

Journal of Multi-Disciplinary Legal Research

ENVIRONMENTAL JUSTICE STORIES & STRUGGLES: **THE LEGAL AFTERMATH OF MUMBAI OIL SPILL** **CASES 2010-11**

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CHAPTER – 1: ABSTRACT

The preliminary aim of the study pertains to the comparative analysis of the incidents of ‘Deepwater Horizon- BP Gulf of Mexico Oil Spill’ and the several accidents called as, ‘Mumbai Oil spill cases’ that took place in the year 2010 by assessing the legal and ecological consequences arising out of the negligence of the private actors. The research study has incorporated methodological and analytical approaches towards the nature and extent of liability being imposed in the cases of ‘International Marine-based Oil Pollution’ by the examination of the issue of propriety of capping the liability limits against the private parties in the events of such disasters. The research study has assessed the data collected by the organizations such National Institute of Oceanography (NIO), National Environment Engineering Research Institute (NEERI), Maharashtra Pollution Control Board (MPCB) etc. in order to conceptualize the diverse dimensions of the issue in light of the recent judgement passed by the National Green Tribunal in the case of Samir Mehta vs. Union of India¹ imposing an exemplary fine of Rs.100 crores on the private actors based upon the ‘Polluter to pay’ principle.

¹ Original Application No. 24 of 2011

KEYWORDS – *“International Marine-based Oil Pollution”, “Deepwater Horizon- Gulf of Mexico Oil Spill”, “Mumbai Oil Spill Cases 2010-2011”, “Samir Mehta vs. UOI”, “Polluter to Pay Principle”*

CHAPTER – 2: THEORETICAL DISCUSSION

2.1 THE ‘DEEPWATER HORIZON – BP GULF OF MEXICO OIL SPILL’, 20th APRIL, 2010:

The ‘Deepwater Horizon – BP Gulf of Mexico oil spill’ that took place on 20th April, 2010 must be observed as the largest environmental disaster in the past years that has led to grave economical as well as ecological damages to the society. It must be noted that the explosion that took place due to the spillage in one of the oilrigs of the ship, ‘Deepwater Horizon’ leading to the total spillage of almost 210 million US gallons of heavy fuel oil in the vicinity of the Gulf of Mexico. The issue was taken up initially by the United States Department of Justice to settle the criminal charges raised against the liable private actor, British Petroleum (BP).

In 2014, in accordance to the judgement passed by the US District Court, it was held that BP must be liable to pay all the consequent damages accruing out of the massive spillage caused due to their negligence and unsafe industrial practices.² In 2015, the Court reached an agreement with the owners of BP by imposing a huge compensation of 18.6 billion dollars upon them and furthermore, revoking the company’s right to operate and to take up future contracts in the petroleum industry. The reports shockingly reveal that there is a recurrent oil spillage of almost 300-700 tonnes per day from the site of the disaster since 2010 despite repeated assurances from the authorities confirming the sealing of the oilrig located at the ship, ‘Deepwater Horizon’.³

² http://www.eoearth.org/article/Deepwater_Horizon_Oil_Spill

³ In re: Oil spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico 148 F Supp. 3d 563 (E.D. La 2015)

2.2 THE COLLISION BETWEEN THE SHIPS, ‘MSC CHITRA’ AND ‘MV KHALIJA III’, 7th AUGUST, 2010:

The cargo ship, MSC Chitra was carrying 2600 metric tonnes of heavy fuel oil when it collided with another ship, MV Khaliya III on 7th August 2010 around 20 nautical miles off the coast of Maharashtra leading to a spillage amounting to 879 metric tonnes and 31 IMDG cargoes class -3,6 and 8 of hazardous chemicals in the vicinity of the rich ‘mangrove forests of the coastal region’. ⁴ According to the Environmental Impact Assessment Study conducted by the National Institute of Oceanography (NIO) in the year 2015⁵, it was observed that the oil spill caused Genotoxic, Neurotoxic and Xenobiotic effects on the marine life such as molluscs, zooplanktons, fishes due to the excessive over-contamination of the marine water in the affected regions of Maharashtra.

