints regarding the safety measures of the pesticide plant by the agronomic engineer of the plant, UCIL ignoring all these complaints kept on producing dangerous & hazardous chemicals in the plant. Unfortunately, on the intervening night of 02-03 December 1984, the Methyl Iso-cyanate (MIC) gas (approx. 40 tons) used as a raw material in the production upon mixing with water and creating an exothermic reaction leaked into the atmosphere and unleashed a havoc on the residents of entire Bhopal City and adjoining areas. Due to high wind pressure, the MIC gas traveled as far as the peripheries of Bhopal. Due to the outbreak of this ghost of 1984 in Bhopal as many as 2600 people immediately died and the death toll rose to a huge 8000 within a

fortnight, while tens of thousands were displaced, injured and affected. The later estimates indicate that the death toll rose to an enormous 20000 while more than 600000 were left injured. This catastrophe not only left the live human beings, flora and fauna victimized it also injured the babies in the womb. The residents of Bhopal are suffering even today due to this ghastly catastrophe that happened due to the negligence of a multinational company. Union of India immediately to provide speedy justice to the victims enacted Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (the Bhopal Act) making the Union of India representative of the victims by the virtue of Doctrine of *Parens patriae.*

Judgment: The court in order to not to waste any more time in writing detailed judgment ordered Union Carbide on February 14, 1989 to pay a hefty compensation of US $470 Million before March 31, 1989. However, few months later on May 4, 1989 passed a reasoned order regarding the same. The Supreme Court ordered Union Carbide to pay US $470 million against all the destruction that the leak of MIC gas from the industrial premise. In the reasoned order Justice Pathak said that it was the duty of the court to secure immediate relief to the victims of the MIC leak and while doing that the court did not entered into any virgin territory. However, this settlement of US $ 470 Million was way less to the promised amount by the government and also various jurists considered it to be an inappropriate compensation. After analyzing the ratio, it seems that an amount less than INR 50,000 was delivered to each victim.

Critical Analysis: The MIC leak disaster brought out the incompetence in Indian laws as well as the institutions that claim themselves to be the protector of rights vested in the citizens of the nation. From Parliament's decision to fight the case in U.S. to the ambiguous and inappropriate decision of SC, it was reflected that all the rights and freedom that a citizen is guaranteed is only on papers. The government's lack of confidence in the judiciary was a critical criticism on the judicial system of the nation. The Parliament claimed that Indian courts are not well equipped to entertain such huge matters. This shows how less Parliament thinks of Indian Judiciary. Our legislature is asking a foreign state for justice when it should have faith in the Indian Judiciary. Due to huge backlog in pending cases and no scope of Law of Tort in India made Parliament to consider the option to approach US courts. Further, the Indian courts in order to liberalize its standards did not order a compensation that would suffice the loss of disaster.

Therefore, this a lesson from which all the constitutional functionaries should learn a strict lesson. The Parliament must formulate such stringent laws by the virtue of which India becomes self – sufficient in resolving such matters and not brag about its incompetence in International arena.[iii]

DEVELOPMENT OF ENVIRONMENT LAW

Law for environmental protection is not a new phenomenon in India, although the terms "environment" and "pollution" are of recent origin. The duty to maintain a clean environment can be found in various provisions in the ancient laws of India. Kautilya in his Arthasastra laid down "environmental" precepts for city administration and prescribed penalties for anyone making the city dirty. We also find relevant provisions in the prescription of punishment of public offences in other ancient Hindu works on legal matters. The doctrinal roots of modern environmental law could be based on the law of nuisance: nuisance actions could challenge every major industrial and municipal activity which is today a subject of comprehensive environmental legislation. The law of nuisance can be divided into public nuisance and private nuisance; public nuisance, which could encompass most environmental issues, falls mainly in the purview of the criminal law. In India the offence of public nuisance is contained in Chapter XIV of the Indian Penal Code of 1860. Specific provisions prescribing punishment for fouling water and air are contained in sections 277 and 278. However, the Code of Criminal Procedure of 1973, which is based on several earlier codes since 1861, contains in Section 133 specific provisions empowering a magistrate to make orders to abate public nuisance. The move towards effective legal control came about in 1976 by the 42nd Amendment of the Constitution of India. This amendment incorporated a new article in Part IV of the Constitution, Article 48A, as a Directive Principle of State Policy. So also, a specific provision in Article 51A(g)[iv] was provided in the newly added Part IV.A, incorporating Fundamental Duties. The new legal policy towards environmental protection is also seen in the 1976 amendment to the Code of Civil Procedure 1902 facilitating easier access to courts in lawsuits for public nuisance. A suit based on public nuisance as a civil wrong is contemplated in section 91 of the Code, which, after the 1976 amendment, facilitates an easier procedure for pollution cases.

The Stockholm Conference of 1972 gave impetus for the new development of environmental law as far as India is concerned. It prompted India to initiate legislation in line with developed countries to deal specifically with environmental pollution caused by industries. The Water (Prevention and Control of Pollution) Act 1974 ("Water Act") was India's pioneer legislation to deal with industrial pollution. The Water Act contains elaborate provisions for the constitution of administrative agencies both at the national and State level. It empowered the State government to make rules prescribing conditions and standards to control water pollution. The control of water pollution was sought to be achieved through a "consent" system of administration; the Act itself did not initially bring about any changes in the state of the environment. The Water Act more or less remained dormant, apart from the creation of a bureaucratic agency. Many inherent defects, apart from various other reasons, rendered this legislation inefficient and mostly unenforceable. The 1980s saw continuous changes in all the branches of the government in achieving the objectives resolved in the Stockholm Conference Declaration of Principles Concerning the Human Environment. A separate Department of Environment under the new Ministry of Environment was set up as a focal administrative agency to plan, promote and co-ordinate environmental programmes. In 1981 the Air (Prevention and Control of Pollution) Act ("Air Act") was enacted to combat air pollution. This Act was a corresponding enactment to the Water Act passed earlier. It also contained elaborate provisions for constituting administrative bodies and empowering them to make rules for the purpose of controlling air pollution. In the early years the implementation of these laws was impaired, mainly because of the lack of initiatives by the administration. The Boards could have accomplished the objectives of the legislation if they had had greater resolve, but that could be brought about only by more public pressure and through greater environmental awareness.

