

INDIAN SUPREME COURT ON PRECAUTIONARY PRINCIPLE

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Precautionary principle is one of the mechanisms and procedures by which possible danger to environment can be mitigated. Right from the independence of India, the application of precautionary principle was not possible, because India was not open to understand the meaning and value of this principle. India started respecting this principle only from participating in Rio declaration of 1992. However, before 2010, no legislation on environmental protection ever spoke of precautionary principle and its application. Indian Supreme Court, from 1996 accepted the precautionary principle as part of the law of the land. From this year, most of the environmental cases decided applying precautionary principle.

INTRODUCTION

In India, environmental jurisprudence has been nurtured and developed, significantly, by the Supreme Court. It is because 'right to life' as enshrined under article 21 of the Indian Constitution also includes right to pollution free environment, was for the first time recognised by the Supreme Court and stated that any pollution to environment or degradation to any component of the environment would lead to violation of fundamental right, that is, right to life under article 21. It was not very easy for the Supreme Court to adopt the precautionary principle, because none of the environmental legislations discussed the application of precautionary principle in environmental matters. Therefore, the Supreme Court had to rely on international regulation, for example, "World Commission on Environment and Development" of 1987 and finally, Rio de Janeiro declaration of 1992. The central government brought this idea of precautionary principle under National Environment Policy of 2006 and explained the circumstances regarding application of this principle for the purpose of protecting and preserving the environment. Though, the National environment policy mentions the importance of precautionary principle in environmental matters, but environmental legislations, such as, the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986, the Forest (Conservation) Act, 1980, the Wild life (Protection) Act, 1972, et cetera are missing to mention the importance of precautionary principle in the protection of forest and other environmental resources. However, the national green tribunal can apply the precautionary principle to decide the environmental cases from 2010. The laws controlling the pollution of water and atmosphere including the laws protecting and preserving the forest and wildlife resources are comprehensive enough to tackle the situation of environmental degradation and solution thereof, with the help of enforcement machineries mentioned in the respective

legislation, but this sets of legislations have not paid attention on the utilisation of precautionary principle as one of the innovative mechanism and procedure to control the environmental degradation. As sometimes we say that 'prevention is better than cure', the precautionary principle runs on this platform only. Based on this fact, the Indian Supreme Court, while deciding environmental cases in India, paid maximum attention to international regulation, which not only declared the importance of precautionary principle, but also provided the avenues how and when this precautionary principle should be used by the nation concerned.

INTERNATIONAL REGULATION ON PRECAUTIONARY PRINCIPLE

History of application of precautionary principle can be traced back from 1854, where the working of London water pump and spread of the epidemic was the issue¹. However, officially the application of precautionary principle dates back from 1970, where in Germany the clean air Act was passed². There are many international regulations³, those who not only declare the precautionary principle, but also request the participating nations to implement this principle in their national laws. Principle 15⁴ of the Rio declaration 1992, clearly states that the participating nations must incorporate the precautionary principle in the national laws to control the environmental degradation and this adoption should be done as per the capabilities of the respective nations. Moreover, the states should not wait for scientific certainty to protect the environment from irreversible damage. The United Nations Framework Convention on climate change through its article 3, provides that the parties to this convention should not be against any climate change issues and should

¹ The Late Lessons from Early Warnings report (Harremoës et al., 2001) mentions the example of Dr John Snow who in 1854 recommended removing the handle of a London water pump in order to stop a cholera epidemic. The precautionary principle developed by world commission on ethics on scientific knowledge and technology, at p. 9, Available at <http://unesdoc.unesco.org/images/0013/001395/139578e.pdf> (last visited on 09.03.2017)

² In Germany, the PP ('Vorsorgeprinzip') 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 precautionary principle developed by world commission on ethics on scientific knowledge and technology, at p. 9, Available at <http://unesdoc.unesco.org/images/0013/001395/139578e.pdf> (last visited on 09.03.2017)

³ Within the United Nations system, the PP is included in the 1992 Rio Declaration on Environment and Development, and in the United Nations Framework Convention on Climate Change. Later, the PP was incorporated into the article on precaution (Article 5.7) of the World Trade Organization's (WTO) Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) of 1994, as well as into the Biosafety Protocol that was approved in Montreal in January 2000. The precautionary principle developed by world commission on ethics on scientific knowledge and technology, at p. 8, Available at <http://unesdoc.unesco.org/images/0013/001395/139578e.pdf> (last visited on 09.03.2017)

