Chapter – V

Judicial Response
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JUDICIAL RESPONSE

The Indian scenario depicts a grim picture of environmental degradation. The groundwater is an integral part of our environment. The industrial growth, population, urbanization, poverty and illiteracy have resulted in much misuse of groundwater and its pollution and the country is facing an unprecedented crisis. While the country was progressing on the economic front, in beginning no attention was paid to groundwater depletion and its quality. The country today is facing twin challenge. We have to restore natural resources on one hand and prevent its misuse on the other hand.\(^1\) We have two sources of water – the surface and the groundwater. The surface water is badly polluted. We are facing serious problem with the groundwater as the water level is going down day by day. During the last ten years the water level has gone down by 8 to 12 metres. The availability of water is becoming scarce every day. The surface water is not fit for drinking and the ground water level is going down because of uncontrolled water pumping.\(^2\)

Water is primary human need and deprivation of which may be termed as the denial of the right to life. Indeed, the world may go to war on the struggle to control water. People in cities and towns suffer desperately for want of drinking water. This gift of nature has to be equitably distributed for every human being to keep life going. But water mafiosi, who strangle sources of

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2. Id., p.18.
supply water and corrupt it, are denying life miserably. The state has great duty of preservation vis-à-vis distribution of drinking water. Our rivers are sacred; so too our lakes and dams which serves several social uses. Aqua robbery by corporate is becoming common practice, which is a serious dereliction of duty from the government side.³

Industrialised countries, not knowing what to do with their toxic wastes are trying to ship them to Third World Countries for dumping. These wastes enter groundwater resources polluting entire food cycle. As much as 70% of water sources are polluted by human and industrial wastes. There is over exploitation of non-renewable natural resources.⁴ It is now an established truth beyond all doubts that without recognizing the importance of water as a whole, the very survival of mankind is at stake. Decline in groundwater quality has been the result of increasing pollution and therefore threat to life support system.

The need for judicial activism in this direction should be considered the need of hour. When the society is facing newer challenges, such challenges can not be met through legislative measures alone. Moreover, legislative changes cannot be expected to take place at frequent intervals. Frequent amendments to legislation weaken its essence. However, these challenges can be effectively met by a newer interpretation of the legislation without amending them. This lies in the hands of the judiciary. A classic example is M.C. Mehta v. Union of India popular known as Oleum Gas Leak Case⁵. In this case the rule of absolute

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⁵ (1987) 1 SCC 395.
liability was created instead of enacting a new law or amending existing laws. It may be regarded as one of the best examples of the judicial interpretation. The judiciary realized the changing needs of the time and interpreted the law accordingly. However, the same can be achieved only if the judiciary is active. The judicial activism was developed in 1980s in the form of recognizing liberal rules of interpretation in favour of environment. It has come long way in protecting the environment. This was the emergence of a new jurisprudence – ‘jurisprudence of masses’ in the Indian Legal system which altered radically environmental litigation process in India. Public interest litigation became a real litigation in the interest of public.

Since 1980, the Public Interest Litigation has altered the role of the higher judiciary in India. Instead of being asked to resolve private disputes Supreme Court and High Courts were asked to deal with grievances over flagrant human rights violation by the state or to vindicate the public policies embedded in statutes or constitutional provisions. This new type of judicial business is collectively called ‘Public Interest Litigation’.

Judicial recognition of environmental rights was achieved in India through the device of PIL. The judicial innovation of PILs and letter petitions to the Supreme Court and the High Courts boosted the morale of the public spirited individual, the green party activists and environmental organizations. Whether the technique of PIL, which is of recent origin, has contributed in addressing the issues of misuse of ground water? Whether the courts have been

able to develop new principles for more effective control of water quality? Whether the judiciary can be regarded as an effective mode to curb violation of environmental Laws? What are the new areas where the courts have laid down specific guidelines for protecting the natural resources? As to under what circumstances PIL can be resorted to and who can come forward are some of the relevant questions. Another point which requires emphasis is that the problems of groundwater quantity as well as quality are now coming to the forefront and judiciary must play a significant role in organizing and shaping the litigation. Obviously urgent attention has to be bestowed to keep abreast of the changing situations and make proper and timely amends.

Protection of natural resources is a matter of constitutional priority. Neglect of it is an invitation to disaster. The problem is the concern of every citizen and class action brought can not be dismissed on the ground of locus-standi. The right to sue in this regard is inherent in the citizens. When administrators do not mend their ways, the Courts become the battle ground of social upheaval. If the administrators show indifference to the principle of accountability, law will become a dead letter on the statute book, the public interest will be the first causality. Entitlement to a clean and potable water is one of the recognized basic human rights and human rights jurisprudence cannot be permitted to be thwarted by status quoism on the basis of unfounded apprehensions.9

As a result of this development, regulatory mechanism for the prevention of environmental degradation through writ process is provided for

our Constitution. Under Art. 32\(^{10}\) and 226\(^{11}\) of the Constitution, Supreme Court and High Courts respectively possess a wide latitude to grant relief and prevent environmental damage by issuing directions, orders and writs.

It is unfortunate that the politicians in India are totally oblivious of the serious threat posed by the environmental hazard. It is only judiciary which can arbitrate on the competing rights of the parties in different fields. The role of judiciary is gaining significance day by day. The judiciary, however, has come to the expectations of the people, and is doing a lot to control water pollution. The Indian judiciary has created a lot of awareness among the people by its various judgements. Whatever, has been done so far in India in the field groundwater preservation, it has been done by the judiciary.\(^{12}\)

The problem of ground water scarcity and its quality has drawn the attention of the entire World Community and therefore they resolved to protect and enhance the environmental quality. How could the judiciary remain a silent spectator when the subject has acquired high importance and become a matter of caution and judicial notice. The judiciary has to play an active role to protect the people’s right against the anti people order by infusing confidence in people as a whole for whom it exists, rightly put forth by J. Lodha, “Judiciary exists” for the people and not vice-versa”.\(^{13}\)

\(^{10}\) Article 32(ii) The Supreme Court shall have power to issue directions or orders or writs including writs in the nature of habeas corpus mandamus, prohibition, quo warrant and certiorari, which may be appropriate, for the enforcement of any of the right conferred by this part.

\(^{11}\) Article 226(i) Every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including [writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari], or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

\(^{12}\) Krishna Chandra Jena; “Environmental Pollution and its Legal Control, SCJ, 2000, p. 38.

\(^{13}\) Thakur Kailash Lal: Environmental Protection Law And Policy in India, 2003, p. 305.
Time has come when we must place that the basic human rights like right to life, right to potable water, and similar other rights should be part of the environmental jurisprudence and the basic principles such as precautionary principle, polluters pay principle and environmental impact assessment, etc. be also recognized as part of the environmental jurisprudence and all the courts in the country should recognize these principles as the law of land. In fact underground water quantity and quality is a basic right to life and the judiciary must protect it.\textsuperscript{14}

Infact what is said above is true with regard to all fields of day to day life. The apex Court of India has a special role in the matter of enforcement of fundamental rights. Our Courts have shown a tendency to interpret fundamental rights in the light of Directive Principles of State Policy. By adopting this interpretative technique the Courts expanded the scope of fundamental rights. It is Article 21 which received the maximum blow up in this sector. Many unremunerated right were read into Art. 21 and many of them in fact got enlivened and invigorated in the context of Directive principles of State Policy. Same is the case with the protection of environment, which finds place in Directive Principles State Policy under Art. 48A and 51A(g) of the Constitution.\textsuperscript{15} Though Article 21 does not explicitly mention environment, the Supreme Court and various High Courts of the country have given a wider interpretation to the word “life” in this Article.\textsuperscript{16}

\textsuperscript{14} Supra note 1, p. 21.
But Courts in India have been relying on Art.48A and 51A(g) of the Constitution to remedy the mischief. When the court is called upon to give effect to the Directive Principles and Fundamental Duty the Court would not shrug its shoulders and say that priorities are matter of policy and so it is matter for the policy making authority. The most important contribution of Indian Courts has been to bring environmental protection within the ambit of fundamental right to life under Art.21 of the Constitution.\(^17\)

Our judiciary has not lagged behind in reaffirming it through its pragmatic decisions. Our Courts have treated cases involving degradation of environment as a violation of the fundamental right under Art. 21 and liberally accepted PIL applications for considering such cases under its writ jurisdiction. The role of judiciary in preserving the quality of groundwater and preventing its pollution can be discussed under the following heads:

A. Groundwater Preservation and Article 21

(a) Role of Supreme Court

(b) Role of High Courts

B. Groundwater Pollution and Article 21

(a) Role of Supreme Court

(b) Role of High court

C. Sustainable development – Role of Supreme Court

A. Groundwater Preservation and Article 21

Role of Supreme Court

The word "Life" used in Article 21 has a broad meaning. Article 21\(^{18}\), though touched in negative language, confers on every person the fundamental right to life and person's liberty. The right to life, which is the most fundamental of all is also the most difficult to define.

