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Precautionary Principle and its Application in Indian Judiciary

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ABSTRACT

The principle of the precautionary principle was defined in the Rio Declaration under Principle 15 that “where there are threats of serious or irreversible damage, a lack of scientific uncertainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. This principle helps lawmakers take immediate proper preventive measures against activities harming the environment.

However, in recent times, it has been observed that there has been an inconsistent approach by the court while enforcing this principle. Such inconsistency has caused a massive impact on the precedents being used to adjudicate and has resulted in enormous confusion regarding the proper application of the precautionary principle.

The authors will try to explain and critically analyse the precautionary principle and its interpretation in this paper. We will be critically analysing the principle’s application in the case of Vellore and Narmada Bachao Andolan (NBA case) and observing the different interpretations given by the court. We will be analysing the reasons behind such different interpretations and also be analysing other cases where the court used the precautionary principle to show that there has been an apparent inconsistency in the approach taken by the supreme court regarding the application of the precautionary principle.

I. INTRODUCTION

The principle of the precautionary principle is essential for the management of environmental/scientific risk, which is also the fundamental component of the Ecologically Sustainable Development (ESD). This principle was defined in the Rio Declaration under the Principle 15 that “where there are threats of serious or irreversible damage, a lack of scientific uncertainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” According to this principle, if any activity is a threat to the environment, then it should be prevented. The sum-up of this principle is that ‘Prevention is better than cure.

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Hence this principle can be a key player in promoting the sustainable development of the environment and society. In many environmental cases, we often provide scientific proof that can stir up concern but does not give any definitive information. The precautionary principal's role emerges for such situations where there is a strong requirement for a balance between the need to safeguard the environment and the health on one side and the foregone benefits of strict restrictions that may turn out to be unnecessary on the other.

According to Cass Sunstein, the precautionary principle enjoys international support, and there are two versions of this principle, i.e., the 'weak' version and the 'strong' version³. The weak version suggests that lack of evidence of harm cannot be the reason for refusing to regulate the principle, whereas the 'strong' version shifts the burden on those who create the potential risk to show that the activity does not threaten the environment⁴. This 'strong' version is criticised by Cass Sunstein, and according to him, it should be rejected as it will hinder creativity, innovations, etc. We see that Supreme Court inconsistently applies the principle of precaution in several of its cases. Due to this inconsistency, the principle of precaution that was stated in Principle 15 of the Rio Declaration has been expanded, therefore the authors in this paper will be analysing the inconsistency on the part of the Supreme Court using various Indian case laws and will be analysing how the concept of the precaution and prevention which the courts have used is causing confusion⁵.

II. APPLICATION OF THE PRECAUTIONARY PRINCIPLE

In the **Vellore case**⁶, the Supreme Court was presented with the issue regarding the discharge of untreated chemical effluents, which was causing harm and polluting the River Palar. The Supreme Court was shown clear evidence as to the cause of the pollution, which was the discharge of untreated chemical waste from the tanneries. It was also scientifically proven that the discharge was the cause of the pollution, and hence there was no 'scientific uncertainty' attached to it. The laws laid down at the time also opposed the action in question. The Supreme court, therefore, applied the precautionary principle. After this judgement, there was a consistent application of this principle similarly. The court would apply this principle in the cases where it was certain or foreseeable that the action in question would cause damage to the environment or the people.

³ University of Chicago Law School Chicago Unbound, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1086&context=law_and_economics (last visited Jan. 7, 2022)

⁴ *Id.*

⁵ *Id.*

⁶ *Vellore Citizens' Welfare Forum v. Union of India and others*, (1996) 5 S.C.C.

A similar application of the precautionary principle was observed in the **M.C Mehta vs Union of India**⁷ (**Taj Trapezium**) case, where it was shown that pollution was being caused by the industries which were near the Taj Mahal. This pollution was being caused as the industries were using coal for their industrial activities. the court stated, *“It is rather proved beyond doubt that the emissions generated by the use of coke/coal by the industries in the TTZ are the main polluters of the ambient air.”* Hence, there was no scientific uncertainty about the cause of the pollution. Accordingly, the precautionary principle was again applied in this case, and the court also shifted the burden of proof upon the industries. Another case where we can see a similar application of the precautionary principle is the **A.P. Pollution Control Board Case**.⁸ Similar to the other cases, the Supreme Court was given evidence that the construction of a hazardous industry near a water reservoir would be extremely harmful. This principle was applied in this case as well as there was no scientific uncertainty as to the damages which would have been caused.

In these cases, it can be observed that the precautionary principle was being consistently applied where there was enough evidence that showed to prove that there was no scientific uncertainty as to the cause of the damage/pollution. The inconsistency in the application of this principal was first observed in the **Narmada Bachao Andolan (NBA) case**⁹. In this case, a PIL was filed to oppose the construction of a huge dam on the Narmada River as the environmental impacts were extremely severe. The Supreme Court was shown evidence that such a construction would result in harmful ecological damage. This construction was also causing the uprooting of many tribal and Adivasi settlements which had been staying in those areas for years. Evidence was also shown as to the damage and trauma this construction was causing to these settlements. The Supreme Court, however, did not apply the precautionary principle. Instead, the court applied the principle of sustainable development. The Supreme Court justified its decision by stating that *“we cannot presume that there will be ecological damage just merely on the basis that the construction of the dam will result in some changes”* This clearly shows that the court was favouring the construction rather than concerning the environment. This judgement caused there to be an inconsistency in the judicial approach with respect to the application of the Precautionary Principle.

