5.1 INTRODUCTION

As brought out in Chapter 4, the major contribution of the Supreme Court to human rights jurisprudence has been enlarging the scope of Article 21 relating to right to life and including within it’s ambit the right to safe and pollution free environment. A vast body of case law has been developed favouring the right to a clean and healthy environment as a fundamental right within the meaning of right to life under Article 21 of the Constitution of India⁶⁰. This step by the Supreme Court of India has been hailed by some scholars as the most inventive step towards the fundamental rights of the citizens (Amirante, 2012). This chapter brings out the powers of the judiciary and discusses through case law and the significant decisions handed down by the Supreme Court in favour of a right to environment and the principles established for protection of the environment and human rights of the people affected by environmental degradation.

Despite the positive role played by the judiciary in pronouncing a number of landmark judgements in pollution related cases and interpreting the right to a healthy environment within the meaning of right to life, the chapter highlights two important cases, namely, the Sardar Sarovar Project (SSP) and the Bhopal Gas Disaster case in which it’s approach was contradictory to its activist stand. It fell short of meeting the public expectation in providing relief to the communities affected by large infrastructural development projects and to the victims of mass disaster. It did not consider the long term cumulative effects of mass disasters that adversely impact not only the present generations but future generations as well.

⁶⁰ Article 21: Protection of life and personal liberty -No person shall be deprived of his life or personal liberty except according to procedure established by law.
5.2 THE CONSTITUTIONAL STRUCTURE AND SEPARATION OF POWERS

The formal legal system in India is based on a written Constitution, effective since 1950. The democratic setup is based on the doctrine of separation of powers, a theory propounded by Montesquieu in 1748, in his book De l'esprit des lois. The pronouncement on this aspect of law by the courts is that under the Indian Constitution there is a broad separation of powers between the legislature, the executive and the judiciary, each having its own constitutional responsibility, (Venugopal, 2012). India was founded as a democratic welfare State which allows equal opportunity to all, irrespective of caste, creed, colour, sex or any other form of discrimination. The concept of rule of law is entrenched into the Indian polity and parliamentary democracy was chosen as the form of Government. An important feature of the Constitution is the system of checks and balances between each of the institutions. The three organs of the State being co-equal with a broad division of powers between them, they would not be entitled to encroach upon the area, jurisdiction and powers distributed by the Constitution (Venugopal, 2012).

India incorporated a number of basic human rights as fundamental rights that are sacrosanct in the Constitution such as freedom of expression, right to life and liberty, equality before law and protection against discriminatory laws. In addition, largely drawn from the Universal Declaration of Human Rights, it incorporated certain ‘Directive Principles of State Policy’ (DPSP) which are principles that are fundamental for the governance of the country. The purpose of the Fundamental Rights, on the one hand, and the Directive Principles, on the other, is complementary (Muralidhar, 2010).

In order to ensure that the promises made by the Constitution would not remain merely on paper, the Constitution-makers provided for an independent judiciary. The Judiciary is invested with the power to ensure that all organs of the Constitution act within the respective constitutional limits (Srikrishna, 2009). The Supreme Court is at the apex of the legal hierarchy. The Supreme Court has the power to issue

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61 (The Spirit of the Laws)  
62 Constitution of India. Part III. Articles 12-30 Available at lawmin/nic.in. p 6-20  
63 Constitution of India. Part IV. Articles 36-51. Available at lawmin/nic.in p 21-24  
64 Article 37, Constitution of India.
writs\textsuperscript{65} under its original jurisdiction for infringement of Fundamental Rights guaranteed by the Constitution. It has Appellate jurisdiction\textsuperscript{66} in certain civil and criminal matters. The Supreme Court acts as a watchdog against violation of Fundamental Rights guaranteed under the Constitution. Laws made by the legislature, contrary to the provisions of the Constitution can be struck down by the Supreme Court or the High Courts. The validity of government decisions can be challenged before the higher judiciary and writs of mandamus are available for enforcing the State to comply with its obligations. It has the power to review any law passed by the legislature. Judicial review of the executive action, legislation and judicial and quasi-judicial orders is recognised as part of the basic structure of the Constitution. The Supreme Court is the final interpreter of the Constitution- a power which cannot be taken away even by an amendment of the Constitution. The law declared by the Supreme Court is binding on all authorities (Muralidhar, 2010).

The Supreme Court gives due importance to international conventions\textsuperscript{67} and norms for construing domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. For example, in the absence of a law on sexual harassment of women at the work place,\textsuperscript{68} the Supreme Court relied upon the international human rights law, namely, the Convention on All Forms of Discrimination against Women (CEDAW) to lay down the guidelines. It held that,

“In cases involving violation of human rights, the country must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field.”

In many environment related cases, the Supreme Court’s decisions have been based on the internationally recognised principles such as sustainable development, polluter pays principle, precautionary principle and restitution of the environment. These principles, recognised by the Supreme Court, were subsequently incorporated into the national policy and laws relating to the environment.

\textsuperscript{65} Article 32  
\textsuperscript{66} Articles 132-134 and Article 136  
\textsuperscript{67} Apparel Export Promotion Council vs. A.K.Chopra (1999(1)SCC 759)  
\textsuperscript{68} Vishaka v State of Rajasthan (1997) 6SCC 241
5.3 STATE OBLIGATIONS ON ENVIRONMENTAL ISSUES

As brought out in the last chapter, the interpretation given by the Supreme Court is that Articles 48A and 51A (g) which place a duty on the citizens, cast a corresponding obligation on the state to protect and improve the environment. As an affirmative action, the Supreme Court can command the executive and the legislature to comply with their statutory obligations.