Field J. spoke of the right to life in following words: 'By the term "life" as used here something more is meant than mere animal existence. The inhibition against its deprivation extends to all limbs and faculties by which life is enjoyed.\(^{19}\) Taking this as a clue, the term "life" in Article 21 has been interpreted to mean a decent life and not mere animal existence.\(^ {20}\)

In relation to groundwater protection the Supreme Court expanded the boundaries of the fundamental right to life and personal liberty in Article 21 of the Constitution of India. The concept as elaborated in several judicial decisions.

In \textit{M.C. Mehra v. Union of India}\(^ {21}\), the Supreme Court of India in its verdict has given paramount significance to the groundwater for the sustenance of life in recognition with the Article 21 of the Constitution. Though the verdict has not been used term fundamental right explicitly but the essence of the judgement discerns that the Court has implicitly tried to declare it at par with the right to life. Thus in cognizance with right to life in the Article 21 of the

\begin{footnotes}
18. Article 21 - "No person shall be deprived of his life or personal liberty except according to the procedure established by law."
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Constitution, it has been tried to emphasise the role and significance of groundwater in relation with survival of the masses.

Further, in *S. Jagannath v. Union of India*\(^2\), the Supreme Court ordered the closure of shrimp farms which was established in the coastal zone, or which resorted to withdrawal of groundwater for aquaculture. This means that the right to groundwater for commercial purpose cannot be claimed as a part of right to life. The Court’s main concern for safety of groundwater is expressed in *D.L.F. Universal* case\(^3\), wherein Court found that since treated waste water alone was used for farming purposes, there was no threat to groundwater.

Furthermore, one of such example can be found in the case of *Hinch Lal Tiwari vs. Kamala Devi*\(^4\), the Goan Sabha allotted apart of land including village pond, which was filled up with silt with the passage of time.

The Supreme Court held that material resources of community like the above maintain delicate ecological balance. They need to be protected for proper and healthy environment to enable people to enjoy a quality of life, which is the essence of the rights guaranteed under Article 21 of the constitution of India. The Revenue Authorities after taking notice, that the pond is falling in disuse should have bestowed their attentions to develop the same to prevent ecological disaster, and to provide better environment for the benefit of public at large. Meaning thereby, the ponds are natural source for maintaining groundwater resource.

In the light of aforesaid background, the Supreme Court of India in *M.C. Mehta’s case*,\(^5\) was of the view that any mining activity in the five districts of

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22. AIR 1997 SC 811.
24. AIR 2001 SC 3215.
Haryana including Gurgaon cannot be permitted. One of the expected outcomes of the project is the reduced soil erosion and improved water regime in the rehabilitated area will be drastically reduced and run-off leading to recharge of constantly depleting groundwater resources.

More recently, in *Intellectual Forum Trupati v. State of A.P.*[^26], Supreme Court in preserving the groundwater resource for the purpose of improving the existing water resources has passed the following orders:

With regard to Peruru and Avilala tanks, each house already constructed by the TTD must provide for roof top rainwater harvesting. Abstraction from groundwater to be completely banned. No borewell or tubewell for any purpose to be allowed in the area. Piezometers to be set up at selected location, in consultation with the CGWB to observe the impact of rainwater harvesting in the area of groundwater regime.[^27]

Hence, it is clear from above discussion that the Supreme Court has taken adequate initiatives to provide clear regulations for various bodies for harnessing the underground water in a particular area.

*Role of High Courts*

In addition, the High Courts on the right to life under Article 21 of the Constitution have shown some potential to check over exploitation of groundwater in extreme cases like salination or depletion of groundwater. As viewed by the Kerala High Court[^28] that "the right to sweet water and right to

[^26]: AIR 2006 SC 367.
[^27]: Ibid.
fresh air are attributes of the right to life, these are basic elements which sustain life itself.  

When steps are taken by administrative agencies to augment water supply they should see to it that this does not result in upsetting the equilibrium and salinity is not increased by undue exploitation of freshwater.

The Court’s decisions on rights to life are indicative of the fact that our judiciary is alert and active to the right of not only the present generation but to the future generations also. Denial of fresh air to breath and sweet water to drink is denial of right to live. It is perhaps the worst that can be done to any generation. No state or society should do it. These are the basic elements which sustain life itself.  

The court recognized the importance of water for sustaining life. Since the exploitation of groundwater has a bearing on the user’s fundamental right to life under Article 21 constitution, one’s right to dig bore wells can not be restricted by an executive fiat. This right may be restricted or regulated only by an Act of the legislature. Another writ petition, upheld the administrative direction as a reasonable restriction to ensure supply of water for drinking purposes, which otherwise would have been thwarted by overcrowding of bore wells which were being sunk for commercial purposes.  

In the background of the above two contradictory judgements, the Divisional Bench of Karnataka High Court had to decide the scope of the right to groundwater. The court held that right to life could be held to include

29. Id, 323.
right to have water for drinking purposes without which right to life cannot be enjoyed at all. However, right to have water for irrigation purposes cannot be stretched to the extent of bringing it within the ambit of Article 21 of the Constitution. The right to have subsoil water for irrigation and business purposes may not amount to a right enshrined in Article 300-A. The court pressed upon the state, the need to enact a law in this matter.

Recently the Kerala High Court rules in favour of Pepsi in the company’s dispute with a Panchayat over the right to water tell the different tale. Significantly, the Court said that the concern of the Panchayat (about water shortage) was not one that should be ignored, as the right to life enshrined in Article 21 of the constitution, implies the right to food and water. The court said that apprehensions raised by the Panchayat about the exploitation of groundwater, the depletion of water table and the drying up of wells should not lose sight of the authorities under the Kerala Ground Water Control and Regulation) Act and the Kerala Industrial Single Window Clearance Board.34

The Court further observed that although the concerns about over exploitation of groundwater might have been genuine, ‘the court cannot be blamed for this predicament,’ because “the legislature and executive, in their wisdom, had excluded the industrial area from the preview of the panchayat Raj Act.; This means that Panchayat could not take any action against the company.

In short, it can be said that the High Court had given precedence to the economic growth by completely ignoring the importance attached to the

protection of environment and protection of valuable and most cherished fresh water sources.\textsuperscript{35}

The Madras High Court dealing with sand mining to slaughter point vividly described the horrendous calamity flowing from what may be described as mafia mining in the following words.\textsuperscript{36}

"Sand mining has an adverse destructive impact. Its disastrous effect is unimaginable. It has "Crippled the riverine ecology and depleted the groundwater table resulting in a nascent desertification process." It has been identified as the main reason for the water crisis. The potable nature of available drinking water is affected as the sweet water aquifers (recharge and purifier) are destroyed by quarrying. It has increased the base flow of groundwater to the rivers.

Is it conceivable that a corporate titan is contemplating the operation of the construction of huge bore wells in the suburbs of Cochin in a parched village where people clamor of water for conversion into mineral water to be exported to Kuwait for the drinking water needs of the American Army which may be stationed there? An enterprise, Drink 'N' Fresh Beverages, has allegedly (though disputedly) got suction to begin preliminary work and the local people are getting ready for demonstration against the mega-negation because they have no water to drink while leaving their well go dry (or turn brakish) paddy fields ceasing to be cultivable if enormous volumes of water are exploitatively exported. Water is life for the life and not a commodity for sale. If it is F.D.I. (Foreign Direct Investment) that the country looks for from the

\textsuperscript{35} Air. May 2006, SC 1351
\textsuperscript{36} Supra note 3, pp. 2-3.
insatiable greed of foreign investors, I hope that the state and Court will intervene on the side of the people rather than on the side of micro Corporate.\textsuperscript{37}

Krishna Iyer's observation clearly shows that the government is not much serious about the role of underground water. The above instance not only reveals government's apathy, but it also reveals the truth that the establishment is serving the interest of the corporate sector rather than masses.

\textbf{B. Ground Water Pollution and Article 21}

\textit{Role of Supreme Court}

Pure water is as essential for a living human being as air and other commodities. Now, the question of underground water has attained greater significance compared to earlier days because of the global concern for maintaining good health and decent living. Safe drinking water is obtained mainly through underground aquifers, which nowadays are being contaminated by industrial effluents as well as urban sewer systems. Besides, insufficient treatment methods, the greatest threat appears to be from the indiscriminate sucking of underground water either by manufacturing units or for irrigation purposes. No human civilization can flourish without readily available quantity of pure water, and above all water born diseases have become greatest menace to the human existence. Thus the preservation of underground water needs to be addressed quite seriously. In the context of India, Article 21 of the constitution provides greater respite to the issue of underground water.