The Environment (Protection) Act 1986: After the accident at Bhopal, the Department of Environment came under considerable pressure from both the Prime Minister's office and the general public to decide on "comprehensive legislation" for controlling toxic and hazardous substances. A new umbrella statute, the Environment (Protection) Act, was enacted in May 1986. Only the broad outlines of the law can now be discussed here, since the work on implementing the rules has not been completed to date. The basic thrust of the Act is to empower the central government to correct deficiencies of policy-making and enforcement in the States through action not specifically permitted under earlier laws. New powers were

conferred on the central government to set standards for pollution emitted or discharged into the environment and also to regulate the handling of hazardous substances. The Act established environmental laboratories responsible for analysing air and water samples collected by the enforcement authorities, and substantially strengthened the government's capacity to penalise polluters. Even though the Act has closed some of the loopholes in the earlier laws, it is too early to say how effectively the environmental policies will be implemented through this legislation. Although the Act created a radical modification to the rule of locus standi, some criticisms have been voiced regarding the provision requiring a 60-day notice period to the authorities since, in effect, it gives enough time for an offender to escape liability under the act.

LEGAL SOLUTION

From the beginning of this decade the judiciary, especially the Supreme Court of India, has shown a keen sense of commitment to the social and political needs of the country. Some judges responded through judicial activism and with creative innovation to develop environmental law in India. The recent decisions in the M. C. Mehta cases are of great significance in the development of environmental law in India. There are to date five cases reported under this name in India. The first case, decided in early 1986, was on a public interest writ petition filed before the Supreme Court under Article 32 of the Constitution, for orders against the reopening of certain plants which were closed following a major leakage of oleum gas from one of the units of the Shriram Food and Fertilizer Corp., an industry engaged in the manufacture of caustic chloride chemicals. The Court, after considering the reports of expert committees appointed by the government and also by the Court, permitted the plants to be restarted, but imposed strict observance of conditions laid down by the Court. In this case the judicial concern for environmental protection was to a great extent influenced by the Bhopal disaster. The Court expressed concern for developing the law to control corporations employing hazardous technology and producing toxic or dangerous substances. The Court also raised the question as to the extent of liability of such corporations and remedies that can be devised for enforcing such liability with a view to securing payment of damages to the persons affected by such leakage of liquid or gas.

On 22 September 1987 the Supreme Court decided in another *M. C. Mehta v. Union of India*[v], which again gave significant development to the law on environmental protection. This case was brought as a public interest petition to stop the discharge of trade effluents by tanneries in Kanpur into the river Ganga. The Court ordered the closure of about 30 tanneries which had failed to take minimum steps required for the primary treatment of industrial effluents, and the government was directed to enforce the standards required under law on more than 100 other tanneries in Kanpur. On 12 January 1988 the Supreme Court decided yet another public interest case brought before it concerning abatement of Ganga water pollution, M. C. Mehta (II) v. Union of India.[vi]The Court asserted the importance of Articles 48A and 51A(g) of the Constitution and issued directions to the Kanpur municipality and to all other municipalities having jurisdiction over the areas through which the Ganga flows. It also directed the High Courts to grant sparingly orders of stay in criminal proceedings taken up against polluters of the river Ganga. [vii]

CONCLUSION

Thus, we find the Supreme Court is now in the process of broadly laying down the legal framework for environmental protection in India. All doubts and criticisms about the lack of environmental consciousness of the Indian judiciary have to be reviewed in the light of the developments occurring in the last few years. However, since the victims of the Bhopal disaster have not received adequate redress even now, one cannot assert that modern India's impressive schemes for the legal protection of the environment and for the protection of citizens from pollution and its threats to life have worked out entirely satisfactorily. India is in the process of making the right to clean environment a fundamental right to be more precise to include it in part III of the constitution rather making it a welfare scheme, which in turn creates an obligation on part of the state. The biggest role in this process is played by the courts through public interest litigations which pave way to judicial activism.

REFERENCES

[i] ROBERT PINDYCK and DANIEL RUBINFELD, MICROECONOMICS, 8TH EDITION.
[ii] 1990 AIR 273.
[iii] HEMANT VARSHNEY, CASE SUMMARY OF UCC v. UOI, available at https://lawtimesjournal.in/union-carbide-corporation-vs-union-of-india-etc-case-summary/, 2018.
[iv] Art.51A reads as follows: "[It shall be the duty of every citizen of India] (g) . . . to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures."
[v] 1987 4 SCC 463.
[vi] 1988 1 SCC 471.
[vii] C. M. Abraham and Sushila Abraham, The Bhopal Case and the Development of Environmental Law in India, The International and Comparative Law Quarterly, Vol. 40, No. 2 (Apr., 1991), pp. 334-365, available at https://www.jstor.org/stable/759728.