CHAPTER VII

AN ASSESSMENT OF THE PRINCIPLES OF LIABILITY AND THE ROLE OF JUDICIARY IN REGULATION OF GLOBAL WARMING IN INDIA

The environmental law and the laws related thereto left some vacuums in the control and prevention of pollution and the preservation of environment. The judiciary in this situation tries to fill the gaps in the existing constitution and environmental laws, in this attempt judiciary evolved certain principles and doctrines to give a new vision to the said legal provisions.¹ The principles are a significant contribution to the environment jurisprudence.² Some of these principles are self-explanatory and applied as a preventive mechanism, while others are evolved as a compensatory one. None of these principles are comprehensive enough to account for every sort of environmental pollution and degradation. However, these principles are important to achieve the ends of environmental jurisprudence.³ According to the court, the power is implicit in Article 51 (c), which directs the state ‘to foster respect for international law and treaty obligations in the dealings of organized people with one another’.⁴ Because whatever the principles and doctrine brought and applied are generally recognized in international conventions and the judiciary introduced them into Indian legal system.

⁴Leelakrishnan, note 2.
Whatever the observation made by judge Keenan of the *US District Court in Union of India v. Union Carbine Corporation*\(^5\), when Union of India in the capacity of parens patriae\(^6\) approached the US District Court of Southern District of New York, that “*deprive the Indian Judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary...*” It is proved the Indian Judiciary to develop an indigenous jurisprudence and formulate new remedies.\(^7\) This observation has raised doubt about the capability of Indian Judiciary in handling the case. This observation provoked the Indian Judiciary to develop an indigenous environmental jurisprudence with new strategies. It is appropriate now to remember chief Justice Bhagawati’s declaration (including Ranganath Mishra, G.L. Oza, M.M. Dutta and K.N. Singh, JJ.) in *M.C. Mehta v. Union of India*\(^8\) that “*we have to evolve new principles and lay down new norms, which would adequately deal with the new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for matter of that in any other foreign country. We no longer need the crutches of a foreign legal order*.\(^9\) Then, Indian judiciary propounded certain principles to protect environment from various sources of environment such as air pollution, land pollution, water pollution. These pollutions will lead to many problems, as pollution is a cause of environmental degradation or ecological imbalance which will result in global warming, acid rain, ozone depletion, and totally it affects ecosystem.

\(^{5}\) (1986)2 Comp LJ 169

\(^{6}\) Right of a person, to sue or to be sued on behalf of another who is incapacitated to take up the case before a judicial forum as effectively as the former can.


\(^{8}\) AIR 1987 SC 1086 at p 1089.

\(^{9}\) Shanthakumar, note 7.
The formulation and application of these principles/doctrines are remarkable milestones in the judicial process in protecting the environment from pollution. Because it led the people to be alert as all such cases arose through PIL which blocked the undue influence of political bigwigs and invalidated illegal contracts with adverse impact on ecology. The year 1986 onwards uninterruptedly may be labeled as period of court’s care and innovations in the field of Environmental law. The concern of the courts for prevention and control of water and air pollution is reflected from the judicial decisions. It shows that the Supreme Court took up the cases involving different issues and delivered judgments with far reaching consequences\(^\text{10}\) one of such consequences is global warming.

The application of the principles/doctrines evolved by the Supreme Court to the phenomenon of global warming is appropriate for three reasons: the United Nations General Assembly has recognized that climate change is “a common concern of mankind”\(^\text{11}\) and that the global climate must be protected for present and future generations of human kind;\(^\text{12}\) environmental concerns have heretofore been treated primarily as raising issues of national sovereignty in appropriating natural resources and controlling transfrontier pollution. To protect effectively the global atmosphere, standards of “good neighbourliness” must transcend notions of global proximity (spatial dimension) and of obligations owed merely notions of global states or areas beyond national jurisdiction (temporal dimension). A global solution is required, based on legal principles which transcend traditional international legal notions of national sovereignty and the spatial dimensions upon which these notions are based; global warming satisfies all the criteria in application of these principles/doctrines namely- seriousness and urgency of the


\(^{12}\) UNGA Res. 44/207 of 22 December 1989. And also see ibid, pp. 245-248.
problem, potential for irreversible damage, need for new ways of thinking about the issues, possibility for developing acceptable measures of accountability, degree to which the problem serves as a useful prototype for analysis that occur in other contexts.13