By interpreting Article 21 of the citizens' "Fundamental Rights to life", the Supreme Court expanded its meaning to read several basic human rights

\textsuperscript{37} Id., p.9.
into it. This jurisprudence fully developed with the decision of Supreme Court in the case of Francis Mullin.\(^{38}\) Article 21, thereafter, began to expand in many directions to include implicitly within it the ‘right to livelihood’\(^{39}\) and ‘right to potable water’.\(^{40}\)

The court is now more concerned not only with ‘right to life’ but to ‘quality of life’. The judicial system in India has done a remarkable service by making an open declaration that the right against pollution and clean environment is a fundamental right. The question crops up as to who would determine that these rights are not being violated? What should be quality of water and whether the environment which has been provided for is a safe environment? To achieve the best answers of the above questions, a collective effort by all wings of the state is necessary.\(^{41}\)

The word “Life” has also been used prominently in the Universal Declaration of Human Rights, 1948. The fundamental rights under the constitution are almost in consonance with the rights contained in the Universal Declaration of Human Rights as also the Declaration and the Covenants of Economics, Social and Cultural Rights to which India is a party having ratified them. That being so, since ‘life’ is also recognized as a basic human right, it has to have the same meaning and interpretation as had on that word by the Supreme Court of India in its various decisions relating to Article 21 of the Constitution. As a matter of fact the jurisprudence of personhood or the

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38. Francis Corali Mullin vs. Union Territory Delhi Administration, AIR 1981 SC 746.
40. Attokoya Thangal v Union of India 1990(1) KLT 580
Philosophy of right to live as envisaged by Article 21 enlarge its sweep to encompass human personality in its full blossom.\textsuperscript{42}

According to dictionary meaning “Life” means, ‘state of functional activity’. But the term as used in the Constitution does not mean mere existence. Life is the most cherished thing possessed by a man. This right one inherits by birth. This absolutism has not been curtailed or eroded. Article 21 of the Constitution is a constitutional command to every state to preserve the basic human rights of every person. Existence of right and its preservation has thus to be construed liberally and expansively. The Supreme Court of India feels that the right to life includes the quality of life as understood in its richness and fullness within the ambit of Constitution.\textsuperscript{43}

The Indian Courts have embraced Judicial activism in developing environmental jurisprudence. The right to pollution free water is treated as a fundamental right. The concept of locus standi has been expanded so as to tailor environmental cases to fit into the frame work of public interest litigation.\textsuperscript{44}

The real genesis of Environmental Law, much before the Rio Treaty of 1992, and without reference to such concepts as ‘sustainable development’ and ‘precautionary principle’ or ‘polluter pays principle’ can be traced to the Supreme Court decision in Ratlam Municipal Council case. Case by case the principles contained in the International law were enforced in Domestic law by the Superior Courts with the aid of Article 21 of the Constitution.\textsuperscript{45}

\textsuperscript{42} Id. P. 263.
\textsuperscript{43} State of Himachal Pradesh v. Umed Ram Sharma, AIR 1986 SC 847.
\textsuperscript{44} Monga Seema; “Environmental Protection: A Legal Perspective”, Cochin University Law Review, 1992, p.287.
\textsuperscript{45} Dharmadhikari (J.); “Environment – Problems and Solutions”, AIR 2003, p. 165.
The Supreme Court in *Ratlam Municipal Council v. Vardhi Chandra*\(^46\) has recognized the importance of pollution free environment and the status of human rights. Right to pollution free air and water was held to be a fundamental right under Article 21. Monetary compensations for violation of Fundamental Right were also introduced.

Coming to the right to pollution free environment as a right emanating from the right to life, the first case where Supreme Court recognized the right to clean environment as an integral facet of right to life. In *Rural Litigation & Entitlement Kendra v. State of U.P*\(^47\) the Supreme Court ordered for the closure of those limestone quarries that had adversely affected the perennial water springs. The result of this order was that leases of limestone quarries were thrown out of business, but according to the court, it was a price that had to be paid for protecting and safeguarding the right of people’s to life in the healthy environment.\(^48\)

In Ganga Pollution Case\(^49\), the concluding observation of Justice K.N. Singh supports the expanded environmental approach – right to clean and healthy environment is a fundamental right under Article 21. He observed that pollution of river Ganga is affecting the life, health and ecology of Indo-Gangantic plain. He concluded that closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance than revenue.

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46 AIR 1980 SC 1622  
47 AIR 1985 SC 652  
48 Id. p. 656.  
49 M.C.Mehta V Union of India AIR 1988 SC 1037.
Thus in all of the above cases, although specifically Article 21 has not been mentioned, but all the directions have been issued under Article 32, which surely can be understood on the basis that an unarticulated right, i.e. right to a wholesome environment is to be treated as a part of right to life. The right to life would be meaningful and effective, if a clean, healthy and unpolluted environment is made available to the citizens which ensure the dignity and well being of the individual.

Again, in *Subhash Kumar v. State of Bihar*\(^50\), the Supreme Court ruled that ‘right to life is a fundamental right under Article 21 of the Constitution and it includes right to enjoyment of pollution free water, air for full enjoyment of life” and that if anything endangers or impair the quality of life, in derogation of laws, a citizen has a right to have recourse to Article 32 of the Constitution for removing the pollution of water on air which may be detrimental the quality of life.” Similar view has been expressed in M.C. Mehta’s case.\(^51\)

Again, in *M.C. Mehta v. Union of India*\(^52\) the Supreme Court of India took note of the environmental pollution due to stone crushing activities in and around Delhi, Faridabad and Ballabghar complexes. The court was conscious that environmental changes were inevitable consequences of the industrial development in our country, but at the same time the quality of environment cannot be permitted to be damaged by polluting the air, water and land to such an extent that it becomes a health hazard for the residents of the area. Thus the

\(^{50}\) AIR 1991, SC 420

\(^{51}\) M.C. Mehta v Union of India, 2003 Cr.L.J. 2045.

\(^{52}\) (1992)3 SCC 256.
Supreme Court of India once again, treated it a violation of Article 21 of the Constitution.

The Supreme Court of India in the case of *Virendar Gaur v. State of Haryana*\(^{53}\) was of the opinion that interference with environment, ecology, air, water pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, again, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a human and healthy environment.

Apart from above cases, the Supreme Court of India, in a case popularly known as H-Acid case\(^ {54}\) observed “once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on such activity. The rule is premised upon the very nature of the activity carried on. It was concluded that polluting industries are “absolutely liable to compensate for the harm cause by them to villagers in the affected areas, to the soil and to the underground water and hence they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas. In forming this view reference was made to Article 21, 48-A and 51-A(g) of the Constitution of India.

The right to pollution free environment as a part of right to life was again reiterated in Vellore Tanneries case.\(^ {55}\) In this case, untreated effluents by the tanneries in the state of Tamil Nadu were being discharged in the river

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54 *Indian Council for Enviro Legal Action v Union of India* AIR 1996 SCW 1069.
rendering the river water unfit for human consumption, contaminating the sub
soil and spoiling the physico-chemical properties of the soil making it unfit for
agricultural purposes. The Court held that it is the Constitutional and Statutory
provisions to protect a person’s right to fresh air, clean water and pollution free
environment, but the source of the right is the inalienable right to clean
environment."

The concept of water pollution touches several aspects. How solid waste
is to be disposed of, and how these rivers are to be cleaned are some of the
issues which were looked into by the Supreme Court of India in a number of
decisions.

Underground water pollution has specific issues for the region of coastal
belts, leathering manufacturing units of Calcutta and northern area river basin.
In all three cases underground water will have to bear the problems of its
quality. Great danger lies in over extraction of water in the Coastal region. It
will add more saline water and thus shortage being created owing to overuse of
the underground water. Same problems may also occur to the water of Yamuna
river and the nearby water bodies of the Kolkata. The existing underground
water sources will have definite role to degrade the quality of the water of
Yamuna basin and the wetland of Kolkata.

Once again, the Supreme Court of India in *S. Jagannath v. Union of
India*\(^{56}\) held that sea beaches and sea coasts are gifts of nature and any activity
polluting the same has to be prohibited. The intensified shrimp prawn farming
industries by modern methods in coastal areas was found to be causing

degradation of mangrove ecosystem, discharged of highly polluting effluents and pollution of potable as well as ground water. It was held that the said activities of the industries are violative of constitutional provisions contained in Article 21 of the constitution.

Right to access of clean drinking water is equally a fundamental right. It is the duty of the State to provide clean drinking water to the citizens. It was accordingly held that state government can not grant exemption and permit to an industry to set up a plant which may lead to pollution of underground water resources or water bodies. The need for healthy environment was again recognized in this case, which is part of Article 21 of the Indian Constitution. This view was expressed by the Supreme Court in the case of Prof. M.V. Nayudu.\(^57\) The emission of untreated waste water by the dyeing and printing units deprives the citizens of access to unpolluted groundwater, which is essential for their existence. Not only the groundwater by the way but the operation and working of the industrial units have also affected the quality of vegetables and crops, which are grown in the area. The owners of industrial units, unmindful of the environmental degradation are causing disturbance to the ecological condition for their self interest as their actions are hazardous to life within the meaning of Article 21 of the constitution of the India. Thus industrial units were directed to be shifted for enforcing the rights under Article 21 of the Constitution of India and compelling the person to discharge their fundamental duties under Article 51-A(g) of the Constitution of India.\(^58\)

\(^{57}\) A.P. Pollution Control Board II v. Prof. M.V. Naidu (2001)2 SCC 62.
In *M.C. Mehta v. Union of India*\(^{59}\) the Budkal and Suraj Kund lake are monsoon-fed water bodies. The natural drainage system of the surrounding hill areas feed these water bodies during rainy season. The mining activities in the vicinity of the tourist resorts would disturb the rainwater drains, which in turn may badly affect the water level as well as the water quality of these water bodies. The mining may also cause features and cracks in the sub-surface, rock layer, causing disturbances to the aquifers, which are the source of the groundwater. This may disturb the hydrology of the area.