According to a risk assessment study conducted by the National Environment Engineering Research Institute (NEERI), ⁶it was assessed that the damages amounting to over Rs.525 crores should be imposed on the negligent private actors based upon the criteria such levels of toxicity of marine water, costs of cleaning-up processes etc. The research study commends the role played by the coast guards, national cadets and the workers of the Maharashtra Pollution Control Board (MPCB) in initiating an effective and immediate response mechanism to prevent the spread of oil into the coastal regions of Maharashtra through techniques such as aerial surveillance of the targeted areas, aerial oil dispersant spray systems, soaking excess oil off the critical coastal ‘ecosystems’ etc.

⁴ ‘Keynote: The role of MPCB’ during oil spills by Dr Y. B. Sontakke’ on 29th January, 2015 (Joint Director Water pollution control)

⁵ Impact of Spillage of Oil and Hazardous Chemicals in Mumbai Bay subsequent to Ship Collision on 7th August, 2010 on Marine Ecology (Interim Report) (NIO/SP-68/2010/SSP2473)

⁶ Final report submitted in April, 2013 by NEERI sponsored by MPCB

2.3 THE SINKING OF THE SHIP MV RAK, 5TH AUGUST, 2011:

The sinking of the ship, MV Rak owned by Adani Enterprises Ltd. took place on 5th August, 2011 leading to the unnatural deposition of 60,000 tonnes of coal into the seabed almost 20 nautical miles off the coastal regions of Maharashtra such as Juhu Beach, Aksa Beach etc. The reports submitted after the investigation of the causes of the malfunction of the ship reveal that the ship was not worthy to be operating on the high seas due to the expiration of the safety mechanisms and therefore, was inherently bound to sink during the transportation of such heavy quantities of choking coal.⁷

The National Green Tribunal in its landmark judgement of Samir Mehta vs. Union of India,⁸ imposed a huge fine of Rs.100 crores against the liable private actors to establish intolerance against environmental wrongs by reiterating the 'Polluter to pay' principle. Moreover, the Court directed Adani Enterprises Ltd. to immediately release an amount of Rs.5 crore to the Ministry of Shipping in lieu of the massive cleaning-up costs incurred by them. The tribunal elaborated upon questions regarding the implications of the territorial principles in determining the nature of liability, whether the sinking amounted to dumping, the risk assessment of the ecological damages caused by the negligence etc. to impose a severe liability upon the environmental wrong-doers on the basis of the calculation of the cleaning up costs by NEERI etc.⁹

⁷ 'Keynote: The role of MPCB' during oil spills by Dr Y. B. Sontakke' on 29th January, 2015 (Joint Director Water pollution control)

⁸ O.A. No. 24 of 2011

⁹ Final report submitted in April, 2013 sponsored by MPCB

CHAPTER – 3: CONCEPTUAL DISCUSSION

3.1 THE INTERNATIONAL CONVENTIONS ON ‘MARINE - BASED OIL POLLUTION’:

In 1954, the nation-states came together to conceptualize ‘Marine-based Oil Pollution’ as a ‘Collective action problem’ and thereby, signed the first ever international convention on the legal issue of the liability of private actors causing oil spills, ‘The International Convention for the Prevention of the Sea by Oil (OILPOL)¹⁰. The Convention was responsible for the immediate establishment of The Inter-Governmental Maritime Consultative Organization (IMCO) in the year 1958. Therefore, the period between the year 1954-1971 was critical in relation to the development of international cooperation and rules of liability in relation to the prohibition of instances of ‘Marine-based Oil Pollution’. The International Convention for the Prevention of Pollution ¹¹from Ships was adopted in the year 1973, and furthermore, was suitably modified in accordance to the recommendations of the international organizations as the Protocol of 1978.¹²The OILPOL and MARPOL lay down the basic legal framework to strengthen the position of the nation-states while imposing exemplary fines against the negligence of private actors and thus, embodies the rules of liability with respect to the intentional discharge of oil pollution as well as specifies the standards of safety, technical thresholds, condition of equipment etc. in relation to the precautionary principles within the broader discourse of ‘International Maritime Law’.