⁴ Principle 15-In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

foresee and minimise the effect of those factors which are responsible for climate change⁵. The agreement on sanitary and phytosanitary measures of the World Trade Organisation, through article 5.7⁶ described the importance of precautionary principle. It suggests that in case of scientific uncertainty with regard to food grade and safety, provisional measures can be taken by the nations. Finally, objective 1⁷ of the Cartagena protocol on biosafety to the convention on biological diversity of the year 2000, clearly mentions that the precautionary approach should be adopted by the participating nations, as per the mandate of principle 15 of Rio declaration 1992, for safe handling, transportation of leaving modified organisms which will be the result of application of modern biotechnology. It is interesting to note here that, in the year 2006 Ministry of environment and Forest, government of India pronounced the national environment policy, in which precautionary principle was adopted as a guideline for preservation of environmental resources.

ENVIRONMENTAL POLICY AND PRECAUTIONARY PRINCIPLE

India, for the first time, prepared a very comprehensive policy on environmental preservation and control of pollution in the year 2006⁸. In the policy document, various principles⁹ were initiated and described for the purpose of protecting various environmental components. In which, precautionary approach¹⁰ has been made as one of the principles. According to this principle, the nation will have to take specific measures for the protection

⁵ Article 3 (3)- UNFCCC- The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.

⁶ Article 5: Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection- In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

⁷ Objective-1-In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.

⁸ the National Environment Policy, 2006. Approved by the Union Cabinet on May 18, 2006.

⁹ For example: human being at the centre of sustainable development, right to development, environmental protection is the integral part of developmental process, precautionary approach, economic efficiency, polluter pays, cost minimisation, entities with incomparable values, Equity, legal liability, fault-based liability, strict liability, public trust doctrine, decentralisation, integration, environmental standard setting, preventive action, environmental offsetting; Pp 13-14, National environment policy, 2006. Available at <http://www.moef.gov.in/sites/default/files/introduction-nep2006e.pdf> (last visited on 09.03.2017)

¹⁰ Principle IV- The precautionary approach -Where there are credible threats of serious or irreversible damage to key environmental resources, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

of the environment even if there is absence of scientific evidences that there will be serious irreversible damage to certain but key environmental resources because of action or inaction of any parties. The principle emphasises on, not postponing or delaying to take measures for environmental protection if there is any apprehension of irreversible damage to be caused because of certain action of any legal entity. However, there is no direct finding of this precautionary principle in environmental legislations in India. Therefore, apart from National Green Tribunal Act of 2010, there are no environmental legislations, which include precautionary principle as a statutory principle.

ENVIRONMENTAL LEGISLATION AND PRECAUTIONARY PRINCIPLE

The Wild life (Protection) Act, 1972, is the first comprehensive legislation in terms of protecting various components of environment, in particular to protect wild animals¹¹ and few important but rare medicinal plants¹². There is no express mentioning of precautionary approach/principle in this wildlife law, however, there are few provisions which, impliedly, give the indication that state should adopt precautionary approach for the protection and conservation of wild animals in India. For example, under section 3, the director shall be appointed to look after that the provisions of this legislation are duly observed. Under section 4, Chief wildlife Warden shall be appointed to ensure that the wild animals as prescribed under the Act are protected. There is a provision to constitute wildlife advisory board under section 6. Various duties as prescribed for the wildlife advisory board under section 8 of the Act. Hunting of wild animals are regulated under section 11 of the Act. Apart from protecting wild animals, the law also protects wild plants which are having medicinal values under section 17 A. Various species of wild animals can be protected while declaring certain portion of forest as sanctuary¹³, declaring prohibited activities or regulated activities within the sanctuary¹⁴, national parks¹⁵. Under this Act, the wild animals had been considered as government properties¹⁶. Persons interested to deal with the animal trophy, must have proper licence¹⁷ to be provided under this Act. Therefore, these all the above-mentioned provisions are the example of implied precautionary approach.

The Water (Prevention and Control of Pollution) Act, 1974 does not provide any express provision on precautionary approach. In this legislation implied meaning of precautionary approach has been incorporated. For example, the enforcement agencies, that is, central pollution control board¹⁸ and state pollution control board¹⁹ shall be established under this

¹¹ For details, see-schedule I, the Wild life (Protection) Act, 1972, where one can find mammals, amphibians, reptiles, fishes, et cetera.