The first significant judgement in which the Apex Court held that a responsible municipal council cannot run away from the principal duty by pleading financial liability was *Ratlam Municipality v Vardhichand*. The Supreme Court gave directions to the municipalities, the state administration and statutory bodies to perform their duty in the matter of sanitation, health and environment. It directed the removal of the nuisance. A similar direction was given in the case of *LK Koolwal vs State of Rajasthan* wherein the petitioner had approached the court in the matter relating to the prevalence of an acute sanitation problem in Jaipur asking the court to issue directions to the State to perform its obligatory duties. The Supreme Court while directing the municipality to remove the dirt, and filth from the city, observed that the maintenance of health, preservation of sanitation and environment is the statutory duty of the municipality. The Court observed that the health risks posed by the lack of sanitation and the resultant pollution will adversely affect the life of citizens as it would amount to slow poisoning. This would, if not checked, reduce the life of the citizens because of the hazards that would be created, thereby violating Article 21 of the Constitution which is a fundamental right.

In the *Indian Council for Enviro Legal Action vs. Union of India* relating to the notification of the coastal zone regulations, the court held that the enforcement agencies are under an obligation to strictly enforce the environmental laws; In the *Delhi Garbage case* the Court held that Government agencies may not plead non-availability of funds, inadequacy of staff or other insufficiencies to justify the non-performance of their obligations to strictly enforce environmental laws. The case came up before the court for non-performance of statutory duty by the municipal authorities regarding the collection, removal and disposal of garbage and other

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69 Ratlam Municipality v Vardhichand, AIR 1980 SC 1622
70 LK Koolwal v State of Rajasthan, AIR 1988 Raj.2
71 Indian Council for Enviro Legal Action vs. Union of India ( CRZ Notification) 1996(5) SCC 281, 294, 301
72 Dr B L Wadhera v Union of India ( Delhi Garbage case )AIR 1996 SC 2969,2976
wastes in the city of Delhi, the Court held that the authorities entrusted with the work of pollution control have been totally remiss in the discharge of their duties under the law and that they cannot absolve themselves of their duties on the pretext of financial and other limitations like inefficiency of staff members. The Court issued directions to the Delhi Administration to perform its duties. In order to ensure that the improvements would actually take place, it also directed the Central Pollution Control Board (CPCB), a statutory body, to organise a comprehensive inspection of the follow-up steps that were being taken every two months and to report the results to the Supreme Court.

Referring to Article 51-A (g) regarding the fundamental duties under the Constitution, the Court stated that it was the duty of the Central Government to direct all educational institutions throughout India to teach lessons in school for at least one hour per week relating to the protection of the natural environment, including forests, rivers and wildlife, and to distribute text books on the subject free of cost to educational institutions.

In the case of air pollution in Delhi, the Court ruled that it was the duty of the Government to ensure that the air was not contaminated by vehicular pollution. In the case\(^\text{73}\) of damage to the Taj Mahal from air pollutants from the Mathura Refinery, the court directed the creation of a Taj trapezium to regulate activities in relation to air pollution. The Court asked the Government to take steps to undertake clean-up operations for restoring the whiteness of the marble of the Taj Mahal. In the aforementioned public interest matters, the Supreme Court, in giving directions to the government was acting in consonance with fulfilling its constitutional obligations.

### 5.4 PUBLIC INTEREST LITIGATION AND JUDICIAL ACTIVISM

The Supreme Court, acknowledging that a vast majority of the population are unable to access the justice system, adopted a progressive approach by relaxing the rule of standing and permitting ordinary citizens to petition the Court in matters of public interest. In 1980s and 1990s a number of environmental issues came before the Supreme Court in the form of PILs. Even though formal pleadings are not insisted upon in PILs, based on the issues involved the court may seek the assistance of an

\(^{73}\) M.C. Mehta vs. Union of India AIR 1997 SC 734.
amicus curiae. It may also appoint commissioners or expert bodies to verify the facts and submit reports. Often the expert bodies in environment cases are government agencies such as NEERI and CPCB who are asked to give recommendations for corrective action. Before deciding to accept or reject such reports the Court hears the objections, if any, on the reports submitted. The Court verdicts in PILs are not self-executing.

As explained by Justice Muralidhar, the nature of directions given in PIL cases are either declaratory or mandatory. The mandatory orders are in the form of continuing mandamus in which the Court gives specific directions to errant state authorities to take specific steps. The court monitors such orders to ensure their compliance and builds into the directions a fore-warning of the consequences of non-implementation even amounting to a contempt of court. To ensure enforcement, the court monitors implementation of its decisions, seeks periodic reports and keeps the litigation alive. If implementation lags behind, the court asks officials to appear personally in court and explain the matter. A large part of the courts orders are complied with as there is a fear of being hauled up for contempt of court (Muralidhar, 2010).

The declaratory PIL orders are in the nature of directions to the state authorities and require their acceptance before implementation. For example, setting up of environmental courts; introduction of environmental education in schools. The government is at a liberty to examine the implications of such orders and take a decision. However, several such orders have been acted upon by the government and are being implemented through incorporation of the principles enunciated by the Court into policy formulation or enactment of new legislation as in the case of establishment of an environmental court. Though not in the operative part, the interpretation of Article 21 by the Supreme Court as inclusive of a right to a healthy environment has been incorporated in the preamble of the National Green Tribunal Act, 2010. Important principles enunciated by the Court have also been incorporated in environment policy pronouncements.