¹⁰ U.N.T.S I. 4714

¹¹ U.N.T.S. 1340 (p.61)

¹² Ibid

3.2 THE LEGAL PRINCIPLES OF ‘LIABILITY AND COMPENSATION’ ON ‘MARINE-BASED OIL POLLUTION’:

3.2.1 COMMON LAW PRINCIPLES OF ‘LIABILITY’:

The civil liability of the private actors has been conceptualized within the legal precedents of Common Law as the ‘Tort of Nuisance’ which attracts the principles of ‘strict liability’ as laid down in the ruling of Ryland vs. Fletcher¹³. Therefore, it must be understood that the intentional discharge of oil into the marine water can be categorized as to be liable of being imposed with strict liability that ignores the presence of proof or fault on behalf of the wrong-doer in the instances of grave environmental wrongs. Also, the tort of ‘Negligence’ incorporates the physical damage caused due to ‘Marine-based Oil Pollution’ within the discourse legal claims that can be sanctioned against the wrong-doer.

3.2.2 INTERNATIONAL MARITIME LAW PRINCIPLES OF ‘LIABILITY’:

3.2.2.1 VOLUNTARY LIABILITY:

In the late 1990s, The International Jurisprudence has prescribed voluntary schemes like CRISTAL (Contract Regarding a Supplement to Tanker Liability of Oil Pollution)¹⁴ and TOVALOP (Tankers Owners Voluntary Agreement Concerning Liability of Oil Pollution)¹⁵ to lay down obligations and duties of the private actors during sea operations concerning large quantities of heavy fuel oil. TOVALOP was designed to impose limited liability on the negligent actors whereas, CRISTAL was designed as a technique to generate emergency monetary funds to aid the cleaning-up processes, restoration processes etc. The regime of voluntary liability has a limited scope of application due to the inherent deficiencies within the broader discourses concerning the ‘Compulsory Insurance Liability’.

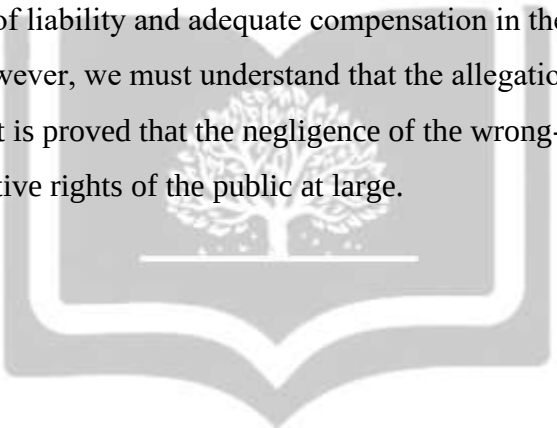
¹³ UKHL 1, (1868) LR 3 HL 330

¹⁴ Bloodworth, Susan (2018) “Death on High Seas: The Demise of TOVALOP and CRISTAL, Florida State University Journal of Land use and Environmental Law: Vol 13: No. 2, Article -5

¹⁵ David W. Abecassis, ‘The Law and Practice Relating to Oil Pollution from Ships’ 3, (Butterworth/ London/ 1st ed./1978)

3.2.2.2 CIVIL LIABILITY:

The civil liability regime has been endorsed by the conventions ratified by the nation-states in the years 1969¹⁶ and 1992¹⁷, that specified the role played by the Courts in the evolution of the doctrine of strict liability in relation to the instances of ‘Marine-based Oil Pollution’. The exceptions to the general rule have been enumerated as channelling of liability, mandatory insurance or other financial securities, etc. have been incorporated based upon the legal precedents of the past that has led to the evolution of the discourse upon ‘Compulsory Liability Insurance’ to protect the operators from suffering massive economic losses due to ‘Marine-based Oil Spills’. In 2001, International Convention on Civil Liability for Bunker Oil Pollution Damage¹⁸ was adopted to ensure standardization of the rules and procedure in relation to the questions of liability and adequate compensation in the instances of ‘Marine-based Oil Pollution’. However, we must understand that the allegations of ‘Public Nuisance’ can only be sustained if it is proved that the negligence of the wrong-doer has caused interference to the collective rights of the public at large.