The Supreme Court of India was of the view that in order to preserve environment and control of pollution within the vicinity of the two tourist resorts it is necessary to stop mining in the area. The Apex Court further suggested that the action plan shall be prepared in such a way that it shall be a guiding tool also in the hands of the State Pollution Control Boards and Government agencies for enforcement of the Environmental Laws for the restoration of environmental quality of the area. Monitoring mechanism shall include frequency of monitoring for air quality, water quality, groundwater and solid waste etc.\(^{60}\)

The Supreme Court while recognizing the importance of clean water supply issued several directives – since 1993\(^{61}\) – asking the Delhi and Haryana government to prevent untreated industrial effluents from being released into the Yamuna, and to this effect quite recently, the government of Delhi has announced the measures, which will be initiated to clean the Yamuna river from its being one of the most polluted rivers of the World. Delhi contributes

\(^{59}\) AIR 2004 SC 4016  
\(^{60}\) Ibid.  
\(^{61}\) The Times of India, February 1, 2008, p.12.
57% of the pollution by way of garbage, effluents, untreated sewage, animal carcasses and other waste. With little sewage being treated, the water is becoming more and more toxic. The Yamuna remains relatively static for nine months in a year and so toxins, instead of getting flushed away, remain in the water and soil for long periods, polluting the water table of surrounding areas. By heralding the measures to clean it, multiple problems will be minimized relating to the aquifers.

In accordance with the different verdicts of the Supreme Court, it may be observed that the Apex Court has quite appreciately tried to attach prime significance to the quality of underground water in relation with the right to life. As Article 21 signifies that the right to carryout life should not be hindered in anyway. Thus the Supreme Court of India, has too given the due recognition to the fact through various verdicts, which clearly maintain that the requirements of clean water need to be managed so that no human being is deprived of the basic necessity of safe underground water. The level and quality of groundwater both are equally important because regular supply of water may not be possible without the optimum level of underground aquifers, and clean water is life line to provide survival of a person. And the right to life means clean water also which is enshrined in Article 21 of the Indian Constitution.

Role of High Courts

Apart from the provisions under the Water Act, there exists a clear Constitutional mandate for protection of environment including prevention of
water pollution. By an activist interpretation of the provisions, the High Courts, in the last two decades, have substantially enriched environmental jurisprudence in India\textsuperscript{63}, by extricating itself from the restrictive principles of locus standi\textsuperscript{64}, and using the instrument of PIL to maximum effect.

At least High Courts have explicitly recognized environmental rights as part of Article 21 of the Constitution. Article 21 of the Constitution, which deals with the fundamental right to quality of life and personal liberty, are also directly relevant to the groundwater. Social action litigation, wherein a liberal interpretation of this Article was taken are many. However, cases related to groundwater are scanty.\textsuperscript{65} The High Court of Kerala\textsuperscript{66} was a forerunner when it said “Right to life is more than the right to animal existence and its attributes are manifold, as life itself. A prioritisation of human needs and a new value system has been recognized in these areas. The right to sweet water and right to free air are the attributes of the right to life. These are the basic elements, which sustain life itself.” It was further held that excessive pumping of water and disturbance of its quality was violative of Article 21 of the Constitution.\textsuperscript{67}

How unconcerned the government is about its environmental obligation can be seen in Rajiv Ranjan case.\textsuperscript{68} In this case a chemical industry was discharging untreated trade effluents outside the factory premises causing grave problem of water pollution. This was also corroborated by the reports of two

\textsuperscript{63} Upadhyaya Sunjey And Videsh: Water Laws, Air Laws And Environment, 2000, p.15.
\textsuperscript{64} Locus Standi means “ A place of standing, standing in court, a right of appearance in a Court of justice, or a before a legislative body, on a given question”; Black’s law Dictionary, 6th Ed, West Publishing Comp, 1990.
\textsuperscript{65} Rama Devi P.; “Groundwater Development And a Legal Regulation”, ILI1991, Vol. 33;4, p. 616.
\textsuperscript{66} Attokaya Thangal v Union of India, 1990 KLT 580.
\textsuperscript{67} Ibid.
\textsuperscript{68} Rajiv Ranjan v. State of Bihar, AIR 1992 Pat. 86.
committees constituted by the Court. But the government of Bihar took the stand that it had no information of such pollution, and, therefore, no judicial action was attracted. How can the state government remain insensitive to the problems in the state? The Patna High Court without paying any heed to the ill informed regime of the government, directed the polluting industry to close down the industrial process forthwith. The Court further expressed the opinion “that the failure to protect the inhabitants of the locality from the poisonous and highly injurious effects of the distillery’s effluents and obnoxious fumes amounted to an infringement of the inhabitants rights guaranteed under Article 21 of the constitution of India”.

In the state of Madhya Pradesh, the underground water had excessive fluoride contents. This affected the quality of the drinking water and in turn caused major set back to public health like skeletal flurosis, dental flurosis and deformities in hands and legs. It was alleged that thousands of people were suffering from bone diseases; whereas the state government hardly took any precautionary measure for the supply of proper drinking water. A practicing advocate moved the Madhya Pradesh High Court against the state government for its apathy and gross negligence that it is not taking proper measures in this regard.

However, the relevant part in the judgement was that plea of the counsel for the petitioner, to make accountable those who were irresponsive to this misery, was not allowed because, according to Mathur, C.J. speaking for

69. Ibid.
the division bench, 'we cannot haul them up for the lack of guidance'. 72 In this pathetic scene, it was unfortunate that the culprits were given a clean chit. However, the court did not leave the miserable high and dry. It directed the Government of Madhya Pradesh to provide the victims free medicare and a compensation of Rs. 3000/- and Rs. 200/- each to those who had undergone surgery and also those suffering from dental flourosis respectively. In this effort the court did not leave any scope for the plea of financial bankruptcy which is a normal defence, rather it gave directions to the state government that financial difficulty was not to be raised in the way of providing treatment to the victims.

Despite the unprecedented role being played by the judiciary, in certain cases it could not maintain the position, for instance, in the cases of Pepsi company and fluoride content, it failed to deliver the good. The mere justification it put forth was that legislative and executive bodies were bottle mark in the above cases. Such kinds of insufficient pronouncements may not only complicate the issues but there is every chance that the deteriorating condition of underground water may aggravate altogether. Judiciary needs to have great in this area so as to check the menace of the over exploitation, contamination as well as unwarranted utilization of the underground water. In the age of consumerism if the judiciary fails to deliver and intervene then of course, the concept of sustainable use of the previous natural resources like water will prove to be futile.

Alike the non-serious and unconcerned approaches of judiciary, the case of Rajiv Ranjan of Bihar and above reported matter in Cochin University Law

72 Id. p.193.
Review (2002) reflects the similar kind of callous attitude being shown by the government of Bihar as well as Kerala, which in no way should have gone this way.

C. Sustainable Development – Role of Supreme Court

The time has ripened to create a congenial atmosphere and environment to bestow “sustainability of life” to all living creatures irrespective of our activities. The advancement of science and technology and industrialization has no doubt conferred many benefits, at the same time resulted in over withdrawal of natural gift of nature i.e. groundwater and also brought in its trail of problems of water and land. While advancement and development is a must to every economy, it is also essential to ensure that no irreparable damage is caused to ecosystem. Hence, this paved the way for the approach of “sustainable development” to balance the exigencies of industrial growth against the trade of an environment concern.73

The degree to which a nation can prosper depends on its productive, which is the efficiency with which it is able to utilize the natural resources of the environment to satisfy human needs and expectations. If the gains in productivity are to be sustained, resources must also continue to be available for all times to come. This requires that while providing for current needs the resources base be managed so as to enable, ‘sustainable development’.74 The traditional concept that development and ecology are opposed to each other, is no longer acceptable, since ‘sustainable development’ is answer. Thus, the basic approach should be sustainable development in harmony with

environment. It would have to be ensured that all development programmes, in all sectors, should take environmental considerations fully into account.