In view of the Supreme Court’s over zealous role in matters relating to the protection of the environment and human rights, there grew amongst the public a high expectation, that in case of violation of their fundamental rights relating to environment they could approach the highest court for relief. The expectation that the court will provide full justice in all environment and human rights cases was however misplaced. The public at large was disillusioned by the approach adopted by
the Supreme Court towards relief and rehabilitation of communities displaced by mega development projects in the case of the Sardar Sarovar Dam and its failure in giving justice to the victims of the Bhopal gas tragedy involving mass torts and gross violation of human rights. The contradictory response of the Apex court in these cases has been brought out in para 5.8.

The point often raised is whether the Supreme Court was treading into areas which were reserved for the executive and the legislative wings of the State. According to a leading advocate, ‘judges when seized of highly controversial and populist issues sometimes find it difficult to resist the temptation to deal with matters which to even a layman would clearly belong to the area of policy making,’ (Venugopal, 2012). He further suggests that the Supreme Court should exercise restraint in matters of PILs involving environmental issues such as degradation of forest, mining, land-use as the enthusiasm of judges sometimes takes them beyond the bounds of accepted law, (Venugopal, 2012). Some experts are of the view that neglect by other institutions of governance of their own duties compels the courts to take ‘law into their own hands’ (Shourie, 2001). According to Justice Chandrachud, the judiciary is being called upon to decide on institutional and social issues as those in the executive who are required to take decisions are simply not making those decisions (Chandrachud, 2011). The truth however lies somewhere in-between.

5.5 ENVIRONMENT PRINCIPLES RECOGNISED BY THE SUPREME COURT

The Supreme Court has drawn on several international environmental law principles using them as guiding principles for incorporating concerns into decision making. Briefly, these principles are as follows:

(1) Principle of absolute liability of an enterprise engaged in a hazardous or inherently dangerous industry:

In 1987, in the case74 of Oleum gas leak from a chemical industry in Delhi, the Court laid down the principle of absolute liability of hazardous/inherently dangerous industries. The Court recognising that the right to life of the citizens was adversely affected held that:

“...an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of persons working in the

factory and residing in surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of activity which it has undertaken; the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part …

Besides laying down the strict and absolute liability of hazardous or inherently dangerous activities without exceptions under the law of torts, the court stated that the measures of compensation are to be correlated to the magnitude and capacity of the enterprise. This formed the basis of the subsequently enacted Public Liability Insurance Act, 1991. In the same case, the court advocated the establishment of Environment courts with judicial and technical experts as members of the bench to adjudicate on environmental matters.

(2) The Polluter Pays Principle

The Supreme Court in several cases, applied the internationally recognised principle in the Rio Declaration, 1992 (Principle 16) that 'polluter must pay' to internalise the environmental cost. The application of the principle implies that the polluter should bear the cost of pollution. In the case of pollution by the leaching of H-Acid and sludge produced by a company named Silver Chemicals (located in Bichhri, a village near Udaipur, Rajasthan) long-lasting damage had been caused, to the soil, underground water, human beings, cattle and to the village economy. The Supreme Court held that the company was absolutely liable for the environmental degradation due to leaching of the H-acid and based on the polluter pays principle it directed the company to pay for the restitution of the environmental damage it had caused. The polluter pay principle requires that a polluter must bear the remedial or clean up costs as well as the compensation to the victims of pollution. The polluter pays principle has been incorporated in the statute governing the National Green Tribunal, 2010.

75 ibid
76 Indian Council for Enviro Legal Action vs. Union of India ( Bichhri Case), 1996 SC 1446;
77 Section 20
(3) The Precautionary Principle

The precautionary principle, adopted in the Rio Declaration, 1992 (Principle 15) and subsequently incorporated in international protocols\(^\text{78}\) has been recognised by the Supreme Court in several of its directions. The principle implies that even in the absence of full scientific evidence, there is a social responsibility to protect the public from harm when scientific investigation suggests a plausible risk. It is also relevant in the context of intergenerational justice.

In *Vellore Citizens case*\(^\text{79}\) and the *Shrimp culture case*\(^\text{80}\), the Supreme Court held that the government authorities must anticipate, prevent and attack the causes of environmental pollution. According to the precautionary principle the burden of proof is on the developer to show that his or her actions are environmentally sound.

(4) Doctrine of Public Trust

In *M.C. Mehta vs. Kamal Nath*,\(^\text{81}\) a public interest matter was brought before the Supreme Court, wherein a motel was constructed on the banks of the river Beas, resulting in interference in the natural flow of the water. The Court held that the state government, by granting the lease, had breached the Doctrine of Public Trust. The Court quashed the prior approval given by the Government of India for the construction of the motel and applying the ‘polluter pays principle’, directed the company to pay compensation for the cost of restitution of the environment and ecology of the area. The Court referred to the Public Trust Doctrine and stated that the latter extends to natural resources such as rivers, forests, seashores, and the air, among other things, for the purpose of protecting the ecosystem. The approach of the Supreme Court in this case supports the view that natural environment has to be preserved for its own sake, that human beings are the trustees and governments have an obligation to preserve the same. In the context of intergenerational equity the present generations have an obligation or a duty to preserve the environment in trust so that it can be passed on to the future generation in the same or better condition than when it was received by the present generation.


\(^{79}\) *Vellore Citizens Welfare Forum v Union of India*, AIR 1996 SC 2715, 2721.

