

Constitution of India and Environmental Governance Administrative and Adjudicatory

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Module 01

Lecture 08

Theoretical Moorings, Sources and Evolution - Part 07

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- *re-draws the relationship between and among the Resources of the State, People and the Government- while the people are its beneficiaries, the government is its trustee, having a clear obligation to ensure its application for public good*

6. **PRINCIPLES OF LIABILITY:-** - Rooted in the Law Torts and Consumer Law - profusely made use of a set of the following principles under this, to ensure environmental protection:

(a) **STRICT LIABILITY:-** Rylands v. Fletcher - one is strictly liable for the possession of any thing that has the potential of causing harm, injury or inconvenience to any person, property or environment, in the event of it escaping from his custody - "Wild Goose Theory"- exceptions: Accidents, "Act of God" or statutory obligation-

(b) **ABSOLUTE LIABILITY:** any one, in possession of a toxic or a hazardous substance, would become absolutely liable for any damage caused by it- no exceptions- Hazardous Substances Law



A salutary effect of the enunciation of the public trust doctrine has virtually redrawn the relationship between and among the resources of the state, on the one side, the people, the second point, and the government, the third of the triangle. While the people are the beneficiaries, the government is its trustees, having a very clear obligation to ensure the application of the public resources only and exclusively for public good.

The kind of impact that this particular principle has is immense. In a way there is a clear paradigm shift in the way in which the state and state agencies would function in relation to the people and the resources, the colonial thinking about the resources being the exclusive property of the state agency, and it can do anything and everything with regard to that is gone the notion of eminent domain, giving way to the notion of public trust.

The holders of the public office hold that office and the resources in trust, in utmost confidence that one should have over the resources and this confidence that is so reposed in them need have to be exercised in such a manner that the public welfare, the public health, the public well-being is the paramount concern and consideration of a public office holder.

Interestingly, this inspiration of the higher judiciary of India or back to the western legal system as well and now what you have is a position where the western states and the countries there have invariably started looking up to the public trust doctrine as the link pin for the management of all public resources be it the forest wildlife or the land or any of the resources that belongs to the state and the people.

We now move on to yet another important principle, actually, a compendium of principles coming together under the rubric of the liability principle. This is a principle that is rooted in the common law traditions and under consumer law. And this is a principle which has been applied to make the one who is responsible for a wrong, an offensive act, responsible in every sense of the term and be on that account held liable to redress the damage that is caused to anyone.

There are three streams of the idea of liability that emerges out of it. The first one is the stream of 'strict liability' principle. As has been celebrated through a case law decided by the British courts in our pre-independence era and that has come to stay in India as well, the case of Rylands versus Fletcher. All that it refers to is that one becomes strictly liable for the possession of anything that has the potential of causing harm, injury or inconvenience to any person, property or environment in the event of it escaping from his custody.

To put it in simple terms, if I am in possession of a dangerous object, it need not to be dangerous by itself, but it has the potential to cause harm, it is my duty to ensure that that particular object is kept with me with strict supervision, control and within my custody, so that if it were to escape from my place, I become responsible, because I become fully responsible for all the consequential acts of that dangerous thing that has escaped from my custody and has caused harm to my neighbours.

A dog, for example, which I own, I need them to keep it under tight leash, tie a belt around it, hold the rope on hand, if I take it to the public place or while being in the house, keep it secure, so that anyone who comes closest to this particular area will in no way be affected by this particular potentially dangerous object. Should the dog escape from my control for whatever reason, I may be negligent and just allow it to go free or it may be that I am just holding it but still it overpowers me and goes beyond my control and bites my neighbour, I become liable.

I become strictly liable. I cannot say, it escaped my custody, or I did not notice it, you become strictly liable for the conduct of something which you had an authority and a control over and where you should have exercised complete control over that. It is also called as the 'Wild Goose Theory'. It is almost like a group of geese which move in a particular direction, slightly disturb them and each one of them go in very different directions. And the strict liability principle is precisely applicable to a wildbeast or a wild goose. Its conduct and its behaviour, for which I am the owner would become exclusively and strictly liable.

There are exceptions to this principle that supposing there were to be an accident and so it is not my negligence, it is not my carelessness, but it is just that it was something that happened accidentally. Well, I have an escaped. Or it may be an Act of God that owing to the torrential rain of the previous day, the wall to which this particular dog or the dangerous object was completely secured, the wall gave way and so the dog became free, and in the process, after it has escaped, to celebrate its liberty, it has bitten the leg of a neighbour. And in that event, I come under the exception I will not strictly become liable.