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¹⁶ 973 U.N.T.S. 3

¹⁷ U.N.T.S. 1956

¹⁸ 972 U.N.T.S. 3

CHAPTER – 4: ANALYSIS

4.1 ANALYSIS OF THE ‘INDIAN MARITIME LAW’ PRINCIPLES IN THE INSTANCES OF ‘MARINE-BASED OIL POLLUTION’:

According to the 15th National Oil Spill Disaster Contingency Plan (NOS-DCP),¹⁹ that was implemented in the light of the ‘Deepwater Horizon- BP Gulf of Mexico Oil Spill’ by the Indian government was aimed at establishing Tier-I facilities in the major ports as well as the establishment of adequate oil spill response systems to combat the incidences of such environmental disasters. The legislative efforts portrayed by the NOS-DCP were inclusive of the recommendations towards establishment of coastal bio-shield, oceanographic monitoring through satellites, proper utilization of oil cess fund etc. The ‘Indian Maritime Law’ prescribes the liability of the private actor upon the onset of maritime accident based upon the legal principles codified as the Coastal Vessels Act, 1838²⁰ and Merchant Shipping Act, 1958, which has been promulgated as Merchants Shipping (Investigation of Marine Casualties Amendment) Bill, 2020²¹. The issues in relation to the liability and insurance of the merchant ship owners have been categorically laid down in the MSA within the provisions of the Part -IX, X, XA, XB, XC and XI A.²² The safeguards enumerated within the provisions of section – 352I, 352J and 352W pertain to the limitations over the capping of the liability by the private parties in the cases of negligence and also, prescribes a suitable legal framework to provide stringent adjudication over the matters like compensation, criminal liability etc.

¹⁹ CGBR 771 2015 Edition

²⁰ Act No. 19 of 1838

²¹ Refer to the Draft Bill dated 18/11/2020

²² Act no. 44 of 1958

4.1.1 ‘LIABILITY’ IN THE INSTANCES OF ‘MARINE-BASED OIL POLLUTION’ FROM SHIPS:

The legal provisions that deal with the intentional discharge of oil into the vicinity of the marine ecosystems have been classified under the Part- X of the MSA, 1958 that impose stringent punishment upon the ship owners by the reading the provisions of section-286 and section-352(1) in harmony with each other to establish the degree and nature of the negligent activities being perpetrated by the private actors. The section-352(3), (4), (6) establish the existence of a mental element during the commission of the offence on behalf of the crew members in the cases of collision, sinking etc. that lead to complex legal issues being adjudicated upon circumstantial evidence collected during the investigation.

4.1.2 ‘LIABILITY’ IN THE INSTANCES OF ‘MARINE-BASED OIL POLLUTION’ FROM TANKS OF VESSELS:

The BUNKER Convention signed in the year 2001 determines²³ the role played by the judicial tribunals in providing adequate remedies to the ‘Ecosystem people’ affected by the negligent actions of the private actors by prescribing a swift and exemplary compensation to be imposed upon the private parties if the disaster occurred within the vicinity of the exclusive economic zones or territorial waters of the nation-states. The civil liability conventions such as MARPOL²⁴, have been suitably adopted in accordance to the Indian circumstances that are implemented within the scope of the NOS-DCP by the central government to ensure the monitoring of the levels of coastal pollution across the major ports of India. The MSA is read together with the ‘polluter to pay’ principle in the cases of intentional ‘Marine-based Oil Spills’ that can be adjudicated upon by the National Green Tribunal (NGT).