\(^{80}\) *S Jagannath v Union of India ( Shrimp culture case)* AIR 1997 Sc 811, 846, 850.

\(^{81}\) *M.C. Mehta vs. Kamal Nath (Span Motels case)* 1997(1) SCC 388.
(5) Principle of Sustainable Development
The principle of sustainable development was first enunciated by the Brundtland Commission (WCED, 1987) and subsequently adopted in the Rio Declaration, 1992. Although not legally binding, the Rio Declaration, 1992 enunciated the key principles of sustainability. Applying the principle in *B K Srinivasan* case, \(^8^2\) the court held that ‘Sustainable Development’ as a balancing concept between ecology and development has been accepted as a part of the customary international law though salient features are yet to be finalized by international law jurists. The court directed that sustainable development, precautionary principle, the polluter pays principle and the new burden of proof as laid down by the Court should be applied by the government development agencies in making decisions on environmental matters. This principle has been incorporated in the National Green Tribunal Act, 2010.

(6) The Principle of Intergenerational Equity
The principle of inter-generational equity was first enunciated by the Brundtland Commission in (WCED, 1987). According to the principle, the states are obliged to conserve and use the environment and natural resources for the benefit of present as well as future generations. In the case of *State of Himachal Pradesh v Ganesh Wood Products*, the Court, with respect to the natural resources, held that the present generation owes an obligation to the future generation to hand over to them an environment that the present generation inherited from the previous generation\(^8^3\).

The recognition of the internationally accepted principles by the Supreme Court has guided the executive and the legislature to incorporate these principles into the government policy framework and legislative enactments, the more recent one being the National Green Tribunal Act, 2010.

5.6 DUTY OF THE COURT TO BALANCE THE PUBLIC INTEREST

The Supreme Court has taken a balancing view in public interest issues relating to health and ecology. In the matter of pollution of the Ganga by the discharge of effluents from the tanneries\(^8^4\), while reiterating the right to a pollution free air and water, the court ordered the closure of the tanneries. It observed that while the closure may cause unemployment and loss of revenue; life, health and ecology are of

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\(^8^2\) BK Srinivasan v State of Karnataka  
\(^8^3\) State of Himachal Pradesh v Ganesh Wood products AIR 1996 SC 149,159, 163  
\(^8^4\) M C Mehta V Union of India AIR 1988 SC 1037
greater importance to the people. The court stated that ‘just as an industry that cannot pay minimum wages to its workers cannot be allowed to exist, a tannery which cannot set up a primary treatment plant cannot be permitted to continue, for the adverse effect on the public at large which is likely to ensue from the effluents discharged by it into the river will outweigh any inconvenience caused to the management and the labour on account of its closure’. Similarly, while ordering the shifting of stone crushing units from Delhi and Haryana, the court was of the view that the quality of air, water and land could not be damaged to such an extent that it becomes a health hazard for the residents. In the *Goa Foundation case*[^85], the Apex Court observed that in cases involving a conflict between ecological protection and development activity, it was the duty of the courts to strike a balance between the two.

### 5.7 DIRECTIONS TO THE CENTRAL GOVERNMENT FOR ESTABLISHING AN ENFORCEMENT MECHANISM

The Supreme Court gave several directions to the central government to establish an institutional mechanism for implementation of laws and enforcement of the right to Environment.

**1) Directions for establishing an Authority**

In the case of coastal states allowing big businesses to develop prawn farms on a large scale in violation of the Environment Protection Act, (EPA 1986) and non-implementation of the Coastal Regulation Zone (CRZ) notification[^86], the Court directed the Government of India to set up an Authority under the Environment Protection Act, 1986 (EPA ) stipulating that the authority so constituted shall implement the precautionary and polluter pays principle. The Court appointed the National Environmental Engineering Research Institute (NEERI) to visit the coastal states of Andhra Pradesh and Tamil Nadu, and submit its report. It also directed that the workers engaged in shrimp culture at the prawn farms should be retrenched and that compensation should be paid to them. In the *Vellore Citizens Case*[^87] the Apex Court reiterated that the Central Government should set up an Authority under Section 3 (3) of the EPA. The direction of the court being declaratory in nature, the Government is not bound by it. So far, it has not set up an authority and the implementation of the EPA is being done by the MoEF in accordance with the provisions of the EPA, 1986.

[^85]: Goa foundation v Diksha Holdings, AIR 2001SC184
(2) Directions for establishing Environment Courts

In 1987, the Supreme Court while articulating on a new standard of strict liability for hazardous or inherently dangerous activities in the *Oleum gas leak case*[^88] advocated the establishment of Environment Courts. In 1995 the Supreme Court reiterated the establishment of specialised environment courts. In 1999, in *AP Pollution Control Board v Professor Nayudu*[^89] the Apex Court expressed that both, the Supreme Court and the High Court were experiencing difficulty in adjudicating on the correctness of scientific and technological opinions. Specialised Environment Courts were necessary to provide judicial and scientific inputs objectively rather than leaving complicated issues to the officers drawn from the executive. Again the direction being declaratory, in the form of a recommendation, the Government was not bound by it but had the option to consider the feasibility and accept it.

Though an exercise was undertaken by the MoEF in 1990 in consultation with some leading environmental NGO’s and the Central and State Boards engaged in enforcement of the pollution control laws and a draft was prepared for setting up environmental courts throughout the country, it did not see the light of the day[^90]. What emerged after a prolonged period was a much diluted version of the original draft. The National Environmental Tribunal, 1995 and the National Environmental Appellate Authority, 1997 were established but both these institutions had limited jurisdiction and for most part remained on paper only. They were disbanded by the repealing of the constituent Acts when the National Environmental Tribunal (NGT) Act, 2010 was passed by Parliament. The NGT in its present form is largely based on the lines suggested by the Apex Court and has a statutory mechanism for providing scientific advice and access to environmental justice.

