

THE CRIMINALISATION OF ECOCIDE - AN INDIAN PERSPECTIVE

Isabel Liao & Tharun Pranav

Law Student, Christ (Deemed to be University), Bangalore

Introduction

In light of cases such as the Bhopal Gas Tragedy and the Oleum Gas Leak, wherein there were several injured parties, those who lost their lives, and countless victims of those who were not directly affected by the cases but were born with deformities and disabilities, the criminalisation of ecocide, a grave international crime that is gaining momentum on the international scale is something to be reckoned with. India already has criminal provisions in order to penalise the offenders. However, the current Indian government under the Modi administration plans to decriminalise environmental violations and replace them with higher penalties, according to a consultation paper that was published in July, 2022, by the Indian Government¹. In addition to this, in light of the Conference of Parties 27 (COP27), wherein the main theme has centred on climate finance and green bonds. India, as a rapidly developing nation, actively pushed for climate funds in addition to holding on to their fossil fuel “phase down” policy, as the current Indian fossil fuel market is the second-largest in Asia². This goes to show how the curbing of climate change through policies and legislations has become a lesser priority as compared to the acquisition of climate finance and funding for India - both in the domestic scenario as well as in the international forum. This paper illustrates how and why this is not a fair exchange, as this alteration would largely cater to business interests and corporations motivated by profit-making incentives, and delves into the importance of criminal liability of corporations for environmental pollution and damage in today’s world.

What is ecocide?

The term “ecocide” is relatively new, and has gained momentum in its use since the late 2010s due to an exponential increase in climate awareness and the public call for climate action. “Eco” generally refers to the abbreviation of “ecology” or “environment”, whereas “-cide” is a Latin suffix meaning “killer” or “the act of killing”³. Thus, the literal meaning of the

¹ ENVIRONMENT (PROTECTION) AMENDMENT RULES, 2022 INDIA ENVIRONMENT PORTAL, <http://www.indiaenvironmentportal.org.in/content/472602/environment-protection-amendment-rules-2022/> (last visited Oct 30, 2022).

² OIL & GAS INDUSTRY IN INDIA INDIA BRAND EQUITY FOUNDATION, <https://www.ibef.org/industry/oil-gas-india> (last visited Oct 30, 2022).

³ -CIDE DEFINITION & MEANING DICTIONARY.COM, <https://www.dictionary.com/browse/-cide> (last visited Oct 30, 2022).

term “ecocide” is the “act of killing the environment”, and the word has substantially gained substance and expanded its meaning since the spread of environmental awareness and education, as a result of the public pushing for legislative and policy changes towards climate action and curbing global warming. The roots of the word are the Greek *oikos* (home) and the Latin *cadere* (to kill)⁴.

Ecocide can be described as an act of “substantially damaging or destroying ecosystems, or harming the health and well-being of a species, including humans,” and, in other words, means “destruction of the natural environment by deliberate or negligent human action”. Examples of ecocide range from: ocean damage; deforestation; land and water contamination; and air pollution. Such large scale, harmful industrial activities have ultimately been the cause of the climate emergency, which calls for the necessary action to be taken in order to abide by the objective of sustainable development and steady growth that will not harm the natural environment.

In both the domestic and international contexts, environmental experts have demonstrated the need for the criminalisation of ecocide. Under international law and the Rome Statute, making ecocide a crime, especially in times of war, has been globally encouraged. This has also been codified by ten countries⁵. It has been proposed that ecocide should be a crime punishable by the International Criminal Court⁶. In addition to this, American environmental theorist Patrick Hossay has stated that the “human species” is causing an “ongoing extinction and ecocide”⁷. This has often been associated with the rapid and ever-growing increase of consumer demands being met with the supply of unsustainable practices by corporations, fuelled by a capitalistic environment. In the domestic opinion, critics have indicated there is a strong need for the usage of criminal punishments for violations of environmental law⁸. India’s rapidly developing economy, the vast infrastructural changes that have been taking place, and primal focus on poverty eradication have led to unsustainable practices and an unprecedented rate of

⁴ TO STOP CLIMATE DISASTER, MAKE ECOCIDE AN INTERNATIONAL CRIME. IT'S THE ONLY WAY THE GUARDIAN, <https://www.theguardian.com/commentisfree/2021/feb/24/climate-crisis-ecocide-international-crime> (last visited Oct 30, 2022).