7.1 Principle of Absolute Liability14

The rule of strict liability15 replaced with the absolute liability in Indian system. The Strict liability rule holds a person strictly liable when he brings or accumulates on his land something likely to cause harm if it escapes, and damage arises as a natural consequence of its escape. The strict liability principle was applied with certain exceptions which considerably reduced the scope of its operations. Exceptions are; act of God, act of third party, plaintiff’s own fault, plaintiff’s consent, statutory authority. With the expansion of chemical based industries in India, increasing number of enterprises store and use hazardous substances.16 For the harm caused by in hazardous and inherently dangerous activities a new doctrine of absolute liability is formulated which is free from the exceptions to the strict liability rule 17 and with a standard stricter than strict liability. The absolute liability was first articulated by the Supreme Court and has since been adopted by Parliament i.e. this principle has got statutory status with Hazardous Substances Rules 1989, Public Liability Insurance Act 1991, and National Environment Tribunal Act 1995.

14 We can say it as an improved version of Strict liability followed with certain exceptions: Plaintiff’s Own Default, Act of God, Natural use of land, Consent of the Plaintiff, Act of Stranger, Statutory Authority, Common benefit.
15 The principle of strict liability evolved in England in 1868 which is older than a century in Rylands v. Fletcher(1868) LR 3 (HL) 330.
Public Liability Insurance Act 1991: The Parliament of India enacted this Act with the object to provide immediate relief to the persons affected by accident occurring while handling any hazardous substance. This Act provides relief to the claimant without pleading that death or injury was caused due to negligence of the owner. Under this Act, it is mandatory on the part of the owner to buy insurance policies to protect his employees and also liable to the surrounding residents and their property.

National Environment Tribunal Act 1995: The Parliament of India enacted this Act with few important objects: to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substances along with effective and expeditious disposal such of cases, and to implement the decision taken at the Rio Conference 1992 by developing national laws regarding liability and compensation for the victims of pollution and other environmental damages.\(^\text{18}\)

This Principle as propounded by the Supreme Court in *Shriram Food and Fertilizer Industries and another v. Union of India and others*\(^\text{19}\)*(M.C. Mehta v. Union of India) in determining the liability of large enterprises engaged in manufacture and sale of hazardous products.\(^\text{20}\) The Supreme Court directed to relocate in order to restart the industry some other place, with fulfilling certain conditions with new principle of absolute liability in respect of hazardous or inherently dangerous industry. Later the Supreme Court reiterated this principle in many cases. In *Indian Council for Enviro Legal Action v. Union of India*\(^\text{21}\) case,

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\(^\text{18}\) Without enforcing the Act has been repealed by the National Green Tribunal, 2010.

\(^\text{19}\) AIR 1987 SC 965.

\(^\text{20}\) Shriram Foods and Fertilizer Industries, was situated in a single complex in Delhi, in a thickly polluted area. It had several units engaged in the manufacture of caustic soda, chlorine, hydrochloric acid, stable bleaching powder, superphosphate, Vanaspati, soap, sulphuric acid, aluminium anhydrous, sodium sulphate, high test hydrochloride and active earth etc. There was a major leakage of oleum gas on December 4, 1985 and affected a large number of persons, both workmen and public with one death. Again within two days one minor leakage also took place.

\(^\text{21}\) AIR 1996 SC 1466.
the Supreme Court held that “the Industries are absolutely responsible not only for the remedial action of safely disposing of the sludge, but also for the loss and sufferings sustained by the villages.”

7.2 **Precautionary Principle**

This principle underlines the idea that prevention is better than cure and suggests a technique different from the traditional reactive methods. The “precautionary Principle” is more a policy than a law, which should be applied by the Government as well as the industries at the time of consent and proposal to establish the plants respectively. The principle obligates that the precautionary measures should be integrated into the development plan. The industry must earmark some capital for the purpose of installation of treatment devices at the time of establishment of the plant. Before the precautionary principle there was a concept at international level ‘assimilative capacity’, it was permitted to pollute to a certain limit, law will be enforceable when the limit is crossed. According to this principle, enforcement was delaying as enquiry/investigation of concentration and boundaries of pollution were postponing it to do so. Hence, the ‘precautionary principle’ was replaced with ‘assimilative capacity’.