The aforementioned directives of the Supreme Court were given by way of examples of how the Court was pioneering the application of international principles in environmental cases and in giving directions for the establishment of environmental institutions and mechanisms for effective implementation of laws and good governance. The optimism of the 1990s was however short lived. The Apex Court’s total disregard for the human rights of communities affected by mega projects and victims of mass disaster came as a shock to the public who by then had begun to look

[^89]: AP Pollution Control Board v Professor Nayudu 1999 2 SCC 718
[^90]: Personal Knowledge, as author was involved in the preparation of the draft ( MOEF no.8(6)/86-PL)
up to the Supreme Court with high expectations. Two cases which bring out the failure of the Supreme Court in protecting the human rights of the people affected by large development projects and innumerable victims of industrial disaster are the Sardar Sarovar dam project on river Narmada and the Bhopal Disaster Case. It goes to show that in the absence of a clear guiding policy, even the highest court in the country can fall short of giving justice to the victims of environmental harm.

5.8 PUBLIC EXPECTATION FROM THE SUPREME COURT AND IT’S FAILURE IN GIVING JUSTICE TO VULNERABLE COMMUNITIES

In the absence of a clear governmental policy, by dragging the executive to do its duty and by stepping into the shoes of the administrator, it would appear that the courts were doing all they could with consistency and sensitivity to ensure good governance in protecting the interest of the people as well as that of the environment. However, this was not so. In *Almitra Patel v Union of India* the Supreme Court dealt with the question of eviction of urban encroachers from public land. The question posed by academicians is whether in the name of protection of public spaces this segment of workers was being denied the fundamental right to life and livelihood. The two cases in which the Supreme Court failed to meet the expectation of the public in providing justice to the marginalised communities and the victims of a gas tragedy involving mass torts are discussed below.

(1) **Sardar Sarovar Dam Project**

The Sardar Sarovar project on river Narmada in the western part of India was the largest and the most contentious among the thirty dams planned by the Indian Government. Starting in the 1960s the controversies in the project arose between the three states of Gujarat, Madhya Pradesh and Maharashtra through which the river Narmada traverses. A Tribunal was constituted to sort out the issues between the three states.

The Narmada project envisioned the creation of 30 large dams, 135 medium dams and 3000 small dams. The government promised that the dams would provide potable water in the region to over forty million people, hydroelectric power and irrigation for over 6 million hectares of land (Rajagopal, 2005). The assertion made

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91 2000(1) SCALE 568
92 Jawaharlal Nehru, P M of India’s address at the 29th annual meeting of the Central Bureau of Irrigation and Power on 17 November 1958.
by the government was that the dams were essential for India’s economic development and the benefit that would accrue to the millions of people would outweigh any potential harm to environmental and human costs, thus taking a cost benefit approach to development over an approach that puts human rights at the centre of the debate (Rajagopal, 2005). In 1985 the World Bank agreed to finance the cost of the project to the extent of US $ 450 million. There was no discussion with communities on environment impact and involuntary displacement. The ostensible benefits would come at a huge cost of involuntary displacement of communities and environmental damage (Human Rights Watch, 1992).

Led by a well known activist Medha Pathkar, a number of NGOs and activists came together to form the Narmada Bachao Andolan93 (NBA), to oppose the dam. They proposed various development alternatives. NBA demanded the accountability of the World Bank for financing a project that threatened the lives of millions of people and was against the human rights norms endorsed by the World Bank. The World Bank constituted a Commission to review the project. The Commission recommended the withdrawal of the World Bank from the project. The World Bank established a mechanism in the form of an Inspection Panel in 1993 which was a major milestone in integrating human rights into the practice of development aid. Besides the human and environmental costs, the foremost issue in the Narmada Valley Development Project was the displacement of a huge population inhabiting the Narmada Basin (Rajagopal, 2000). The estimated number was 40,827 inhabitants in 2000 as per the Supreme Court record. (The figure rose much higher in 2007).

Inspired by the Court’s activist record wherein it had interpreted liberally the Constitution to allow social action groups to bring claims, the NBA filed a petition94 in the Supreme Court. The NBA’s petition to the court was to call for a comprehensive review of the project and for a court order to stop all construction and displacement until the completion of the review. In May 1995, the court issued a stay on further construction of the dam but the orders were disregarded. In late 1995, the NBA’s march to Delhi resulted in halting the construction work. The work on the dam was suspended between 1995 and 1999. In 1997 the court’s approach on the Narmada project shifted and instead of undertaking a comprehensive review of the

93 Narmada Bachao Andolan v UOI. AIR 199SC3345
94 No. 319/1994
entire project, in February 1999 it vacated the stay and limited itself to the question of resettlement and rehabilitation.