¹² For details, see-schedule VI, the Wild life (Protection) Act, 1972

¹³ Sections 18 and 26 A, the Wild life (Protection) Act, 1972

¹⁴ Sections 27, the Wild life (Protection) Act, 1972

¹⁵ Sections 35, the Wild life (Protection) Act, 1972

¹⁶ Sections 39, the Wild life (Protection) Act, 1972

¹⁷ Sections 44, the Wild life (Protection) Act, 1972

¹⁸ Section 3, The Water (Prevention and Control of Pollution) Act, 1974

¹⁹ Section 3, The Water (Prevention and Control of Pollution) Act, 1974

legislation. Different functions²⁰ have been imposed both on central pollution control board and state pollution control board under this Act, which can be considered as the example of precautionary approach. The pollution control board is empowered under this legislation to make entry within the industrial premises and inspect²¹ the documents and other industrial activities to ensure that there should be control of water pollution. There is a specific provision under this Act, which prohibits any activity to deposit pollution in the water bodies, for example, water of the wells and streams²². The implied precautionary approach also can be found with regard to restrictions imposed on new outlet and new discharges of trade effluents²³ and the legislation also deals with the regulation of existing outlet and control of trade effluents²⁴. The Air (Prevention and Control of Pollution) Act, 1981 is another legislation where there is no express provision dealing with precautionary approach. Though, there are many provisions which are exhibiting the indirect meaning of precautionary approach. For example, the enforcement agencies, such as, state pollution control board²⁵ and central pollution control board²⁶ shall be established to ensure that there should be proper controlling of atmospheric pollution. Similarly, the precautionary approach can also be evidenced, impliedly, with regard to specific functions for the central²⁷ and state²⁸ pollution control board as specified under this legislation. State governments can declare a specific area of the city as air pollution control area²⁹. Regarding, controlling the emission standards from of the vehicles³⁰, the state government is empowered under this legislation to take appropriate steps and measures. Under this law no person or industry shall be entitled to go beyond the prescribed standard of emissions³¹. Therefore, these provisions are the example of implied precautionary approach as mentioned under this legislation.

The Environment (Protection) Act, 1986 is considered to be the umbrella legislation in India, because, most of the Rules framed for controlling environmental pollution of its different components, have been framed under the provisions of this legislation. The central government is empowered³² under this law to take all the preventive measures for the protection and promotion of environment. Under this law, there is a provision to frame the rules to regulate various kinds of environmental pollution. Moreover, the central

²⁰ For details, See, Sections 16 and 17, The Water (Prevention and Control of Pollution) Act, 1974

²¹ Section 23, The Water (Prevention and Control of Pollution) Act, 1974

²² Section 24, The Water (Prevention and Control of Pollution) Act, 1974

²³ Section 25, The Water (Prevention and Control of Pollution) Act, 1974

²⁴ Section 26, The Water (Prevention and Control of Pollution) Act, 1974

²⁵ Section 4, the Air (Prevention and Control of Pollution) Act, 1981

²⁶ Section 3, the Air (Prevention and Control of Pollution) Act, 1981

²⁷ Section 16, the Air (Prevention and Control of Pollution) Act, 1981

²⁸ Section 17, the Air (Prevention and Control of Pollution) Act, 1981

²⁹ Section 19, the Air (Prevention and Control of Pollution) Act, 1981

³⁰ Section 4, the Air (Prevention and Control of Pollution) Act, 1981

³¹ Section 22, the Air (Prevention and Control of Pollution) Act, 1981

³² Section 3, The Environment (Protection) Act, 1986

government enjoys the power under this law to make various Rules³³ to mitigate most of the environmental crisis that might occur in future. This is nothing but the implied meaning of precautionary approach under this law. It is important to mention here that, though, from the above discussion it is clear that there is no direct provision available in any of these environmental legislations about precautionary approach, but the National Green Tribunal Act, 2010 provides an express provision about precautionary principle³⁴, that the tribunal can consider while delivering award/order to any environmental case. Now, it becomes necessary to know that how the honourable Supreme Court in India brought this idea of precautionary principle to mitigate future environmental crisis.

