



THE USE OF CRIMINAL JURISPRUDENCE FOR COMBATING ENVIRONMENTAL ISSUES IN PAKISTAN

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Abstract

Our country is going through the phase where color crimes boomlet, we have waves of offences which endangers health of the general public, jeopardizes workers and safety of the consumers as well as threatening our very existence through environmental crimes. Indeed those people who commit crimes against the environment even the organized groups need to be held accountable and brought before justice. Sometimes these criminals take advantages from the loopholes that exist in environmental laws to put the lives of thousands of people and the survival of various animal species and plants. This study examines the efficacy of criminal jurisprudence for environmental protection and further investigates the conditions and general preventions in criminal environmental context.

Keywords: Criminal Jurisprudence, Environmental Issues, Public or Private Nuisance.



1. Introduction

The original response to a criminal offence is a criminal prosecution in terms of fine and/or imprisonment which are certainly suitable for certain criminal acts. But now there is greater realization that the circumstances, in which we are today, are very diverse. Sometimes it is due to carelessness and sometimes due to our negligence that we are developing such a great range of environmental sanctions in shape of imprisonments, fines, undertakings, publicity orders and the challenge now for regulators has somewhat called the integrated approach. It is often said that the devastating environmental issues that the current generation is facing entirely the failure of our criminal as well as civil protection system to deter people from damaging acts (Himmelhoch 1992). Indeed those people who commit crimes against the environment even the organized groups need to be held accountable and brought before justice. These people after committing such illegal acts either go unnoticed and hence unpunished, or the crime is deemed incidental whereby very low administrative actions are taken against them. Thus much remains to be done and that is the reason that we need to work on our legal system in order to develop a holistic approach which could criminalize and bring justice to those who are responsible for environmental crimes.

2. Research Objectives and Methodology

The prime purpose of the study is to investigate every possibility to use criminal jurisprudence as a means to control environmental hazardous acts of individuals or corporations. The study further examines various conditions which are deemed necessary for penal laws to serve generally a preventive purpose. In order to achieve the above purpose empirical material consisted of both primary data (leading cases and court proceedings) and secondary data in form of existing printed material (law books) is carefully consulted. Due to dearth of existing literature on the problem in hand, major focus remained on criminal jurisprudence and on the basis of available data the matter was discussed in major themes such as environmental protection, criminal sanctions, environmental compliance, and conclusion.

The importance of environmental protection by means of criminal laws can be traced from examining various trends that co-exist in contemporary criminal laws. There are two different trends in criminal jurisprudence which though seems contradictory but in reality both are linked and offer the same purpose under the same philosophy (Morris 1972). One philosophy tends about decriminalization of certain crimes like vagrancy, use of drugs individually also called de-penalization. This concept is a response to two basic requirements. The first one is the substantive philosophy which consists of reconciling a



penal law protected interest by punishment in terms of basic values enforcement. The second one is functional philosophy which aims to reduce burden on courts and letting courts to deal with cases of most serious nature. These concepts are very closely connected rather consistent with the philosophy which aims that much criminal behaviour is technically associated with activities that are responsible for impairing human health, well-being and safety of the public at large (Lazarus 1993). To protect environment through use of penal sanction is the basic example of extension of the criminal laws.

Notwithstanding the efficacy of penal sanctions for environmental protection, the penal sanctions are just complements of other regulatory actions. Hawke recommends that penal sanctions from environmental perspective should supplement and support prevailing offences regarding land, air nature and water protection (Hawke 1987). The relationship of environmental law with criminal law can be described as a system for protection of environmental crimes by the use of penal sanction. However, there exists important limitation in this relationship due to special nature of environmental laws. Due to its unprecedented nature in the history, it is sometimes known as virgin law, for reasons that in the last few decades some very important environmental legislations took place and still in the process of proliferation (Hawke 2002). The fact is that, a criminal sanction must be adapted to that area of law where there is lack of stability in terms of giving an effective and reliable result.