The precautionary principle implies, that even where there is no scientific evidence available to support a particular theory, precaution should be taken. The precautionary principle has been invoked to justify a policy of aggressive greenhouse gas (GHG) emission controls that would go beyond "no regrets"

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22 Mehdi, note 10, p. 191.
25 Dube, note 3, p.63.
actions to reduce global warming. However, this justification is based upon selectively applying the principle to the potential public health and environmental consequences of global warming but not to the adverse consequences of such a policy.\textsuperscript{26} In \textit{Vellore Citizens Welfare Forum v. Union of India}\textsuperscript{27} case, the Supreme Court has declared the ‘precautionary principle’ is an essential feature of sustainable development relying on the Principle 15 of Rio Declaration which proclaims that “\textit{in order to protect the environment the precautionary approach shall be widely applied by States according to their capabilities and it is accepted as part of the law of the land. Where there are threats of serious or irreversible damage, effective measures to prevent environmental degradation}” and developments from Stockholm Declaration to Rio Declaration the document prepared jointly by the World Conservation Union, United Nations Environment Programme and World Wide Fund for Nature called, “Caring for the Earth, 1991. The Court also suggested that where there is an identifiable risk of serious and irreversible harm like extinction of species, wide spread toxic pollution, major threats to essential ecological processes, 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. The Court considered that Precautionary principle is one of the essential features of the sustainable development.\textsuperscript{28}

The Court succeeded in bringing the principle under the purview of Article 21, 48A, and 51A (g) of the Constitution and the environmental laws. Therefore, the


\textsuperscript{27} It was case related to industrial pollution caused by large number of tanneries discharging untreated trade effluents in the agricultural fields, open lands and water ways. AIR 1996 SC 2715 at 2721.

\textsuperscript{28} According to the Court, in the context of municipal law, the principle includes three things: environmental measures, to be taken by the State or other authorities, must be such that it ‘anticipate, prevent and attack the causes of environmental degradation’; where there are threats of serious and irreversible damage then any lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation; the onus of proof shall be on the actor or the developer/industrialist to show that his action is environment benign.
Court directed to appoint an authority to implement this principle under section 3 (3) of the Environment (Protection) Act, 1986. The principle makes state to take immediate action as it cannot delay the matters on the ground of scientific precision and as the burden of proof lies on the polluters such incidents could be minimized.

The principle directly applied in *M.C. Mehta v. Union of India* case, for protecting the Taj Mahal from air pollution. The Court held that the industries, identified as potential polluters by the PCB, had to change over to natural gas as an industrial fuel and those who were not in a position to obtain gas connections should stop function in Taj Trapezium Zone (TTZ). The Court observed that the atmospheric pollution in TTZ has to be eliminated at any cost and not even 1% change can be taken when human life apart from the preservation of a prestigious monument.

Again the principle applied directly in *A.P. Pollution Control Board v. M.V. Nayudu* case, the Supreme Court directly applied the principle stating that “it involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity, wherever scientific uncertainty is there. Environmental protection should not only aim at protecting health, property and economic interest but also to protect the environment. Precautionary duties must not be triggered by the suspicion of concrete danger but also by concern or risk potential.” Principles 11 and 15 of the Rio Declaration embody the position that in the protection of environment from pollution, a precautionary approach was best suited and it should be widely applied so that

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29 According to this section 3 (3) the Central Government may, if it considers it necessary or expedient so to do for the purpose of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions of this Act.

30 AIR 1997 SC 734.

31 AIR 1999 SC 912.
uncertainty in scientific results would not deter action to prevent environment from further degradation. It conveys ‘act now and soon’ irrespective of some error. Thus the concept of precision in justice is not rigidly adhered to under this principle. This is what the Supreme Court did in Bhopal Mass Disaster.\textsuperscript{32} Prof. Charmian Barto suggests regarding this principle that an immediate action may be taken with some error which could be corrected at the time of informed decision taken with additional available data or further research.\textsuperscript{33}

Legal provision also brought by the MOEF, introducing EIA, in order to give effect to the principle. Another important factor in precautionary principle is that the “burden of proof” lies on the industrialist to show that ecological balance is maintained. It is said by the Supreme Court in \textit{Narmada Bachao Andolan v. Union of India}\textsuperscript{34}. However, this principle criticized from US industry and trade interests that it is not based on science and raises unfounded fears based on tentative evidence and it can be applied only to major threats of harm involving large uncertainties and does not apply to small or known risks.\textsuperscript{35} But it never prevents environmentalists to approach the court for environmental justice.