III. ANALYSING THE APPLICATION

The main criticism related to the precautionary principle is that it is ill-defined and is

⁷ M.C Mehta v. Union of India, 1988 SC 1037.

⁸ Andhra Pradesh Pollution Control Board v. MV Nayudu, 1999(2) S.C.C 718.

⁹ Narmada Bachao Andolan v. Union of India, AIR 2000 SC 3751.

ambiguous in nature¹⁰. The precautionary principle tells us only what not to do without defining the term ‘serious threat’, which weakens the legal certainty that leads to inconsistent and unprincipled decisions. But it is not only the principle that causes the inconsistency; it is also the application of this principle that must be blamed for it¹¹. This ambiguity and ill-defining character of the precautionary principle has adversely affected the outcome of the litigations in India and has led to the political economy of the environmental dispute. This can be understood by comparing the Vellore case and the Narmada Bachao Andolan (NBA) case, where contrasting judicial decisions were given by the Supreme Court. This comparison also shows the inconsistency of the judicial approach while applying the precautionary principle.

In the case of the NBA, the precautionary principle was not applied by the Supreme Court as we can see that already a large amount of money was spent initially. It should also be noted that the actual gainer from the Dam was the Gujarat Industries rather than the people residing in that area, as the construction of such a huge project would definitely result in some significant earnings¹² also, as this Dam was going to be the Second largest Dam in the world which can be seen as the factor that led to the inconsistent approach. It is also pertinent to note that the victims were the indigenous people living there for almost a decade. Therefore, it would not be wrong to say that their limited political agency and the adverse financial conditions have affected the decision. The ‘balancing out’ technique used by the court to justify the environmental damages as well as the harms caused to the settlements by citing this construction as a necessary project for economic development was seen to be heavily inconsistent with the ongoing application of the precautionary principle. Apart from this, in the case of Vellore, we see that the earners were the foreign entities from those tanneries. There were no strings attached to this project by the State, nor there was any national or international pride at stake. Hence, on one side, the ambiguity can benefit the sufferers and protect the environment from any harm, but on the other side, there is the NBA case, which suggests that there is a need for parameters in the principle. These parameters will help ensure that the ambiguity has been removed and will also bring consistency in the application of this principle.

While referring to the Brundtland Report, The Rio Declaration and Agenda 21, the Supreme

¹⁰ Jonathan Hughes, How Not to Criticize the Precautionary Principle, 31 *The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine*, 447 (2006), <https://doi.org/10.1080/03605310600912642>.

¹¹ European Commission, FUTURE BRIEF: The precautionary principle: decision-making under uncertainty, European Commission (Jan. 1, 2022, 2:24 PM), https://ec.europa.eu/environment/integration/research/news_alert/pdf/precautionary_principle_decision_making_under_uncertainty_FB18_en.pdf.

¹² The Hindu, <https://www.thehindu.com/opinion/op-ed/the-multitudes-dispossessed-by-the-gujarat-model/article29451899.ece>. (last visit Jan, 7, 2022).

Court derived three elements for the 'precautionary principle'. This principle plays a significant role on a national as well as international level. The reason behind such emphasis is that this principle helps courts take action to lessen or prevent the actions that are causing or will cause indefinite or irreversible harm to the environment and human life. The beauty of this principle is that such measures can be taken even when there is scientific uncertainty about the damage which the action in question will cause. The Indian Courts have made the precautionary principle extremely broad and ambiguous in nature by broadening the implication of the principle. The nature of the application of the principle of precaution by the Indian Courts is such that the principle takes a precautionary role in the cases where there is scientific uncertainty, while in the cases where there is irreversible damage or no scientific uncertainty, the principle takes a preventive role. This is problematic as the application of this principle is difficult in cases where there isn't well-established evidence despite there being damage or other such ambiguous cases. As there are many new emerging types of pollutions, environmental hazards, etc., the impacts of which can be new and unforceable to us in the current times, the inconsistent implication of this principle may cause unprecedented harm to the future generation¹³.

IV. CONCLUSION

This inconsistent approach by the Supreme Court has raised many doubts regarding the application of the precautionary principle. In today's world, the judgements given out by the judges have a massive impact on not only the current society but also the future generations as the precedents set must be considered. The judges, while giving judgements, especially those related to the environment, should not only consider the factors which are in play now but also consider the implications that their decisions will have on future generations. It is essential that the courts should not be inconsistent while applying the principles as it is their responsibility to maintain consistency among the cases which have been delivered. As observed in this paper, the inconsistent implication of the precautionary principle has caused a vague and subjective difference between precaution and prevention, and this ambiguity can be considered a potential threat for future judgements.

The threat of climate change is very real, and the environmental changes which have been happening around the world are slowly starting to show the horrors caused if we are careless about the environment. We must keep in mind that if we keep on harming the environment in the name of social development, we will end up inflicting irreversible damage upon the earth.

¹³ *Id.*

This is why it is essential for judges to weed out such inconsistency. Also, the Supreme Court's shifting stance on environmental issues is cause for concern today when environmental deterioration has drawn worldwide attention. Let us hope that the Indian judiciary does not overlook the importance of environmental protection alongside development in this period of development.