⁵ R. D. WHITE & DIANE HECKENBERG, GREEN CRIMINOLOGY: AN INTRODUCTION TO THE STUDY OF ENVIRONMENTAL HARM (Routledge) (2014).

⁶ R. D. WHITE & DIANE HECKENBERG, GREEN CRIMINOLOGY: AN INTRODUCTION TO THE STUDY OF ENVIRONMENTAL HARM, pp. 45-59 (Routledge) (2014).

⁷ PATRICK HOSSAY, UNSUSTAINABLE: A PRIMER FOR GLOBAL ENVIRONMENTAL AND SOCIAL JUSTICE (Zed Books) (2006).

⁸ COMMENTS ON THE PROPOSED DECRIMINALISATION OF FOUR KEY ENVIRONMENTAL LEGISLATION VIDHI CENTRE FOR LEGAL POLICY, <https://vidhilegalpolicy.in/research/comments-on-the-proposed-decriminalisation-of-four-key-environmental-legislation/> (last visited Oct 30, 2022).

industrialisation that have had adverse effects on the environment, and thus stronger laws coupled with the threat of imprisonment would therefore deter such behaviour.

Thus, ecocide is largely regarded as the intentional causation of large-scale environmental damage during times of war⁹ – and the call to action for its criminalisation is seen as a means for the Rome Statute to eventually make it a crime punishable by the International Criminal Court. On the other hand, domestic laws regard ecocide on a relatively smaller scale, and use the term to coin the general damage to the environment caused by various entities ranging from individuals to large enterprises within a country.

While the definitions above largely pertain to international law and order, this paper aims to apply the object of “ecocide” as a criminal act within the country to a national level. It is important to note that there is a marked distinction between minor offences (such as smoking in prohibited zones, etc., that are on a much smaller scale) and large-scale violations of environmental law (for example: wildlife crime; illegal mining; dumping illicit trade and hazardous waste, etc.). Keeping this distinction in mind, the paper funnels into the criminal liability of corporations that are motivated by their profit-making motive in order to act in their self-interest and thereby cause major damage and pollution to the larger environment. The actions of criminal liability and current governmental plans on decriminalisation that largely cater to corporate interests, are analysed from a criminal jurisprudential point of view.

Current Environmental Legislations in India

The current legislations that govern Indian environmental jurisprudence are: the Air (Prevention and Control of Pollution) Act; the Water (Prevention and Control of Pollution) Act, the Environment (Protection) Act and the Public Liability Insurance Act. These four laws, as their names suggest, govern the quality of air and water resources, regulate the methods of protection of the environment, and put forward the penalisation of violators through the satisfaction of legal principles and doctrines such as public liability. The current laws have paved paths for ground-breaking judgements made by the legal authorities, such as *M.C Mehta v. Kamalnath* (1996)¹⁰ and *Union Carbide Corporation v. Union of India* (1989)¹¹. Environmentalists and policy experts claim that, though there is a need for reform for the current laws, the overall decriminalisation of environmental laws would not be helpful. All of

⁹ Prisca Merz, *Ecocide: Prisca merz argues it is now time to act against the large-scale damage or destruction of ecosystems*, SOCIALIST LAWYER , 16–19 (2014).

¹⁰ M.C. MEHTA VS KAMAL NATH & ORS (1997) 1 SCC 388.

¹¹ UNION CARBIDE CORPORATION VS UNION OF INDIA, 1990 AIR 273, 1989 SCC (2) 540.

these laws have provisions for fine and/or imprisonment, which is a method used to deter behaviour that could violate the laws set in the Act. However, it is pertinent to note that these laws have not been updated, reviewed or reformed in many years, which is why policy experts believe that the new intention of the Indian government would be counterproductive to their desired goal. Although the word “ecocide” is not mentioned in any of the Acts, the objectives of the Acts pan out to the ultimate goal of the protection of the environment and to take the necessary steps towards climate action and India’s pledges in the international forum, for example the Paris Agreement in 2015, etc. So, the term “ecocide” can be understood implicitly through the objectives of the various Acts.