On 18 October, 2000 the Supreme Court pronounced its final judgement by a 2:1 majority ruling and upheld the plan for development of the Sardar Sarovar dam. It allowed the construction of the dam up to the originally planned height of 138 metres and its immediate construction of a height of 90 metres. Thus, taking a pro-development stance as against environmental and human rights issues, it not only authorised the construction of the dam to proceed but also stated that it was a matter of priority to complete the construction of the dam. It ordered the ‘monitoring and reviewing of resettlement and rehabilitation programmes pari passu with the raising of the dam height.’ It additionally ordered the states concerned to ‘comply with the decisions of the Narmada Control Authority (NCA) and directed that the ‘NCA will draw up a plan in relation to further construction of the dam and relief and rehabilitation to be undertaken’. The Court further declared that if the Review Committee of the NCA is unable to decide any issue, the committee may refer the same to the Prime Minister whose decision will be final and binding on all concerned. This decision of the Court and its criticism of the NBA were a major blow to the legitimacy of the NBA. This changed approach of the Court can be attributed to the change in the membership of the Court which adopted a pro-development stance and supported the government’s version of the case ignoring the human suffering of the local population (Rajagopal, 2005). The social activists lamented that none of the issues relating to rehabilitation and resettlement or human rights violations were satisfactorily dealt with either by the government or by the Supreme Court.

The Court’s complete faith in the government was according to NBA totally unjustified. In 2002, the NBA again filed a petition claiming that the resettlement and the rehabilitation on the ground was not taking place alongside the construction of the dam. The court dismissed the petition on the ground that the NBA should first approach the administrative authorities set up in the three states for redressal of grievances. The Government constituted a Relief and Rehabilitation Oversight Group to report on the status of rehabilitation in the state of Madhya Pradesh. In 2006 the Court accepted the Prime Minister’s conclusion of not stopping the construction work in larger public interest and that the relief and rehabilitation work could be undertaken in the monsoon period when the construction work on the dam would have to be stopped. In 2008 at the final hearing before the Supreme Court it was
argued on behalf of the farmers that the Rehabilitation and Resettlement by the Madhya Pradesh government was not in accordance with the Narmada Tribunal’s Award directives and the constitutional right to life under Article 21. While the case stagnated in the Supreme Court, the NBA besides pursuing the legal remedies, continued to engage in various forms of direct action such as public meetings, rallies, demonstrations, fasts and dharnas (Narula, 2008).

The Court acknowledged the conflicting rights that had to be considered. On one hand were the people of Gujarat who would benefit from the construction of the dam while on the other were the tribals whose houses and the agricultural lands would be submerged in water. Similarly, in the Tehri Dam case the main issues raised in the petition were the structure of the dam in a seismic zone rendering it unsafe for human life and for the environment and the issue of rehabilitation of those whose villages would be submerged by the dam. The Court decided that it would neither be legitimate nor competent for the courts to enter into an arena of policy decisions of the State concerning economic and social rights.

The Sardar Sarovar dam became symbolic of a larger struggle over the discourse of human rights and development in India. It led to an awareness of the need to approach environmental and human rights issues in tandem- not only in India but globally to prevent the impact of environmental degradation on the marginalised populations (Narula, 2008).

Even while the Court was aware that the tribal population would be displaced and uprooted from their past, culture, tradition and customs the court explained it on the utilitarian logic that such displacement becomes necessary for the larger good. The majority decision was that the Court ought not to investigate into areas which were within the purview of the Executive, taking the stand that the decision whether to have infrastructural projects or not are matters of policy making process and the courts are ill equipped to adjudicate on a policy decision taken by the executive.

Citing the right to development, the government defended displacement as being potentially beneficial to the displaced families. The government held the view that there was no question of violation of human rights. Displacement was seen as ‘costs’ and not a human rights problem. According to Professor Cullet, from a human rights

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95 N D Jayal v Union of India. WP (Civil) 295 of 1992
perspective, displacement of project affected families is a human rights issue, (Cullet, 2007). In the *Tehri Dam Case* the judges indicated that the overall project benefits from the dam cannot be used as excuse to deprive oustees of their fundamental rights. Rehabilitation is a constituent of right to life under Article 21 of the Constitution and includes not only the provision of food, clothes and shelter but also to rebuild lives. In the SSP, it distanced itself form the human rights perspective and left the matter to the government on the grounds that it was a policy issue. None of the issues relating to rehabilitation and resettlement or human rights violation were satisfactorily dealt with either by the government or by the Supreme Court. This hands-off approach of the judiciary towards administrative decisions in environment issues was evident in the early eighties.

**2) The Bhopal Gas Disaster Case**

In the most tragic industrial disaster that took place in the Union Carbide India Limited in Bhopal, Madhya Pradesh on the night of December 2-3, 1984 more than 40 tons of methyl isocynate gas leaked from a pesticide plant, immediately killing at least 3,800 people and devastating the lives of thousands of people.

In March 1985, the Government of India passed the Bhopal Gas Leak Act96 to take upon itself the responsibility by invoking the doctrine of *parens patriae* to bring a suit on behalf of all the victims of the disaster who would be potential claimants for compensation in a court of law, leading to the beginning of legal proceedings. The grounds for invoking the doctrine were given as, constitutional duty to secure justice for all the victims not only the present ones but also the future generations and to protect, preserve and restore the natural environment and the economy of the country.

The case involved the strict liability of a multinational for causing mass disaster. The Government of India filed a suit for compensation against the Union Carbide Corporation (UCC) before Judge Keenan in the South District Court, New York. The UCC argued that the American Court was not the proper forum for adjudication of the suit and that the case be tried by the Indian court. The American court failed to perceive the significance of the Bhopal catastrophe as raising humanity-wide issues of global concern. Based on an affidavit given by Nani Palkhivala, as UCC’s expert witness that ‘the Indian judicial system can fairly and satisfactorily handle the

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96 The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (Act 21 of 1985)
Bhopal litigation’, Judge Keenan dismissed the suit subject to the UCC submitting to the jurisdiction of the Indian courts. In September 1986, the Government of India filed a suit against UCC in the District Court of Bhopal.