ANALYSIS OF PRECAUTIONARY PRINCIPLE BY SUPREME COURT IN INDIA

Right after the Bhopal gas tragedy of 1984 and immediately thereafter the oleum gas leak incident of 1985 at New Delhi, it was quite difficult for the Supreme Court in India to find out the appropriate principle or theory based on which without waiting for scientific evidences the government machinery can take preventive measures, if there are apprehensions of irreversible damage to the environment. After almost a decade with a long struggle, the Supreme Court in *Vellore citizens*³⁵ case finally analysed the precautionary principle and stated that this principle is part of the law of the land. In this case, the Supreme Court analysed the concept of precautionary principle and clarified that this principle in the domestic law would mean firstly, environmental measures, which means that the state government or the statutory agency will foresee the environmental degradation and will prevent such degradation by attacking the cause. Secondly, the state agency or the enforcement agencies shall not wait for scientific evidence to show that there will be irreparable damage to the environment and without waiting for such scientific documents the agencies shall take appropriate measures to protect the environment. Thirdly, the burden of proof shall not be with the complainant, but will be on the respondent to prove that its action is environment friendly. The Supreme Court further stated that the plain reading of the provisions of Articles 21, 47, 48 A and 51 A (g) of the Indian Constitution, give the indication that the precautionary principle is part of the law of the land. Moreover, the apex court also mentioned that even if there is difficulty to understand the constitutional mandates and linkage with precautionary principle, it would be convenient to understand that since, precautionary principle is part of the international customary law, therefore, such principle not only can be incorporated in the domestic law for the protection and preservation of natural environment, but also the domestic judicial organ can apply this principle for environmental protection purposes. From this finding, the honourable Supreme Court did not look back to explain further the position of applicability of precautionary principle in India to decide environmental matters and

³³ Section 25, The Environment (Protection) Act, 1986

³⁴ Section 20, the National Green Tribunal Act, 2010

³⁵ *Vellore Citizens Welfare Forum v. Union of India*, AIR1996 SC 2715

started nurturing this principle in number of subsequent cases for successful attempt to protect and preserve natural environment.

RECENT SUPREME COURT JUDGEMENT ON PRECAUTIONARY PRINCIPLE

The honourable Supreme Court, from the year 1996 continuously applied the precautionary principle for protection and preservation of environment. Few of the important environmental matters and cases thereof have been depicted below to show how the principle of precautionary approach has been successfully applied for delivering environmental Justice in India.

In the *Research Foundation*³⁶ case, the honourable Supreme Court stated that ship breaking cannot be allowed unless the company adheres to the precautionary principle. In the *Court on It's Own Motion*³⁷ case, the apex court clearly stated that precautionary principle belongs to the core value of article 21 of Indian Constitution.

In *Orissa Mining*³⁸ case, it was stated by the forest advisory committee before the apex court that precautionary principle is the only principle available to check the irreversible damage to the environment. In *G. Sundarajan*³⁹ case, the Supreme Court stated that precautionary principle is applicable to prevent the future environmental degradation. The precautionary principle along with other international environmental principles can be of very much help for implementation of national policy to develop, control and use of atomic energy for the mankind and for financial development of the country.

In *State of Tamil Nadu*⁴⁰ case, it was stated by the apex court that the application of precautionary principle means there must be scientific uncertainty regarding irreversible damage to the environment, therefore, competent public authority must anticipate and prevent such damage by attacking the cause for such environmental damage.

Therefore, in most of these cases the honourable Supreme Court has further analysed the concept of precautionary principle and applied in different circumstances for preventing the environmental harm.

CONCLUSION

It can be concluded that among other international environmental law principles, the precautionary principle is the only principle which has the capacity to foresee possible serious and irreversible damage to environment. It is also clear that environmental

³⁶ Research Foundation for Science, Technology and Natural Resource Policy Vs. Union of India AIR 2012 SC 2627

³⁷ Court on Its Own Motion Vs. Union of India (2012) 12 SCC 497

³⁸ Orissa Mining Corporation Ltd. Vs. Ministry of Environment and Forest (2013) 6 SCC 476

³⁹ G. Sundarajan Vs. Union of India (2013) 6 SCC 620

⁴⁰ State of Tamil Nadu Vs. State of Kerala AIR 2014 SC 2407

legislations in India are not very open to expressly show the presence of precautionary principle, but indirectly with various provisions they speak of precautionary approach only. International regulation of precautionary principle, though, has not been accepted under legislation, but has found a place in national environmental policy. What is noteworthy here is that Indian Supreme Court, when found that environmental legislations cannot be of any help to determine the environmental damage which could be of irreversible nature, it is the precautionary principle which not only could foresee such irreversible damage to the environment, but also shifted the burden of proof from complainant to respondent. It is also remarkable to note that the Supreme Court in India, where based on the applicability of precautionary principle, the environmental Justice was promulgated. The journey of nurturing the precautionary principle, though, started from the Vellore citizens case, but will have to go many miles further to ensure the protection and preservation of natural environment.