Or in circumstances where the authority will have certain kinds of functions in the state, authorized under a statutory provision, whereby his possession of a dangerous object under license with the permission and in course of his duty, he is going to harm or injure me, then he is not liable. It is called as a statutory obligation. A policeman, an armed policemen in order to maintain law and order, if he uses the weapon that is there in hand to overpower me, although it injures me, he is very much within the law.

Except these exceptional circumstances, in all other circumstances, a person who is in possession of a potentially dangerous object, which can cause harm if it were to escape or inconvenience to anyone, if it is going to get out of one's control, one becomes strictly liable.

The second stream of idea that comes out of this principle of liability is a principle of absolute liability. This is a contribution of Indian judiciary. In the case popularly known as the 'Oleum Gas Leak' case, decided by the Supreme Court of India in the year 1996. The court pronounces the absolute liability principle task, anyone in possession of a toxic or a hazardous substance would become absolutely liable for any damage caused by it.

Look at the emphasis given here; possession of a toxic or hazardous substance. So, it is not any object which is having the potential to cause harm as in the case of strict liability. But in the case of absolute liability, the one that is there in my possession is a toxic substance. It has an inherent capacity, not the potential, inherent capacity to cause harm. If it is unattended to, if it were not put under very strict supervision and control it is going to cause harm. That is the very nature and a characteristic feature of that particular object, a hazardous substance.

And if I am in possession of it, for whatever reason, even when there is the Act of God as I was mentioning earlier, if it escapes from my custody, my control and harms somebody or somebody's property, I become absolutely liable. There are no exceptions to this rule. This particular principle is brought into play in a very effective way, in the host of laws concerning hazardous substances, hazardous waste, electronic waste and things like that.

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(c) EXTENDED PRODUCER'S LIABILITY: - the obligation of the producer/manufacturer/generator of a product/ substance, towards consumer and the environment does not end with sale or transfer of it, but goes beyond the consumption of the product and extends till the unwanted by-product of the entire process and the transaction, is disposed off in an environment-friendly way -applied in cases of those residue of products and substances like, the packing material, can not easily be disposed off, with out affecting health, hygiene and environment in an adverse way-derived from the " neighbour principle", laid down in Donoghue v. Stevenson. – Lead Acid Batteries and Electronic Wastes Rules.

• IN SUM, THE FOUNDATIONAL PRINCIPLES, GIVE INSIGHTS INTO THE UNDERSTANDING THE PURPOSE OF THE LAW AND SERVE AS TOOLS OF INTERPRETATION FOR REALIZING THE OBJECTS OF THE LAW. HENCE, THEY ARE ALL THE MORE IMPORTANT, TO BE TAKEN NOTE OF, AT THE THRESHOLD LEVEL OF ENQUIRY ABOUT ENVIRONMENT & NATURAL RESOURCES LAW.



The third aspect of the liability principle is the fairly recent one, but it once again has its roots in the British law and that is the principle of 'extended producer's liability'. What does it mean?

It simply means there is an obligation of the producer, the manufacturer, generator of a product or a substance, towards the consumer and the environment. And the obligation is that this particular product, by-product or whatever, the residue of that does not end the obligation that the producer has will not end with the sale or transfer of it, but it goes beyond the consumption of the product and extends to the unwanted by-product of the entire process and that transaction is disposed off in an environment-friendly way.

What does that mean? Look, I have produced something. I have taken it to the marketplace. The retailer or the wholesaler, has taken it from me. And there ends the matter because they purchased it from there, they have paid the price, my job is over, my product is sold. And from the retailer, it goes to the ultimate consumer from whom he takes the price of the commodity and once that is done, the relationship ends. The buyer would ultimately be responsible for whatever that he had bought. There is this principle of 'buyer beware'.

I, as a buyer, before I buy something, I need have to take care that the product that I have got satisfies my expectation or satisfies whatever that product claims that it would perform. And after having bought it, having had the opportunity of scrutinizing it, verifying it for myself and satisfying myself, there ends my relationship with the seller. Thereafter, after having been wary and careful about what I buy, it is my job as to how I deal with it, how I use it and how I consume it. And if anything happens of it, I am becoming responsible for that. So it is essentially based on a consumer principle of buyer beware. But we go a step ahead here.