²³973 U.N.T.S 3

²⁴ U.N.T.S. 1340 (p.61), 1341 (p.3)

4.1.3 ‘LIABILITY IN THE INSTANCES OF ‘MARINE-BASED OIL POLLUTION FROM OFFSHORE INSTALLATIONS’:

The part-XI A of the MSA, 1958 ²⁵ has been designed to mitigate the harm caused to the environmental dangers caused due to the malfunctioning of the offshore installations as seen in the case of ‘Deepwater Horizon – BP Gulf of Mexico Oil Spill’ that lead to the infliction of irreparable damages upon the ecological balance of the marine ‘ecosystems’ located in the oil spill-affected areas. The proviso to section-356K prohibit the invocation of the provisions of the part-XB in the incidents of pollution damages caused during the offshore oil exploration processes and must be dealt along with the beneficial construction of the provisions enumerated as the section-356(J), 356(L), 355(M) and 356(O) to empower the appropriate authorities to take immediate response measures against the negligent private actors through the comprehensive elaboration upon the degree and extent of the liability to be imposed in the cases of such environmental disasters.

4.2 ANALYSIS OF THE US MARITIME LAW PRINCIPLES IN THE INSTANCES OF MARINE-BASED OIL POLLUTION:

It is interesting to observe the example of the intentional sinking of the ship, ‘Erika’ in the Bay of Biscay that took place in 1999. In 2008, the Criminal Court of Paris passed a landmark judgement ²⁶ by imposing both civil and criminal liability on the ship-owner which served as a severe warning to the private actors to refrain from such heinous acts of environmental degradation. However, the US environmental jurisprudence has opted out of the international regime by the creation of a special law against the damages of ‘Marine-based Oil Pollution’, the Oil Pollution Act, 1990 (OPA) ²⁷ that prescribes greater degree and nature of liability to combat the negligence of the private actors along with the incorporation of additional criminal liability against the environmental wrong-doers.

²⁵ Act No. 44 of 1958

²⁶ Commune De Mesquer vs. Total France SA and Total International Ltd. (Case- C-188/07), European Court of Justice, 24 June 2008

²⁷ The Oil Pollution Act of 1990 (101 H.R. 1465, P.L. 101-380) passed by 101st US congress

The US jurisprudence due to the existence of special law on the matter has remarkably in the case of ‘Amoco Cadiz Oil Spill’²⁸ adjudicated upon the non-relevance of the contentions of ownership over the affected ‘Ecosystems’ in determining the quantum of punishment to be imposed on the wrong-doer. It must be noted that the Court held, “neither the state nor the communes has standing to assert the claims for damage to the ecosystem”.²⁹

4.3 IDEOLOGICAL ANALYSIS OF THE ECOLOGICAL IMPLICATIONS OF ‘MARINE-BASED OIL POLLUTION’:

The conclusive analysis of the research study deals with epistemological teachings of environmental justice revolutionaries such as Ken-Saro Wiwa against the reckless oil exploration activities being perpetrated by the private actor, Shell co. Ltd. in the Niger Delta region.³⁰ The suggestions of S.E. Egya’s paper³¹ relate to the centrality and continuity of the struggles of the ‘Ecosystem People’ to be a core example of the phenomena of ‘Environmentalism of the Poor’. Also, the role of eco-centric poetry has been highlighted in demonstrating the ill-consequences of the ‘Spiritual Displacement’ caused by the environmental degradation of the Niger Delta region over the years.

The structural violence being perpetrated by the state institutions in the form of ‘Slow violence’ must be conceptualized as a unity of the ‘Elements of Physical Displacement’ as well as the ‘Elements of Invisibility’.³² As Nixon pointed out through his ideas, we must critically understand the significance of socio-cultural-spatial dimensions³³ of the phenomena of ‘Slow Violence’ being perpetrated through the afore-mentioned instances of ‘Marine-based Oil Pollution’.