Commenting on the Bhopal litigation, Professor Baxi stated that it is ‘unparalleled in the abundance of its ironies and the cruellest and the most saddening of all these is provided by the fact that all the Herculean endeavours were for the 200,000 odd Bhopal victims who were being further revictimised in the process,’ (Baxi, 1985). In November 1988, the Supreme Court told both sides to come to an agreement and "start with a clean slate". Eventually, in an out-of-court settlement reached in February 1989, Union Carbide agreed to pay US$ 470 million for damages caused in the Bhopal disaster, an amount which was 15% of the original $3 billion claimed in the lawsuit. This was a relatively small amount based on significant underestimations of the long-term health consequences of exposure and the number of people exposed. The settlement was full and final for all civil and criminal claims, in the present and in the future. There was a huge public outcry that the settlement was a sell-out.

The settlement was challenged by filing Review petitions. The Supreme Court justified the settlement on the grounds that it considered it a compelling duty, both judicial and humane, to secure immediate relief to the victims. From the stand point of the victims, the Bhopal Gas Disaster Case, an ‘Industrial Hiroshima’, represented the second Bhopal catastrophe. The first produced the actual and toxic impacts and the second aggravated the agony of the victims (Baxi, 1989).

At a time when the Supreme Court was zealously active in interpreting environmental rights into the constitutional and fundamental rights, the Apex Court’s role fell short of public expectation. The court was expected to arrive at a jurisprudence of human solidarity (Baxi, 1990 b). It was also expected to contribute to the liability of multinationals for mass disasters. Neither the government, nor the parliament nor the Supreme Court acted in the interest of the victims (Krishna Iyer, 2011). The case dragged on for twenty-five years. The relief to the victims was neither adequate nor immediate. The presumption on which the settlement was worked out, 3000 dead and 100,000 injured grossly underestimated the actual figures.

Commenting on the litigation in 1990, Professor Baxi expressed that ‘it is otherwise hard to understand, let alone explain, why the litigation failed to produce, for full five
years, any entitlement in victims to financial relief, medical care and vocational rehabilitation in this halcyon days of judicial activism which has earned the Supreme Court of India a high esteem globally,’ (Baxi, 1990 a). The unfortunate settlement wholly overlooked the components of the parens patrae doctrine which the government had justified for invoking. The government’s sudden departure from the pursuit of its constitutional obligations should have alerted the otherwise vigilant Supreme Court of the human rights violations (Baxi, 1990 a). In October 1991, the Supreme Court upheld the original $470 million and set aside a portion of settlement that quashed criminal prosecutions that were pending at the time of settlement. The defenceless population of Bhopal was left to fend for itself. A study revealed that the victims received only symptomatic temporary relief (IMCB, 1996). Not only was the Bhopal gas disaster the worst but it was the least investigated. UCC, the primary repository of information had closed its channels of communication. There was a lack of transparency regarding the gases released and whether accumulation over a period led to cyanide poisoning. In the severely affected areas there was a severe shortage of medicines and medical facilities. Nearly seventy percent of the private doctors were not even professionally qualified. The equipments in the hospitals and clinics under the department of gas relief were dysfunctional (IMCB, 1996).

Commenting on the Bhopal Gas leak Case, Justice V R Krishna Iyer stated that ‘the various parties in power during these twenty-five years are guilty of culpable neglect to sleep over this noxious infliction on Indian humanity (Krishna Iyer, 2011).’ During the pendency of the case for twenty-five years, the government did not move for an early trial. None of the judges took up the matter under the original jurisdiction. Parliament did not amend the relevant provisions of the Indian Penal Code to make punishment more severe. The disaster indicated a need for enforceable international standards for environmental safety, preventative strategies to avoid similar accidents and industrial disaster preparedness. It is a collective failure in securing justice for the victims of the Bhopal gas leak (Panchu, 2010). There are implications of the Bhopal process in case of a nuclear accident. A PIL was filed by the victims in which the Supreme Court issued directions appointing expert committees to monitor the medical relief and rehabilitation aspects. Provision of potable drinking water, removal and disposal of the toxic waste from the Union Carbide factory and provision of full healthcare facilities to the survivors are some of the issues with which the victims are still grappling (Moyna, 2012).
In the recent times there has been a great deal of criticism of the Supreme Court on institutional matters concerning the judiciary, thereby making a case of political oversight. ‘The more serious and consequential critique of the Supreme Court should focus on its substantive failures in matters of law and governance,’ (Mehta, 2010).

Since the Bhopal disaster, some changes have been brought about in the government policy to make hazardous industries accountable, but major threats to the environment and human health still remain from rapid industrial growth and ineffective regulatory mechanism. It also brings to fore the challenges faced by the legal system to cope with calamities of such magnitude and to make the multinationals fully accountable. The Tort law in India is still underdeveloped which is one of the main reasons for not providing quick relief to victims of environmental catastrophes. According to Justice Muralidhar, a major cause for concern was the absence of legal aid in Bhopal as a result of which every claimant had to part with a substantial portion of the already meagre amount of compensation towards fees for the lawyer (Muralidhar, 2010). There has been no attempt by the professional bodies to constitute any fund for providing legal aid. The state’s response has also been inadequate. The failure of the medical profession – in the 20 years since the disaster, the premier medical research institution in the country, the Indian Council for Medical Research (ICMR) has not only failed to come up with a treatment protocol but surprisingly even abandoned medical research abruptly in 1994. Bhopal was an illustrative case of how the Supreme Court could go seriously wrong.