This principle states that the relationship between the producer, the retailer, the buyer you will not end with the sale. Even when a consumer has complete control over the particular product that he has bought, in certain circumstances, the obligation of the former would continue even beyond sale and even beyond consumption. What do you mean? The product is consumed. Yes, the product is consumed, but the wrapper, the container is still intact and the safe disposal, environment-friendly disposal of this container becomes the ultimate responsibility of the producer. That is why it is called as the 'extended responsibility of the producer'.

It would not end with the same -- with the transfer of the goods from him to the ultimate consumer, but it goes beyond that stage and he becomes liable for a proper, safe, environmentally benign disposal of whatever that remains of that particular product after consumption. This is not applicable in every situation, but it is applicable in such cases where that residue is not easily biodegradable, is not something which is going to affect health, hygiene and environment in an adverse way if it is left unattended to, so it needs a bit of a skill in disposing it off, a packaging material.

This is a very interesting thing because the position prior to the application of this particular norm, the producer used to wash off his hands of the product and what happens to the container was not his look up. And what we as consumers would do normally, we buy things and whatever the residue remains; the tin can, the old paper, the glass, the electronic waste whatever that remains, when it becomes irreparable or reuse it -- not reusable at all, we try to pack it up, put it in a bag and give it to the kabadiwala, the old paper merchant.

Now here, this principle makes it very clear. But in certain circumstances that I do not have as a consumer, the obligation of the disposal, not just the disposal from my house through the waste paper fellow, but disposal all throughout till the end that that, that particular unwanted by-product of this particular transaction is safely disposed off is not with me, it is with the one who has produced a particular product. This has been made applicable in a host of laws. We have laws concerning lead-acid batteries.

So after the lead-acid battery, once its function is over the battery waste, I do not have the obligation to dispose it off. The producer, through the retailer or by any means, has the obligation of collecting it from me and then disposing it off in an environment-friendly way, because it cannot be disposed of in a simple way. It is not biodegradable. That is the basic idea behind this.

Actually, this principle has its roots in another British case decided more than 150 years back and that is the case of Donoghue versus Stevenson. The facts of the case are very simple. There is a lady who bought ginger ale from a shop. The ginger ale was contained in an opaque glass container and nothing was visible from outside as to what was there in it. And this lady takes that bottle. It was a branded one from a very reputed company. She took it home and at home, she opened the lid and consumed.

And towards the end of the consumption of that particular liquid, ginger ale, she noticed the remains of a dead snail. She had a shock. And because of the inconvenience and difficulty that she experienced, she brought in a legal action against the manufacturer of this because she went to the shopkeeper and shopkeeper threw up his hands and then said 'look, I had this product, I used to have this particular product all the while in my company and it was being sold across the counter'.

‘I had no occasion to verify the content of it for the simple reason it came in a sealed bottle and the bottle is opaque as you could see whether I know or you could make out what exactly that is there within it. So how can I be held liable. If at all you have anything go to the producer’.

‘No, you sold it to me’.

‘You as a buyer, you should be wary’.

‘But I as a buyer, I should be careful. I agree. But my problem is that I could not really make out what exactly was there within it other than ginger ale, because the product very clearly says the ingredients are, what is there to be there in a ginger ale, nothing more, nothing less, and it is from a reputed company. I had no reason to suspect, I had no reason or an obligation to verify’.

So anyway, the shopkeeper said that he is not liable. So she brought in an action and here the court said that it is not the shopkeeper, it is actually the producer who becomes ultimately responsible. In fact, the relationship between the producer and the ultimate consumer is that of a neighbour, but as you should exercise good neighbourly relations with your neighbour and not to harm or inconvenience your neighbour, so is the case between the producer and the ultimate consumer that you need to take care, and should there be any kind of an inconvenience caused to the ultimate consumer, you become the producer, the manufacturer becomes responsible and liability can be imposed on him for well received whatever inconvenience that has been caused to the ultimate consumer.

Well, these essentially are the major principles of environment law and governance. It is not that this is an exhaustive list. Although this is only an indicative list, these are the major principles which have actually shaped, formulated and worked all the laws and policy decisions of the state in relation to the environment in India and elsewhere in the world.

To sum up, the foundation principles give insights into the understanding of the purpose for which the law has been made and it acts as a kind of a tool of interpretation for realizing the objects of the law. Hence, very important to be taken note of at the threshold level of an inquiry for a student of law trying to learn the basics of environment law and natural resource management law.

This concludes our discussion on the first module. As we move into the second module, we will be exposed to the learning of the common law and the criminal law, content of

environment law and the constitutional concerns for the protection of the environment as the next stage of our understanding of this exciting body of law.