²⁸ In re: Oil Spill Amoco Cadiz 1998 US District Lexis 16832

²⁹ Ibid

³⁰ Civil and Environment Research ISSN 2222-2863 (online) Vol.2, No.3, 2012

³¹ Journal of African Cultural Studies 28 (1). 1-12

³² Nixon, Rob. 2011 Slow violence and Environmentalism of the Poor. Cambridge, Mass: Harvard University Press

³³ Ibid

The tarring of the beaches of Goa as well as Mumbai is a ³⁴clear warning sign that pertains to the drastic consequences of the intentional discharges of heavy fuel oil and coal in the vicinity of the coastal regions. Guha has emphasized on the role played by the local people in raising environmental claims against the 'dispossession of rights' caused to them by the negligent activities of the private actors. ³⁵Guha has also highlighted the process of annihilation of the primordial identities of the 'Ecosystem People' due to the systemic extinction of their 'Ecosystems' caused when the state-actors support the actions of 'negligent omnivores'. ³⁶ As Upendra Baxi has emphasized on the implications of the varied spectacles of development employed by the nation-states in order to justify the environmental wrongs must be understood by carefully imagining the co-existence of 'Third-Worlds within First-Worlds' and vice-a-versa. ³⁷The inherent drawbacks of the initial conceptualizations of 'International Maritime Law' have resulted in non-uniform application of liability rules as well as irreversible ecological consequences. The four-pronged approach ³⁸adopted in accordance to the epistemic teachings of the struggles of Robert Lovelace must be incorporated to combat the severe repercussions of the 'Marine-based oil pollution'.

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³⁴ <http://response.restoration.noaa.gov>

³⁵ Oxford University Press, Guha, R. and Martinez-Allier, J. (1997) Varieties of Environmentalism

³⁶ Ibid

³⁷ Third World Quarterly, Vol 27, No.5 Reshaping Justice: International law and Third world (2006), pp. 713-725

³⁸ Speaking for Ourselves by Robert Lovelace Published by UBC Press in the year 2009

CHAPTER – 5: CONCLUSION

The main objective of the research study was to draw a close parallel between the events of the disastrous oilrig explosion that took place in the Gulf of Mexico during the oil-exploration and drilling processes being carried out by the offshore drilling unit, Deepwater Horizon licensed to the British Petroleum (BP) on 20th April, 2010 and the massive collision that occurred on 7th August, 2010 between the two cargo ships namely, MV Khalija III and MSC Chitra about 10 nautical miles off the coastal regions of the state of Maharashtra. According to a report submitted by NEERI in 2012³⁹, it was submitted that the intentional discharge of long-term pollution by the private actors like Adani Enterprise Ltd. must be stringently punished by deciding upon their liability based upon the ‘polluter pays’ principle to prevent the incidence of such incidents in the future. The importance of indigenous knowledge, aboriginal epistemes and community healing has been emphasized upon through the example of the struggles of the people of Algonquin First Nation.⁴⁰ The consultative and strategic practices must be adhered to while planning a coordinated environmental struggle along with proper consideration of the far-reaching consequences of ‘representational power’ within the broader discourse of Environmental Justice. The movement must be carefully executed and the deeper intent of the struggle must be to appeal to the ‘conscience’ of the environmental wrong-doer. The conclusive implications of the research study pertain towards the economic repercussions faced by the private actors during these accidental disasters such as the collision between the ships MSC Chitra and MV Khalija that caused the stakeholders to lose 4 billion dollars of trade due to the consequences of the oil spill.⁴¹

³⁹ Final report submitted in April, 2013 by NEERI sponsored by MPCB

⁴⁰ Speaking for Ourselves by Robert Lovelace Published by UBC Press in the year 2009

⁴¹ Impact of Spillage of Oil and Hazardous Chemicals in Mumbai Bay subsequent to Ship Collision on 7th August, 2010 on Marine Ecology (Interim Report) (NIO/SP-68/2010/SSP2473)



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