The most remarkable contribution of the Supreme Court has been the adoption of the right to sustainable development as a hard core principle of environmental law in India. The concept of sustainable development itself is comparatively young. It first appeared in the International Union for Conservation of Nature and Natural Resources (IUCN) Report of 1980 in respect of world conservation strategy. From there, it was picked up by the Report of the world Commission on Environment and Development in 1987, popularly called the Brundtland Report. The report itself was the product of 900 days of deliberations by an international group of politicians, civil servants and experts on environment.\(^75\)

The concept of sustainable development is in its infancy. Holmberg and Sandbrook identified some 70 definitions of sustainable development. However, a commonly accepted definition has been proposed by Mrs. G.H. Brundtland in her 1987 report. According to her, sustainable development is the development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'. This definition has a strong ethical orientation focusing upon the satisfaction of human needs rather than wants. It does not lay emphasis on the protection of environment in general. Many contemporary environmentalists are very critical of the concept of sustainable development because it licences economic growth. But the concept of sustainable development as a mass appeal precisely because it is a

catch phrase capable of repetition in ‘a parrot like fashion by environmental policy makers’. The Supreme Court has, however, been careful to distinguish between the concept of sustainable development and its definition by Brundtland preferring not to fall for any given content for the concept and thus open the way for an active definition of sustainable development with a varying content.\textsuperscript{76}

In perspective of India, sustainable development has gained currency to add the scenario of underground water and its quality. Though the term sustainable development has not been included in the constitution of India but the apex court of India’s interpretation equates it with the connotation of the essence of the term, which is laid down in Articles 21, 47, 48-A and 51-A(g).

In a series of cases which may not be large in number but which have much economic significance, the Supreme Court had to consider the application of the principle of sustainable development.

The first case involving claims to sustainable development was the \textit{Bichhri Village case}\textsuperscript{77}, the court held that both development and environment should go hand in hand, in other words, there should not be development at the cost of environment and vice-versa, but there should be development while taking due care and ensuring the protection of the environment. The court did not refer in terms to the ideals of sustainable development. Nevertheless the situation in this particular case classically represents the conflict between the claims of development and the claims of sustainable environment. In fact

\textsuperscript{76} Ibid., pp.531-532.

Jeevan Reddi J. portrayed the conflict in the opening words of his opinion which are worth reproducing.\textsuperscript{78}

It highlights the disregard, nay, contempt for law and lawful authorities on the part of some among the emerging breed of entrepreneurs, taking advantage, as they do, of the country’s need for industrialization and export earnings. Pursuit of profit has absolutely drained them of any feeling for fellow human beings – for that matter, for anything else. And the law seems to have been helpless. It is such instances which have led many people in this country to believe that disregard of law pays and that the consequences of such disregard will never be visited upon them – particularly, if they are men with means.

The next case involves the same kind of problem related to tanneries in Tamil Nadu.\textsuperscript{79} The tannery industry is a significant foreign exchange earner but its effluents are released on the lands, the rivulet and the rivers polluting the sub-soil water and arable lands. Facts indicated that the industries were reluctant to provide treatment of effluents. The court felt that even though the industry was earning foreign exchange and providing employment, contributing to development, ‘it has no right to destroy the ecology, degrade the environment and pose a health hazard’.

The court held that sustainable development is the answer to the problem of conflict between development and ecology. Without much discussion of the content of sustainable development the court held that sustainable development is a balancing concept and has been accepted as part

\textsuperscript{78} Id, p. 217.
\textsuperscript{79} Vellore Citizen’s Welfare Forum v. Union of India, AIR 1996 SC 2715.
of the customary international law. The court even went one step further to declare that the precautionary principle and the polluter pays principle have been accepted as part of the law of the land in India.

In *A.P. Pollution Control Board II v. Prof. M.V. Nayudu (Retd.)*\(^{80}\), the Supreme Court took the question for indepth consideration. The matter involved the question of permission for establishment of industry within 10 km. of the two big water reservoirs, the Himayat Sagar and the Osman Sagar, serving the twin cities of Hyderabad and Secunderabad. Jagannadha Rao J, speaking for the court, adopted the principle of sustainable development. It was asserted that in today's emerging jurisprudence, environmental rights are described as 3\(^{rd}\) generation rights. The United Nation's General Assembly has declared the right to sustainable development as an inalienable human right. Rio Conference was also referred to which adopted as principle 1 the principle that every human being is entitled to a healthy and productive life in harmony with nature. The judge went on to refer to the Earth Summit Meeting of 1997 which reflected this principle.

The reference to all these international sources clearly indicated the willingness of the Supreme Court to adopt the principle of sustainable development from the international domain as a basic principle of environmental law in India. Rao J categorically stated: 'There is building up, in various countries, a concept that a right to healthy environment and to sustainable development are fundamental human rights implicit in the right to “life”.'

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\(^{80}\) (2001) 2 SCC 62.
The Supreme Court in the Nayudu case\textsuperscript{81} weighed the claims of development against the claims of sustainability of the supply of pure water for drinking purposes. It gave precedence to the human need for drinking water over and above the possible economic advantage which could be generated by the industry for the state.

The concept of sustainable development also finds support in the decision of this Court in the Case \textit{Narmada Bachao Andolan v Union of India}.\textsuperscript{82}

The Apex Court in the case of \textit{Essar Oil v. Halar Utkash Samiti}\textsuperscript{83} was pleased to expound on this. Their lordships held:

"Indeed, the very existence of humanity and the rapid increase in population together with the consequential demands to sustain the population has resulted in the concreting of open lands, cutting down of forests, filling up of lakes and the pollution of water resources and the very air that we breath. However, there need not necessarily be a dead lock between development on the one hand and the environment on the other. The objective of all laws on environment should be to create harmony between the two since neither one can be sacrificed at the alter of the other."\textsuperscript{84}

The present case of \textit{Intellectual Forum Tirupati v. State of Andhra Pradesh & Others}\textsuperscript{85} relates to the preservation of and restoration of status quo ante of two tanks, historical in nature being existence since the time of Sri

\footnotesize{\textsuperscript{81} Ibid.}\
\footnotesize{\textsuperscript{82} (2002)10 SCC 664.}\
\footnotesize{\textsuperscript{83} (2004)2 SCC 392, para 27.}\
\footnotesize{\textsuperscript{84} Ibid.}\
\footnotesize{\textsuperscript{85} AIR 2006, May SC pp. 1362-1363.}
Krishnadevayara, 1500 AD. The tanks are called ‘Avilala Tank and Peruru Tank, which are situated in suburbs of Trupati Town which is world renowned popular pilgrim centre having every day inflow of tourists between one lakhs to two lakhs. Tank bed land for housing purposes was systematic destruction of percolation. The tank being in existence and were being put to use not only for irrigation purpose but also as lakes which were furthering percolation to improve the groundwater table, thus serving the need of the people in and around these tanks.

The court held that, there is no doubt about the fact that there is responsibility bestowed upon the government to protect and preserve the tanks, which are an important part of environment of the area.\textsuperscript{86}

The Court further held that, however, this court has often faced situations where the needs of environmental protection have been pitched against the demands of economic development. In response to this difficulty, policy makers and judicial bodies across the world have produced the concept of “sustainable development”.

In the light of the above discussions it seems fit to hold that merely asserting an intention for development will not be enough to sanction the destruction of local ecological resources. What this court should follow is a principle of sustainable development and find a balance between the developmental needs.\textsuperscript{87}

To safeguard the quality of the sources of groundwater, there must be efforts to adopt the methods of sustainable use. The present day need is not

\textsuperscript{86} Ibid.
\textsuperscript{87} Ibid.
mere problem for the mankind rather the main cause for concern is how to maintain the purity of the underground water so that the future generation is not deprived of fulfilling their requirements of using good quality water.

To check the menace caused by underground water pollution, some of the basic principles evolved by the courts for protection and improvement of environment in general may be of great help. The major initiatives generated by the Courts are as follows:

(i) The Principle of Precaution
(ii) Polluter-Pays principle
(iii) The Principle of Inter-generational Equity
(iv) Public Trust Principle
(v) Absolute Liability Principle

*The Principle of Precaution*

A basic shift in the approach to environmental protection occurred initially between 1972 to 1982. Earlier, the concept was based on the ‘assimilative capacity’ rule as revealed from Preamble 6 of Stockholm Declaration 88. The said principle assumed that science could provide policy makers with the information and means necessary to avoid encroaching upon the capacity of the environment to assimilate impacts. It is also presumed that relevant technical expertise would be available when environmental harm was predicted and thus there would be sufficient time to act in order to avoid such

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88 Stockholm Declaration 1972, Principle 6, “The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystem.”
harm. But in the II principle of U.N General Assembly Resolution on the World Charter for Nature, 192, the emphasis shifted to the ‘Precautionary Principle.\(^89\)

The ‘Precautionary Principle’ emerged in international instruments of mid 1980s, although it existed in some domestic legal systems.\(^90\) The inadequacies of science is the real basis that has led to the precautionary principle of 1982. It is based on the theory that it is better to err on the side of caution and prevent environmental harm which may indeed become irreversible. The precautionary principle was recommended by the UNEP Governing Council in 1989. The Bergen Declaration on sustainable development in the European Community affirmed the principle in 1990. The “Caring for Earth” is a document produced by the joint Declaration of World Conservation Union, UNEP and World Wide Fund for Nature also recognized this concept. The Bommako Convention also powered the threshold at which scientific evidence might require action by not referring to “serious” or “irreversible” as adjective qualifying harm. The Earth Summit, makes mention of this. Principle 15 deals with the concept of precautionary principle.\(^91\)

The development of the precautionary approach from Stockholm in 1972 to Rio in 1992 is remarkable. The Rio Conference in 1992 is the high water mark of the development when precautionary approach is recognized as a norm for various nations to pursue.