The criminal justice response for the sake to prevent environmental crimes has to be stepped up as it is considered that the existing environmental legislation is not enough. It is broad, general and too flexible, leaving a huge impunity gap (McMurry and Ramsey 1986). This is the main reason that stakeholders must work and cooperate in order to define clear offences for those activities which damage the environment and also impose precise sanctions for them. We need to strengthen international cooperation including the law enforcement, much more to be done by the judiciary in particular when it comes to those environmental crimes that are linked to organized crimes and the crimes that damage both physical as well as social environment (Hedman 1990).

Politicians are responsible for passing environmental laws as said by one European member of parliament that “we are good midwives but bad mothers” by this she meant that parliament is very good at passing laws but sometimes it ends its implementation (Vercher 1989). In fact it is one of the most important thing which should be done. When we pass a law we have to ask for its enforcement as well as its proper implementation but it does not happen in our country it is a reason that we are facing the setback in this area of law.

3. Relevant Penal Sections for Environmental Protection



The very first commission of criminal jurisprudence formed for the United India was chaired by Lord Macaulay with a chief purpose to draft a Criminal Code (Jabeen, Huang et al. 2015). This code in its 14th chapter included 28 sections (section 268 to 294A) looked into Public Nuisance and the matters related thereto even in the early 1860s. The 14th chapter was placed with the aim to insure the convenience, safety and public health of the community at large as they are facing some serious hazards in shape of water, soil and air pollution by enlisting all those acts which are considered as threats for the human lives to be punishable. In other words, we can say that the acts which endangers the life of the citizen of Pakistan shall be punishable and the ambit of penal laws shall cover it. Here it worth mentioning the ambit of section 14 of the Penal code; it covers Nuisance (Public and Private nuisance), acts relating to human health in general, convenience, safety, morals and decency. It is one of the settled and clear principle of law that companies cannot escape their criminal liabilities.

The mere fact that a company is not a natural person rather a juristic entity does not helps in exemption from a criminal consequence (Pereira 2007). In this regard section 11 of the Penal Code is very clear and it defines person in terms of body of persons, association, company and any other body so combined under any name. Furthermore, the provisions which deals with contamination of water does not take intention or mens rea into consideration. Rather it deals with negligence that every human being is blessed with the power of common sense and duty of care as not to contaminate any natural water channel as to make it dangerous/hazardous to any human or animated life that consumes it. All those acts which cause spoliation of water resources are directly or indirectly associated with, public authorities, companies/corporations or even private persons (Jahan 2012).

3.1. Object, Applicability and Scope of Section 133

Usually section 133 is attracted when there is a threat of serious nature to human health (PLD 2012). It must be kept in mind that one of the requirements to take action under this section is that if the magistrate does not take appropriate action and directing people for recourse the ordinary courts of law, there is a strong likelihood that irreparable loss might be caused (AIR 1949). The section gives some of the Extraordinary powers to the magistrate that are supposed to be exercised under some extraordinary situation by virtue that the matter cannot be addressed by any other ordinary law due to extreme insurgency. It is pertinent to mention that only those cases shall be dealt under this section which offers no other remedy and reasonable time, if there is reasonable time and option available under ordinary laws the magistrate is not supposed to entertain the case (1897 Punjab). This exceptional power of the magistrate is supposed to be put in to practice after taking all the precautions and fairness into consideration (1888 Punjab) in order to confirm



it, this power of the court should not become a nuisance for the general public(AIR 1949).The guard or the consequences shall be on the shoulders of concerned magistrate deciding the matters on the substitute for settling private disputes (AIR 1942). The powers of the Magistrate to look into the environmental matters under this section are not ousted by the Pakistan Environmental Protection Act,1997(2011 HC).

3.2. Remedies for Public Nuisance

Various remedies in case of Nuisance are available to the general public which includes remedies under civil procedure, Pakistan Penal Code and other local laws are basically concurrent in nature, while dealing with the issue of nuisance they shall not bar other. A proceeding initiated under this section shall not be a bar or precedent for the prosecution under our Penal Code (1869 Rat.23). Where the civil right is still to determine the jurisdiction of the Civil Court is not barred, here the determination of the right made by the civil court shall have the prevailing value over any determination made by the magistrate under 133 or any other section of law.(PLD 2000)Similarly by virtue that there exists any other remedy to the plaintiff does not disqualify magistrate to entertain any case presented before him for adjudication (AIR 1920). Thus, if the petitioner has a remedy under PLC Ordinance, this does not mean that the district magistrate has no powers to deal the case under section 133 of the code(PLD 1974).