The current environmental legislations have only just begun taking steps towards producing tangible results in holding corporations and companies criminally liable for their actions in causing damage to the environment. For example, in the case of *Union Carbide Corporation v. Union of India (1984)*,¹² wherein there were several victims of the Bhopal Gas Tragedy, the aggrieved were barely compensated, and the Indian Government had largely taken responsibility for the victims by providing specialised hospitals for them and attempting to treat the contaminated groundwater as an aftermath of the leakage, while the criminals had fled the jurisdiction. The criminals who were liable for the disaster, mainly the owner of the foreign company who refused to pay for maintenance of the pipes from which the methyl isocyanate had leaked from, were never punished. This has led to widespread grief as they were never brought to justice and the victims and their families who would suffer for generations after the disaster will never get the closure that they are entitled to. The corporation as a whole was held criminally liable, and it was later known as the worst gas accident in history. Similarly, in cases such as *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh* and *M.C. Mehta v. Union of India*, the corporations were subject to orders from the Court, and these types of corporations are graded as the fourth-highest group of organised criminal activities that occur across the globe¹².

¹². SHOULD COMPANIES HELD LIABLE FOR THE ENVIRONMENTAL DAMAGE THEY CAUSE, INDIAN JOURNAL OF CORPORATE LAW AND POLICY, <https://ijclp.com/should-companies-be-held-liable-for-the-environmental-damage-they-cause/> (last visited Oct 30, 2022).

What does the Indian government aim to do?

In July, 2022, the Indian government had released the amendments that it plans to make based on a consultation paper¹³. This consultation paper had later manifested itself into a proposal for amending the four environmental legislations, seeking to decriminalise offences under the same, meaning that; although there will still be provisions on the payment of fines, there will be no threat of imprisonment or jail time. The proposed amendments, therefore, seek to make three major changes:

1. The First change that they plan to take is to *replace imprisonment with higher penalties* for majority of the violations presently considered as offences under these laws¹⁴.
2. In addition to this, the proposed amendments also intend to appoint “*Adjudicating Officers*” under each of the Acts to allow the quantum of penalties to be determined.
3. Lastly, the amendments also aim to empower the Central Government to establish three new funds, namely: the Environmental (Protection) Fund, the Water Pollution Remediation Fund and the Air Pollution Remediation Fund, under their respective Acts; where penalties imposed in case of contraventions shall be credited under the EPA, Water Act and Air Act respectively¹⁵.

Thus, the Indian government plans on lifting the threat of criminal liability given for the commitment of “ecocide” in these environmental laws altogether, due to their concern with the consequences of the actions of one set of actors only¹⁶. This is because of the fast-paced industrialisation coupled with the desire to have a boosting economy, that many of the pollution-related activities are outsourced from companies in countries that have much stricter legal standards when it comes to environmental pollution. Therefore, the government felt the need to intervene and “insulate” these economic entities from disruptions¹⁷.

¹³ CONSULTATION PAPER ON PROPOSED AMENDMENTS IN THE FOREST (CONSERVATION) ACT, 1980 MINISTRY OF ENVIRONMENT, FOREST AND CLIMATE CHANGE , http://environmentclearance.nic.in/writereaddata/OMs-2004-2021/263_OM_02_10_2021.pdf (last visited Oct 30, 2022).

¹⁴ COMMENTS ON THE PROPOSED DECRIMINALISATION OF FOUR KEY ENVIRONMENTAL LEGISLATION VIDHI CENTRE FOR LEGAL POLICY, <https://vidhilegalpolicy.in/research/comments-on-the-proposed-decriminalisation-of-four-key-environmental-legislation/> (last visited Oct 30, 2022).

¹⁵ *Supra*.

¹⁶ NEW RULES OFFER COMPENSATION, NOT FREEDOM FROM POLLUTION HINDUSTAN TIMES, <https://www.hindustantimes.com/india-news/new-rules-offer-compensation-not-freedom-from-pollution-manju-m-and-kanchi-k-101657287924441.html> (last visited Oct 30, 2022).

¹⁷ *Supra*.

Issues

There are various issues with the steps that the Government under the administration of Modi plans to take, that encompass matters on compensations, funding, and remaking the entire mechanism. By making it a green finance issue and completely exempting big corporations from any criminal liability, the government is lifting the burden of dealing with legal action from them. To begin with, removing the provisions of imprisonment from environmental laws in its entirety will defeat the original intent for the protection and improvement of the environment as mentioned in the preamble of the EPA. To deter people from committing grave violations, the criminal provisions must be retained. In addition to this, the quantum of penalty being proposed in each of the Acts is too low to effectively deter violations, especially where the profit from violations outweighs the amount of the penalty¹⁸. Therefore, to sum up, the issues are:

1. Removing the provisions of imprisonment from environmental laws in its entirety will defeat the original intent for the protection and improvement of the environment as given in the EPA.
2. The quantum of penalty being proposed in each of the Acts is ineffective.