\(^{89}\) Doibia, T.S. (J.): *op. cit.* 147, 476.
\(^{90}\) Supra note 54, pp. 163-164.
\(^{91}\) Earth Summit, Principle 15 - “In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.”
The meaning of 'precautionary principle' is not clearly defined but it contemplates that any activity which poses danger and threat to natural resources is to be prevented. The term which is normally used is that this principle is meant to ensure "that a substance or activity, only a threat is to be prevented. The words "substance" would include introduction of material through human efforts; it is this human effort which has been termed as "activity". In short precaution makes one to avoid possible danger. 'Precautionary approach' is a principle meant to avert environmental disaster. In a nutshell, "prevention is better than Cure." This is sum and substance of the concept. The "precautionary principle" in the context of municipal law means:

(i) The state Government and the Local Authorities are supposed to anticipate and then prevent the causes of environmental degradation. They are supposed to check the activity.

(ii) Merely because there is a lack of scientific knowledge as to whether a particular activity is causing degradation should not stand in the way of the Government;

(iii) The onus of proof is on the actor or the developer i.e. the industries to show that the action is environmental friendly.

Basing itself on this principle, the Supreme Court said in M.V. Naidu's case that it is better to err on the side of caution and prevent environmental harm than to run the risk of irreversible harm.

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95 Supra note 93, 362.
The apex court has through judicial activism expanded the scope of Article 32 and is utilizing it for fashioning new strategies for protection of environment. For example, the precautionary principle and polluter pays principle which are off shoots of the concepts of sustainable developments are being applied by the court in the context of protection of environment by utilizing article 32 in appropriate proceedings. It has been found that while the industrial and technological advancements are helping to raise living standard; they are at the same time very adversely affecting the natural environment and disturbing the ecological balance. Therefore, to prevent such effect on environment and ecology the court has applied the precautionary principle according to which the state and statutory authorities must foresee and prevent all the clauses of environmental degradation by taking appropriate measures.

Indian Courts have started tending the precautionary principle with great care and enthusiasm as soon as it was born. As early as in 1993, reclamation of wetlands for building a trade centre was prevented as the benefits of Wetlands to the society could not be weighed on mathematical nicety. Every body should be aware of the role wetland play in ground water recharge and discharge.  

There is a long line of cases, beginning with Vellore Citizen’s case. In this case closure of tanneries in certain districts of Tamil Nadu was directed with a view to preventing, among other things, serious damage to ground water. The new concept of burden of proof was admitted in the Vellore case.

The court state that "the onus of proof is on the actor or the developer to show that his action is environmentally benign. The special concept of onus of proof have now emerged and governs the law in our country too, as it is clear from Art. 47, 48A and 51-A(g) of the Constitution of India.

The Supreme Court of India in Indian Council for Environ-Legal Action Group v. Union of India\(^98\) has explicitly recognized the 'Precautionary Principle' as a part of the of law of land. The 'Precautionary principle' makes it mandatory for the State Government to anticipate, prevent and attack the causes of environment degradation. The Supreme Court further observed in M.C. Mehta v. Union of India\(^99\):

'We have no hesitation in holding that in order to prevent the two lakes (Budhkal and Suraj Kund) from environmental degradation, it is necessary to limit the construction activity in the close vicinity of the lakes.\(^100\)

The concept of the Precautionary principle has been very well defined by the Supreme Court in Prof. M.V. Naidu case.\(^101\) The 'Principle of Precaution' involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is based on scientific uncertainty. Environment protection should not only aim at protecting health, property and economic interest but also protect the environment for its own sake. The precautionary duties must not only be triggered by the suspicion of concrete danger but also by way of justified

\(^{98}\) AIR 1996 SC 1446.


\(^{100}\) Id., p. 203

\(^{101}\) A.P. Pollution Control Board v Prof. M.V. Nayudu, AIR 1999 SC 812.
concern or risk potential. The principle suggests that where there is identifiable risk or serious irreversible harm, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment. This is often termed as a reversal of the burden of proof, because otherwise in environmental cases, those opposing the change would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the status quo by maintaining a less polluted state should not carry the burden of proof and the party who wants to alter it, must bear this burden.

The underlying idea behind the precautionary approach area that uncertainty should not be a pretext not to regulate, lack of scientific evidence should not be used to delay implementation of cost effective measures, the preventive and remedial action should not await presentation of conclusive scientific evidence of detrimental effect on environment. In the case of doubt on the effects on environment, no delay can be allowed for regulatory action. When an experiment does not confirm or disprove a hypothesis, the scientists can continue together information whereas the regulators cannot afford to await certainty. They should act swiftly, in anticipation of the environmental harm to ensure its elimination, justifying the old adage ‘ounce of prevention is worth a proud of cure’. The precautionary approach is said to promote development of clean technology. Every big project affecting environment is likely to have such ill effect as rising of groundwater depletion, salinity and soil erosion, etc.

The precautionary principle, therefore, obligates the authorities undertaking developmental activities based on large scale exploitation of Nature to take precaution against minimum possible degradation of Nature irrespective of lack of full scientific knowledge about it. The precautionary principle which is part of the concept of "sustainable development" has to be followed by the state governments in controlling pollution. It is when the effect of the project is known then the principle of sustainable development would come into play which will ensure that mitigative steps are and can be taken to preserve the ecological balance.

A question arose before the Karnataka High Court\textsuperscript{104} as to whether the setting up of the hospital would affect the water bodies and as to whether the concept of precautionary principle was attracted or not? It was observed that the Board has to go into question as to whether the pollution which is likely to be caused falls within the category of 'negligible or non negligible environmental risk. This issue has to be determined on the basis of the principle known as precautionary principle. It was further observed that hospital being an institution which is essential to improve the quality of human life, its establishment falls within the concept of sustainable development. It was further observed that as the area has not been declared as a sensitive area therefore, it is not possible to ascertain any potential non-negligible danger to environment by restoring to the principle known as precautionary principle. Ultimately it was observed that the Board should make a detailed study and it was only thereafter a decision should be arrived at.

\textsuperscript{104} Vijay Nagar Educational Trust v Karnataka State Pollution Control Board AIR 2000 Kart. 123.
The Polluter – Pays Principle

Some of the standards have been adopted through separate international Conventions for protection of particular resources. The most important resources are identified as water quality and the level of ground water. For example, the dumping of waste at rivers may cause harm not only to aquatic life but also pollute underground water of surrounding areas. Undue exploitation of ground water would cause desertification. The efforts to address this problem has led to the emergence of the concept of integrated pollution control, which requires states and project operators to consider and minimize the impact of activities on all environmental resources at each stage of the process related to these activities. The emergence of international law has recognized the importance of environmental information techniques and participation of citizens in decision making processes.105

The ‘polluter pays” principles was promoted by the Organization for Economic Co-operation and Development (OECD) during the 1970s when there was increasing public interest in environmental issues. This period saw demands on Government and other institutions to introduce policies and mechanisms for the protection of environment and the public from the threats posed by pollution in a modern industrialized society.106

The polluter pays principle has not been incorporated into the European Community Treaty as part of the new articles on the environment, which are to be introduced by the Single European Act of 1986. Article 130R

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105 Supra note 45, p. 164.
(2) of the treaty states that environmental considerations are to play a part in all
the policies of the community, and that action is to be based on three
principles- the need for preventive action, the need for environmental damage
to be rectified at source; and that the polluter should pay.

The international agreements now insist on two essential aspects : (i)
ensure that in the multilateral development lending institutions incorporate
environmental considerations into their activities and (ii) ensure availability of
international public sector funds to assist developing countries in meeting the
costs associated with increasing stringent international environmental
requirements.