3.3. Noise

Noise made while carrying on some lawful trade shall also be considered as a nuisance if there appear sufficient evidences that the noise is injurious to public health(PLD 1968). Similarly a working engine that makes sufficient amount of noise or a mill that makes noise to the extent which causes serious trouble to the neighbors in their sleeping by night shall be considered nuisance(AIR 1931).

3.4. Injurious to Health

Section 133 also empowers the magistrate to make an order preventing the waste discharge from any factory or setup into a natural water resource or river thereby making its water hazardous or noxious which can become injurious for the health of human or animals in the community (AIR 1926). But in case of no effect on human health such as a tannery, a setup of bricking or line-kiln cannot be stopped on this account (AIR 1920).

3.5. Danger to person Necessary



For the fulfillment of the conditions provided under section 133 it is sufficient that the danger is appeared to the neighbor. Even about to fall tree, wall or even toxic waters is sufficient to attract this section, same is the case with any kind of dangerous business conducted in the locality (AIR 1959).

3.5.1. Procedure

Section says that when it is brought into the notice of magistrate that there is a hazardous trade carried by someone, then the magistrate is supposed to pass “Conditional Orders” against the person carrying such trade to desist from doing so or to regulate his trade in the directed manner. Subsequent section provides about the manner in which the section is to be served on the concerned person. Section 135 provides that the person against whom the conditional order for further compliance is made shall either comply in manner provided or he shall appear before the concerned court and show cogent reasons for non-compliance. Furthermore, section 136 of the Act provides in case of failure to comply or appear before the court, the person shall be subject to the penalty as prescribed under section 188 and the conditional orders shall be deemed as absolute. Section 137 provides that in case the person is appeared with a cogent reason and if the magistrate thinks fit that the issued order was not justified and proper then he may stop further actions to be taken under the order. If contrary then the conditional order as issued shall be made absolute. (2000 Cr.P.C) In this regard, the Code of Criminal Procedure in its chapter X provides details for maintaining public tranquility and public order in the society where as section 133 to 144 of the same Code looks into the matters of Public/General Nuisance. However the powers exercised in relation to these issues are confined to magistrate concerned by virtue of 133 to 144 of the said Code.

Under Section 133 it is provided that whenever Magistrate, or Sub Magistrate or even any other executive magistrate empowered in this regard by the concerned Government, received information from any other source or by any police officer or on the production of other evidences which he thinks sufficient considers;

- i. That this unlawful nuisance or obstruction needs to be removed from a public path/place or any public road or channel or river, which is or may be used by general public often or regular; or
- ii. The conduction of trading/occupation, or keeping any good or merchandise is not safe and might be injurious or hazardous to the peace, prosperity or health of general community, thus needs to be regulated, prohibited, restricted or removed; or



- iii. That constructing any building, disposing any injurious substance regarding which there is the likelihood of being inflammable, conflagrations or even explosion need to be stopped or prevented; or
- iv. There exists a threat in the community in shape of a setup, tent, building, signboard, tree, structure or any other hazard in a state of situation where there is a likelihood of being falling and thus making the lives of people in danger, consequential to which the work of its repairing, providing vertical or lateral support or even its removal is necessary; or
- v. There is a danger in form of well, adjacent excavation or water tank/reservoir at public place, way or dwellings which needs to be covered up, fenced or cured in what way necessary; or
- vi. That there is a dangerous or untamed animal which needs to be caged, confined, destroyed or deal with any other manner.