The entire purpose of criminal law, as we have learnt in class, are:

1. Punishing criminals;
2. Deterring individuals from committing a crime;
3. Reforming society through methods such as admonishing and probation;
4. And most importantly, compensating the aggrieved party fairly.

It is important to note in this case that the “other party” are not just the environmental authorities or the Indian government. The “other party”, in matters such as the well-being of the environment that are inherently intrinsic to the land, are the generations to come. In environmental law, the factor of “intergenerational equity” is stressed upon, as it is largely believed and agreed upon that the current generation should use the resources that have been given to them without compromising the future generations’ ability to utilise these resources as well. It is also widely believed that we have not inherited the Earth from our ancestors, but have borrowed it from our children. While a representative of the “future generation” cannot

¹⁸ *Supra*.

stand before the Court, organisations and authorities can definitely represent their interests. Therefore, the criminal liability of corporations turning deviant should not be taken away and been rid of by the Indian government. It is important to make provisions and legal mechanisms wherein the strength of criminal law and procedure as well as the object of environmental legislations are utilised to the greatest extent of their abilities, powers and functions.

The future of Indian Environmental Jurisprudence

There have been conflicting opinions on the proposed amendments – ranging from making a different guidance model and retaining the criminal liability provisions in the Acts to bringing in civil liability in order to make court procedures more convenient. However, the government must take a stance with regards to the situation with the environmental laws in order to further the principle of intergenerational equity and for the larger public interest.

According to some policy experts, the proposed amendments of having higher penalties and being rid of criminal liabilities is a model that will not work because these economic entities still need to be held liable in the eyes of the law. However, this set of experts believe that using a legal model based on civil liability would be more effective. As the government may not want to criminally prosecute economic entities that are important to Indian society, and are generally law-abiding actors, the procedure of a criminal case would be too much to bear for both parties involved, ranging from the greater burden of proof, so the limited resources to generate evidence and the long-drawn prosecution procedures¹⁹.

In addition to this, it has been argued that there should be a layered guidance model to assess the penalty amount, as well as a set of guidelines for the adjudication process to be fair and streamlined. This should also be in coherence with the strengthening of “special violations”, that take place often with companies and corporate entities that conduct large-scale operations and therefore have more disastrous consequences on the environment than those causing minor violations of the law and thereby not having as adverse effects. Lastly, to make an effective contribution towards monetary relief, there have been proposals made to have an amalgamation of funds in the existing Environmental Relief Fund (ERF)²⁰.

¹⁹ NEW RULES OFFER COMPENSATION, NOT FREEDOM FROM POLLUTION HINDUSTAN TIMES, <https://www.hindustantimes.com/india-news/new-rules-offer-compensation-not-freedom-from-pollution-manju-m-and-kanchi-k-101657287924441.html> (last visited Oct 30, 2022).

²⁰ COMMENTS ON THE PROPOSED AMENDMENTS TO ENVIRONMENTAL LAWS VIDHI CENTRE FOR LEGAL POLICY, https://vidhilegalpolicy.in/wp-content/uploads/2022/07/Comments_Decriminalization_Environmental_Laws_VCLP_21072022.pdf (last visited Oct 30, 2022)

Conclusion

As the Indian government is often found in a special spot due to international pressure for sustainable development as opposed to its need for economic prosperity, it has been contended that the decriminalisation of the provisions given in the environmental provisions would defeat the original intent for the protection and improvement of the environment as given in the preamble of the Environment Protection Act. This would also feed and cater to one section of society, as corporations and companies are those that contribute the most out of all individuals to environmental damage and pollution, but could easily cater to and budget for the higher environmental penalties if the laws are changed. In addition to this, while decriminalisation does not give these economic entities the “freedom to pollute” it does rid them of the threat of criminal liability and imprisonment, and the proposed civil liability and payment of fines and damages is precisely what these economic entities budget for²¹. In conclusion, the Indian perspective of criminalising or decriminalising ecocide is still a topic of heavy debate, though the objectives of intergenerational equity as well as the Right to Environment must be protected at all costs.

²¹ *Supra.*