OECD’s definition of the principle is that the polluter should bear the
expenses of carrying out measures decided by public authority to ensure that
the environment is an ‘acceptable state’ such measures must not be
accompanied by subsidies causing significant distortions in international trade
and investment.107

The Polluter Pays principle means that the absolute liability for harm
to the environment extends not only to the compensation of the victims of
pollution but also to the cost of restoring the environmental degradation.
Redressal of the damaged environment is a part of the process and as such the
polluter is liable to pay the cost to the individual sufferers as well as the cost of
reversing the damaged ecology. In short, whosoever, is responsible for causing
pollution should meet the cost of mitigating the damage caused.108

107 Supra note 16, p. 284.
The concept is not new. The Municipal Laws did contain provisions for imposition of fines, if damage was caused to the environment. Various Municipal Acts governing the municipal areas contained chapters for seeing that the town and cities remain in proper healthy and sanitary surroundings. These statutes contained power to impose fine, realize penalty and also to change fines. Therefore, to say that the concept of calling upon a person who caused pollution to pay the cost of that pollution is something new is not apt. Only a new terminology has been adopted.109

Thus, the ‘Polluter Pays’ principle is essentially a principle of economic policy for allotting the cost of pollution, rather than a legal principle. But it has certain implications for the development of international environmental law. The principles of ‘let the polluter pay’ and the principle of ‘equal access and non discrimination’ now stand well established through these conventions and is significant in the development of environmental law. The Stockholm Declaration has the tacit support of many state governments and it is therefore suggested that the principles contained in the Declaration Constitute Customary international law, there would be no difficulty in accepting them as a part of domestic law.

The ‘polluter pays principle has already been utilized by the Supreme Court in several cases to do justice to both environment and victims of environmental pollution.

The ‘Polluter Pays Principle’ has been held to be a sound principle by the Supreme Court in H-Acid Case.110 The court observed that the principle

109 Id, p. 486.
on which the liability of the respondents so defray the costs of remedial measures will be determined is the “polluter pays” that is, the responsibility for repairing damages is that of the offending industry”.

The Supreme Court further observed that “we are of opinion that any principle evolved in this behalf should be simple, practical and suited to the condition obtaining in this country.”

The Court ruled thus: “Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on.”

The rule has recently been applied by the Supreme Court in Motal’s case. The apex court found the motal responsible for causing disturbance in natural flow of Beas River and ordered to pay Rs.10 lakhs as the cost for ecological balance’. The Court while awarding damages also enforces the ‘Polluter Pays Principle’. The polluter is under obligation to make good the damage caused to the environment. The court held that pollution is a civil wrong. By its very nature, it is a tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution has to pay damages for restoration of the environment and ecology. In addition, to damages, the person guilty of causing pollution can also be held liable to any

111 Id., p. 1465
112 Id, p. 1446.
(ii) M.C. Mehta v. Union of India (1997) 1 Comp. L.J. 199 (SC).
exemplary damages so that it may act as different for others not to cause pollution in any manner.

The Polluter pays principle was also applied in the Shrim Culture Case.\textsuperscript{114} Where the Supreme Court directed the central Government to constitute separate authorities under section 3(3) of the EPA and directed the authorities to assess the loss to the ecology-environment and recover the amount from the polluters. In Calcutta Tanneries\textsuperscript{115} case, the task of assessment and recovery of restoration costs was assigned to an authority appointed by the state government. Thus the principle of polluter pays was enforced.

The Supreme Court in Re Bhavani River Case,\textsuperscript{116} directed an independent environmental agency, NEERI to inspect the affected area and assess the damage caused by discharges from the sugar factory. The Supreme Court remanded\textsuperscript{117} the matter to the Madras High Court, with a direction to look into the National Environment Engineering Research Institute (NEERI) reports and examine the question of the restitution of the areas damaged on account of the pollution already caused.

Perhaps the most effective approach was the one adopted by the Supreme Court in the Patencheru Case.\textsuperscript{118} Here, the court was dealing with extensive loss suffered by the farmers on account of damage to crops from contaminated surface water. The court accepted the loss estimated at Rs. 28,34,000 by a team of government officials, directed the state government to

\begin{footnotesize}
\begin{enumerate}
\item S.Jagannath v Union of India; AIR 1997 SC 811.
\item M.C. Mehta v Union of India c(1992)2 SCC 44.
\item Re Bhvani River v Shakti Sugar Mill (1998)2SC 601.
\item 1998 (4) Scale, p. 324.
\item Indian Council for Enviro Legal Action v Union of India (1995)6 Scale p.578.
\end{enumerate}
\end{footnotesize}
deposit full amount in the court to enable distribution to the farmers, and ordered the state to recover the entire amount from industry.\footnote{The Estate of Rs.2834000 (1995) 6 Scale 578 was revised to Rs.139,09737 (1996)5 scale 412. The State government was directed to deposit the larger amount as well.}

The emission of untreated wastewater by the dying and printing units deprives the citizens of access to unpolluted groundwater, which is essential for their existence. The High Court\footnote{Vijay Singh Puniya v State of Rajasthan AIR 2004, Raj., p. 1.} on the principle of polluter pays directed that each of industrial units shall pay to State Industrial Corporation 15\% of its turnover by way of damages.

Keeping in view the global concerns about the quality of groundwater and also the maintenance of ground water table, the judiciary in India initiated several legal as well as procedural mechanism to protect the water. The measures adopted by the judiciary incorporate into its ambit two significant principles namely, precautionary principle” and ‘polluter pays principle” to save the underground water. It is, therefore, submitted that to protect the groundwater resources from pollution, the ‘polluter pays principle’ and ‘precautionary principle’ must be applied strictly. These principles will serve as deterrent as well as remedial both.

**The Principle of Intergenerational Equity**

Another principle that has emanated from the concept of sustainable development is the principle of intergeneration equity. According to this principle the present generation should not use the natural resources and environment in a manner detrimental to posterity. In other words, intergenerational equity refers to the right of each generation of human beings
to get benefits from the cultural and natural inheritance from past generations as well as the obligation to preserve such a heritage for future generations.

The Court in *Ganesh Wood Products v. State of Himachal Pradesh*\(^{121}\) relied on the principle of inter-generational equity and explained that inter-generational equity means the concern for the generations to come. The present generation has no right to imperil the safety and well being of the next generation or the generations to come thereafter.

The apex court has incorporated this principle of intergenerational equity in its newly developed environmental jurisprudence and applied in its Prof. M.V. Naidu\(^{122}\) case, and held that the principle of inter-generational equity is of recent origin. The 1972 Stockholm Declaration refers to it in Principle 1 and 2. In this context, the environment is viewed more as a resource basis for the survival of the present and future generations. Several international convention and treaties have recognized the above principles.

Similarly, in the CRZ Notification Case\(^{123}\), the Court observed that environmental statutes were enacted to ensure a good quality of life for unborn generations since it is they who must bear the brunt of ecological degradation.

Furthermore, the principle of inter-generational equity, has also been adopted while determining the case of Motal Case.\(^ {124}\) The Supreme Court went on to categorically enshrine the principle as a sound law in the Intellectual Forum Triputi case\(^ {125}\), and held that “Principle of ‘Inter-generational Equity’ also to be applied for protecting natural resources.”

\(^{121}\) AIR 1993 SC 159.
\(^{122}\) A.P. Pollution Control Board v Prof. M.V. Naydu 1999 AIR SCW 434 para 51.
The Karnataka High Court in *Mathew Lukose v. Karnataka SPCB*\(^{126}\) explaining the inter-generational equity and held that, the world belong to us in usufruct, but we owe a duty to the posterity and to the unborn to leave this world at least as beautiful as found it.

The principles mentioned above wholly apply for adjudicating matters concerning environment and ecology. These principles must, therefore, be applied for protecting the natural resource of this country.

Judiciary’s main cause for concern is the concept of “intergenerational equity”, which signifies that the most precious resource as water requires for judicious use. The emphasis should be accorded to sustainability of the water resource, i.e. the exploitation and uses should be based on the need of not only for the present generation but it must be left for the future generation as well.

**Public Trust Principle**

Another legal doctrine that is relevant to this is the ‘Doctrine of Public Trust’. A public Trust doctrine underlines the importance of gifts of nature and seeks to protect the nature and its gifts which no computer may be able to register or record.

The doctrine of public Trust’ was first developed as a legal theory within the precincts of the Roman Empire’. It was founded on the principle that the Government is the role proprietor of certain common properties such as rivers, seashore, forests and the air, in trusteeship for the free and unimpeded...
use of the general public. According to Roman Law, these natural resources are either owned by none (res nullius) every one in common (res communes). When this concept came to be operated by the English common Law, then it was indicated that the sovereign could own these resources but the ownership was limited in nature. These resources were treated to have been held in trust by the Crown for benefit of the general public.

Ultimately, in course of time, this doctrine of public trust has come to hold the view that natural resources of great importance to the people as a whole should not be made available freely to everyone irrespective of status of life. This doctrine has not been applied in the environmental law because according to this doctrine the state is the trustee of the environmental and as a trustee has the "affirmative duty" to protect and improve the environment for benefit of the people who are the ultimate beneficiaries. The Constitutional duty entrusted upon the state to protect and improve natural environment is based on the "Doctrine of Public Trust". This public trust doctrine has a vast potential and helping the judiciary to scrutinize the executive and legislative actions of the state in the realm of environmental protection.

This doctrine, though in existence during Roman period was enunciated in its modern form by the U.S. Supreme Court, where the court held that the bed or soil of navigable waters is held by the people of the state in their character as sovereign, in trust for public uses for which they are adopted.