Keeping all the aspects in mind the magistrate may issue, if it pertains to a person, any conditional order regarding the obstructions, nuisance, any hazardous activity, holding such merchandise or goods, possessing, constructing any setup, substance, structure, doing any excavation, in possession of tank, reservoir, tree or owner of any deadly or untamed animal within such specified time to be fixed accordingly by ordering;

- a) Of removing the nuisance or any other obstruction; or
- b) Desisting from its carrying or removal, regulating in the directing manner any conducted business, trade, goods or merchandise or to regulate such activities in any manner as prescribed by the concerned magistrate; or
- c) Stopping, preventing any person from construction of a building or structure or even to alter the designed substance or structure; or
- d) Removal, repairing or supporting any tree, structure, sign-board, tent or other building which needs such support; or
- e) Fencing, covering any excavation, tank or well etc.; or
- f) Destroying, taming, confining or disposing off any of the dangerous, wild and untamed animals as may be directed by magistrate concerned; or
- g) In case he raised any reservation/objection so as to appear in person or through his agent before magistrate/other subordinate in the manner, time and place specified in the order, shall show the solid and appropriate cause as to why he shall not be dealt in the order provided hereinafter and making shall order absolute.

Subsection provides that any such order of the Magistrate cannot be questioned in any of the civil courts. "Public Place" here public place shall cover any state property, camp ground any un-occupied property for re-creative or sanitary purpose.



3.5.2. Nature of Nuisance

It is the duty of the competent court to decide whether it is public or private nuisance keeping in view the material facts placed before it and cannot be decided upon the constitutional jurisdictions. Thus, the high court shall only determine the finding or conclusions of the below tribunals or courts which are based on facts and evidences whether they have observed or failed in recording proper evidences in the concerned case (PLD 1985).

3.5.3. Order Passed without Hearing

In case where the orders are passed by the relevant court in the absence of petitioner or where the opportunity was not granted to the petitioner and order was issued during the pendency, the High court can set aside the impugned orders in exercising the power of writ jurisdiction (NLR 1985).

3.5.4. Order Passed without Inquiry

Where objections are made against the orders of magistrate, the magistrate is required to hold an inquiry under section 137 of Cr.P.C. The magistrate shall further record the evidences. However an order made by magistrate in the absence of conducting inquiry, can be set aside by high court and will be directed to follow the relevant law observing strict adherence (PLD 200).

Research in the criminal laws needs always to move with time, pondering how to prosecute a person guilty of lettering which is certainly a matter of less interest today. Environmental crimes are comparatively new that represents new development, using criminal sanctions in developing countries in particular. Keeping in view the prime principle of an organized society, there criminal law is something more than managerial instrument especially in countries adopted entrepreneurial role. Similarly, the support towards penal sanctions, the perception regarding penal laws of the general public is in the way, the criminal jurisprudence functions and operates in a very systematic and coherent way. On the other way, any misuse of penal laws might result in retaliation or even mistrust, extreme reaction, unpopularity among the public and frustration.

4. Conclusion

This fact must be kept in mind that an environmental crime is a crime just like any other crime. For instance a new crime “albeit” has emerged due to economic, social and



industrial growth. For the appreciation of penal nature of environmental disruption, there is a need of expanding traditional meaning crime, the conventional criminal for the purpose to cover gray areas that perpetrate industrial and socio-economic wrongs against the community. A slow but significant evolution of the use of criminal jurisprudence for environmental protection has been witnessed in some of the European states. Most of them either due to their political structure or social characteristics or may be due to special circumstances utilized various degrees of criminal penalties for protecting the environment. States still in order to handle serious environmental issues, use criminal laws as last option. Criminal system gives serious warnings regarding potential, serious infraction of environmental codes, which the country as industrial manager imposed on itself to meet the economic ends.

A major development over the last ten years or so has been the growth of networks of the body responsible for enforcement of environmental law, prosecutors responsible for criminal prosecution and even judges concern with environmental law. This network allows these bodies to exchange prospective to learn from each other and compare what is really going on in the field of environmental laws enforcement mechanism

Looking to the future for those responsible for the enforcement of environmental laws is to ask themselves that why we are doing this...what is the purpose of this all...and that means developing very sophisticated and rigorous outcome measures. This will require both the scientists and the lawyers to work very closely together to come up with measurements which will work and will provide the best information on how effective our protective and enforcement mechanism is.



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