5.9 CRITICAL EVALUATION OF THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL MATTERS

The Supreme Court of India has dealt with a wide range of cases relating to environment which were either in the form of Original Writ Petitions under Art. 32 or by way of appeals under Art 136 against the judgements of the High Courts. The most significant development in matters relating to environment is the creative interpretation given by the Supreme Court of India for including a ‘right to a clean and healthy environment’ within the ambit of ‘right to life,’ a fundamental right under Article 21 of the Constitution of India. The Apex Court evolved innovative methods of access to justice by ordinary citizens and interpreted the existing provisions in the legal system to develop the jurisprudence in the context of environment protection.
Public spirited members of the civil society often approached the Apex Court to seek a directive to compel the government to act and fulfil its obligations, and to enforce laws to arrest violations even in matters such as the removal of garbage. The Supreme Court in turn, has directed the authorities concerned to abide by the laws relating to environment, be it a central ministry, state government or a municipal body. In some cases the Supreme Court even went to the extent of stating that feasible and viable technologies were available to clean up the damage caused to the environment due to such violations. While monitoring its own directions, the Supreme Court found in some cases that those in the executive, who were, in fact, responsible for enforcing the law, were themselves flouting the orders in collusion with the violators. The implementation of the directions and the pace at which the principles were incorporated into the policy and legislative framework has been extremely slow.

The mechanism of Public Interest Litigation has made the courts respond proactively to the needs of the people and address issues of large scale violations of civil, political, economic, social and cultural rights (Balakrishnan, 2008). Enforcement of the right to environment protection through PILs enlarged the access of the NGO's and civil society to approach the courts. The active involvement of the courts in social problems is seen by some scholars as primarily judge-led and judge-induced litigation (Desai & Sidhu, 2010).

The Supreme Court has kept most of the cases active to prevent the executive from becoming lax or ignoring compliance, and has asked the authorities to submit reports periodically, which can be every four months, every two months or even every month on the matters being investigated. Over a period of time, some reports are a mere formality for they are neither studied nor are their recommendations implemented.

The Supreme Court has been criticised for expanding the domain of rights under Article 21. The rights enumerated by the Supreme Court by expansion of Article 21, apart from a pollution free environment, include a right to speedy trial, right to bail, right to food, shelter, health and education. These rights are referred to as the new normative regime (Amirante, 2012). It is argued that in doing so, the aim of the Supreme Court has been to expand its formal jurisdiction rather than achieving real

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97 Vineet Kumar Mathur vs. Union of India and others., Judgment of 08/11/1995
objectives (Mehta, 2010). An issue raised by experts in respect of judicial activism is whether the courts have been interfering too much in the functioning of the executive and whether it can be a substitute for executive efficiency (Lal, 2004).

The rapidly increasing number of petitions before the Courts, the inconsistent approach taken by the courts and the individualistic approach by some of the judges has created a doubt about the effectiveness of the PILs. The various questions being asked in this regard are: Are the courts competent enough to meddle in areas which were not within their judicial competence? Are the right kind of people available in the judiciary to take decisions pertaining to the role of the executive and are they efficient enough to take on new cases when they are already burdened with a large backlog of cases. Without permanent independent statutory panels of environmental scientists to advise the higher judiciary, are its members competent and consistent in their approach?

Professor Cullet, in the context of NBA approaching the Supreme Court for seeking relief in the Sardar Sarovar Dam Project, has aptly commented that “while even in the 1990s the idea of approaching the Supreme Court was not an obvious choice, it was eventually done because it seemed, on the basis of the existing case law that relief could be obtained. The partly unforeseeable problem is that over the past 12 years, PIL has suffered a series of setbacks and the wave of optimism which led people to expect courts to provide full justice in all environmental and human rights cases in early 1990s has proved misplaced. This general trend has been more marked in the case of big development projects where courts have been much less keen to challenge the government than on smaller issues,” (Cullet, 2007).

The Apex Court has been criticised for its role in the Bhopal tragedy case and in its hands-off approach in the Sardar Sarovar Project. A leading lawyer has appropriately commented that ‘the right to environment protection has been whimsically applied by individual judges according to their own subjective preferences usually without clear principles guiding them about the circumstances in which the court could issue a mandamus for environment protection. It appears when socio-economic rights of poor come into conflict with environment protection the court has often subordinated those rights to environment protection; on the other hand when environment protection comes into conflict with what is perceived by court to be ‘development issues’ or powerful commercial, vested interests, environment
protection is often sacrificed at the alter of development or similar powerful interests,’ (Bhushan, 2009).

While questions have been raised about the competency of the judiciary to deal with complex environmental issues and treading into the domain of the legislature and the executive, the fact remains that the impetus for environment protection in the country has come from judicial activism of the nineties. It’s impact has been positive though slow, in forcing the executive and the legislature to act and incorporate the principles laid down by the judiciary into a policy and legislative framework. This has also alerted the policy-makers to bear in mind the fact that the policies they formulate must stand the test of fairness, justice and legality before the courts.

While the three principal organs of the State are obliged to act in accordance with the Constitution and co-ordinate with each other in placing the basic human and fundamental rights of the people as the central focus, in view of the rapid development and industrialisation taking place all over the country, there is a greater need for the judiciary as a protector of fundamental rights and human rights to ensure that the vast majority of the voiceless people of India have access to a clean and healthy environment as a basic fundamental human right.