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127 Supra note 6, p. 271
130 Illinois Central Rail Road Company v People of the State of Illinois (146 US 537, 1892)
The State holds the title to the bed of navigable waters upon a public trust, and no alienation or disposition of such property by the State, which does not recognize and is not in execution of this trust is permissible. 131

The Supreme Court of California, in well known Mono Lake Case132 summed up the substance of the doctrine. The court said:

"Thus the public trust is more than an affirmative of state power to use public property for public purposes. It is an affirmation of the duty state to protect the people's common heritage of streams, lakes marshland and tidelands, surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust. However, when the state holds a resources that is freely available for the use of the public".

According to Prof. Sax's133 article on this subject is considered to be an authority, three types of restrictions on Governmental authority are often thought to be imposed by the Public Trust Doctrine:

(i) The property subject to the trust must not only be used for a public purposes, but it must be held available for general public

(ii) The property may not be sold even for fair cash equivalent.

(iii) The property must be maintained for particular types of use.

The Indian judiciary is also applying this doctrine in disputes having significant environmental importance.134 The doctrine in its present form, was

131 Ibid.
132 National Audubon Society v Superior Court of Alpine Country, 33 Cal.419.
134 Supra note 129, p. 102.
incorporated as a part of Indian law by this Court in the Span Motel’s\textsuperscript{135} case and held that “Our legal system, based on English Common law, includes public trust doctrine as part of its jurisprudence. The state is the trustee of all natural resources, which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea shore, running waters, air, forests and ecologically fragile lands. The state as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.”\textsuperscript{136}

Consequently, in an attempt to enhance the effective use of the principle, the court further held that the public trust doctrine, was a part of the law of the land.”

Fluctuating groundwater tables in different part of the country had caused hardship to the problem. In view of this problem, the apex court has been giving special attention, while taking into consideration of the problem, it was observed that “Tanks are important part of an environment of the area. Government is responsible to protect and preserve historical tanks qua concept of ‘sustainable development’ and public trust doctrine’. The judicial system should be more active in taking care of these problems”\textsuperscript{137}

The principle mentioned above wholly apply for adjudicating matters concerning environment and ecology. These principles, must, therefore, be applied in full swing for protecting the natural resources of this country.

\textsuperscript{135} M.C. Mehta v Kamal Nath AIR (1997)1 338 SCC 413.
\textsuperscript{136} Ibid
\textsuperscript{137} AIR May 2006 SC, p. 1364.
Similar view was taken by the High Court of Kerala in the matter of *Perumatti Gram Panchayat v. State of Kerala*\(^\text{138}\) also known as the landmark "Coca Cola Case" decided on the issue of the excessive exploitation of groundwater. The judgement delivered by the High Court are reiterated below:

"The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purpose.

Our legal system – based on English common law – includes the public trust doctrine as part of its jurisprudence. The state is the trustee of all natural resources, which are by nature meant for public use and enjoyment, public at large is the beneficiary of the seashore, running waters, airs, forests and ecologically fragile lands. The state as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership."

In view of the above authoritative statement of the honourable Supreme court, it can be safely concluded that underground water belongs to the public. The State and its instrumentalities should act as trustees of this great wealth. The State has got a duty to protect ground water against excessive

\(^{138}\) 2004 (1) KLT, 731.
exploitation and the 'inaction of the State in this regard will tantamount to infringement of the right to life of the people guaranteed under Article 21 of the Constitution of India. The Apex Court has repeatedly held that the right to clean air and unpolluted water forms part of the right to life under Article 21 of the Constitution. So, even in the absence of any law governing ground water, I am of the view that the Panchayat and the State are bound to protect ground water from excessive exploitation.

**Absolute Liability Principle**

Apart from adopting some settled principles, Supreme Court has evolved new strategies to deal with pollution cases. Through its judicial creativity, the judiciary has embarked upon the judicial legislation by making them up the gaps of legal vacuum.

In *M.C. Mehta v. Union of India*\(^{139}\) case is one the example of judicial activism which has helped to propound a novel approach in the context of imposition of liability in case of leakage of dangerous material from industrial undertakings. In this case, the Supreme Court found English rule of strict\(^{140}\) liability unsuited to meet the disastrous situation caused by hazardous industries because the rule is subject to certain exceptions.

It all indicates that Supreme Court was clearly in favour of retaining hazardous industries but simultaneously it was concerned about their liabilities also. The Court was of the view that the enterprise undertaking hazardous or inherently dangerous activities is under an obligation to conduct such activities

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139 M.C. Mehta v Union of India AIR 1987 SC 965.
140 Ryland v Fletcher (1868) LR 3 HD 330.
with the highest standards of safety and held them liable absolutely to compensate for the harm which results on account of such activities. The enterprise engaged in such hazardous or inherently hazardous activity has to indemnify all those who suffer on account of the carrying on such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. The Court made it clear that we cannot allow our judicial thinking to be construed by reference to law as it prevails in England or any other foreign countries. Creating a new indigenous jurisprudence of absolute liability the court said that "the exceptions in Ryland case were not applicable." The standard of liability now laid down by courts is in consonance with constitutional norms and social mores.\textsuperscript{141}

Further, the issue relating to liability of hazardous industries came for discussion in Bichhori case\textsuperscript{142} In this case the court while upholding the validity of the rule of absolute liability as laid down in oleum Gas leak case said that it is the most appropriate and binding principle in the case of hazardous industries regardless of whether activities of such industries were being carried on carefully or not.

These above cases are significant as it evolved a new jurisprudence of liability to the victims of pollution caused by an industry engaged in hazardous and inherently dangerous activity.\textsuperscript{143} Although it did not specifically declare the existence of the right to clean and healthy environment in Article 21, the court evolved the principle of absolute liability of compensation

\textsuperscript{141} AIR 1995, 5.
\textsuperscript{142} Indian Council for Enviro Legal Action v Union of India AIR 1996 SC, 1446.
\textsuperscript{143} Id, 1099.
through interpretation of constitutional provisions relating to life and to the remedy under Article 32 for violation of fundamental rights. Now the court was manifestly referring to the concept of right to life in Article 21 and the process of vindication of that right in Article 32. The urgency which court are attaching to environmental problems and the strictness with which they are issuing directions after directions to state instrumentalities for protecting and improving the environment shows our court's concern for conserving the environment and enforcing the provision of various environmental laws. The pragmatism and ingenuity with which environmental consciousness and concern has been created, developed and enforced show judicial activism. It has gone a long way in safeguarding and protecting the environment.

Thus in a nut shell it can be said that an active judiciary may adopt various means to meet the growing needs of a society. One of the major vehicles of justice in this regard is the public interest litigation. As public interest litigation we now want public interest science. Public interest science would mean development through science in a manner to best protect peoples interest. ¹⁴⁴

Indian judiciary started adopting the concept of public interest litigation for protecting various interests of the society including its environment. Judicial activism may not only serve to improve the dynamism of the existing laws and jurisprudence but also leads to newer directions and fields where legal system has not developed at all. One of the classic examples in this regard would be environmental protection, with the limited number of

¹⁴⁴ Supra note 45, p. 164.
legislations, the judiciary went on to adopt newer strategies to fill the gaps. In the 1980s the judiciary started playing an active role. The enthusiasm shown by the judiciary in protecting the environment is remarkable. The Courts in India have developed environmental law which finds mention and appreciation in international forums as models to be emolliated by other nations.

For resolving this such issues concerning human life, judiciary is the proper forum which gets assistance both from the executive and the legislature as also from the people coming before it with complaints. The constitutional forum provided by High Courts and Supreme Court is being frequently resorted to by invoking the new technique of Public Interest Litigation. The remedies available in the environmental law are, therefore, resorted to only very rarely.  

There are large numbers of cases where the Supreme Court and various High Courts interfered to save the environment. That is a laudable work but it is also true that finally it is for the executive to provide environmental safeguards. We hope that in the coming future executive will perform its constitutional obligation and provide machinery to implement the existing laws for the protection of the environment. The judiciary’s role is important specially in the context of sustainable development.

Now, the situation is changed with regard to the judicial accessibility. After the comprehensive interpretation of the Article 21 of the Indian Constitution, Judiciary provided wider base to the citizen to contain the violators of the environmental norms.

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145 Id., p. 167.
Yet the important of the route is acknowledged as one of the important avenues to be pursued. Judicial activism has played a fruitful role in generating public awareness. Judicial activism of its own can not ensure environmental protection. A more comprehensive approach is needed, which must also incorporate other ways of giving environmental problems the attention they deserve.

Last but not least, pure and safe water is essential to human life, yet the underground water is being degraded. In one of the significant measures, pollutants should face legal liability if they discharge substances that are later found to cause harm to water. Any violation may be equated with the question of right life. Environmental legislation is made to protect our environment as a whole. The presence of a legislation to protect water does not necessarily mean that the problem is addressed. For environmental legislation to be implemented effectively there has to be an active judiciary, which is there in India. But to execute the directions and judgements of the Court a conscious and obedient executive is also required.