\textbf{7.3 Polluter’s Pay Principle}

The principle basically means that the producer of goods or other items should be responsible for pollution caused in the process of production and they should bear the cost of the damages done due to such pollution. This includes environmental costs and direct costs to the people or property.\textsuperscript{36} The polluter pays principle has

\textsuperscript{32} \textit{Union Carbide v. Union of India}, AIR 1992 SC 248 at 262 and also see Jariwala, note 1, p. 183.
\textsuperscript{34} (2000) 10 SCC 664.
\textsuperscript{36} Mehd, note 10, p.188.
been invoked as the guiding force behind the public policy remedies to the problem. For example, tradable permits to curb greenhouse gases were advocated as a practical application of the Polluter Pays Principle by Mandate for Change.\(^{37}\) That the polluter must pay for the damage caused by him is a salutary principle evolved very early in Europe when that continent was haunted by a new specter— that of unprecedented pollution.\(^{38}\) Development activities of a country have to face the serious problems of giving adequate compensation to the victims of pollution and environmental hazards.\(^{39}\) When prevention of pollution is found as a waste talk and inefficiency in industrial activities, it was necessary to device different kinds of measures to prevent and minimize industrial pollution.

The principle is originated in this attempt as an economic and administrative measure to restrain and control the pollution problem under the Organization for Economic Cooperation and Development (OECD) as its brainchild. During the time there were demands on Governments and other institutions to introduce policies and mechanisms for protection of the environment and public from the threat posed by pollution in a modern industrialized society. This is, however, only a principle and its exact scope, especially over the limits on payment for damages caused has not been satisfactorily agreed even in the European community or British environmental legislation.\(^{40}\) Despite the difficulties inherent in defining the principle, the European community accepted it as a fundamental part of its strategy on environmental matters by underlying principles of the Four

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\(^{37}\) which was widely seen as the policy guide for Mr. Clinton during his 1992 campaign and indeed, in signing the Kyoto Protocol, the Clinton Administration endorsed the use of a tradable permits program. (The United Nation’s agreement known as the Kyoto Protocol, if ratified by the Senate, would commit the United States to drastic reductions in CO\(_2\) emissions.) Robert, Stavins and Thomas Grumbley(1993), "The Greening of the Market: Making the Polluter Pay," in Mandate for Change ,Washington, D.C.: The Progressive Policy Institute , pp. 203-206.

\(^{38}\) Leelakrishnan, note 2, p. 354.

\(^{39}\) Ibid.

Community Action Programmes on the Environment.\textsuperscript{41} Principle 16 of the Rio Declaration also lays down that national authorities should endeavour to promote the internationalization of environmental cost and use of economic instruments, taking into the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.\textsuperscript{42} Today it has been recognized as a powerful legal tool to combat environmental pollution and associated problems.

However, it is introduced to the Indian environmental law through the Supreme Court only, in the case of \textit{Indian Council for Enviro-legal Action v. Union of India}\textsuperscript{43}, the Court said that for whatever the damage or loss happened by the hazardous substances of an industry, it is responsible to make good the loss caused. The Court observed that Sections 3 and 5 of the Environment Protection Act empowered the Central Government to give directions and take measures for giving effect to this principle. Further in \textit{M.C. Mehta v. Kamal Nath}\textsuperscript{44} case, the Court said that the polluter is responsible for compensating and repairing the damage caused by his act. Despite its deterrent impact on potential polluters, the doctrine is limited in the sense that it can be applied as remedial stage, after pollution has taken place.

In \textit{Deepak Nitrite Limited v. State of Gujarat}\textsuperscript{45} case, the Supreme Court again made it clear that the compensation should have broad correlation with the harm caused by the polluting industry. It means the word ‘compensation’ is equivalent

\textsuperscript{41} Article 130 (2) sets out: preventive action is to be preferred to remedial measures; environmental damage should be rectified at source; the polluter should pay for the cost of the measures taken to protect the environment; environmental policies should form a component of the EC’s other policies. See Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, OFFICIAL JOURNAL NO. L 073, 14/03/1997 P. 0005.
\textsuperscript{42} Mehdi, note 10, p.189.
\textsuperscript{43} AIR 1996 SC 1446
\textsuperscript{44} (1997) 1 SCC 388,p.415.
\textsuperscript{45} (2004) 6 SCC 402
to what was lost. In *Vellore Citizen’s Welfare Forum v. Union of India case*, the Supreme Court had declared that the polluter pays principle is an essential feature of sustainable development. It means that absolute liability for harm to the environment extents not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. As customary International law has been accepted as part of the law of the land, polluter pays principle has become part of the law of the land. Hence, the court directed the Central government to constitute an authority, and accordingly ‘Loss of Ecology Authority’ was constituted to assess the damage caused by the tanneries. Whatever the fine collected from the tanneries had to be deposited under a separate head called “Environment Protection Fund” to utilize for the compensation purpose.

In *Ramji Patel v, Upbhokta Marg Darshak Manch*\(^46\) case, the Supreme Court held that awarding damages is in consonance wit the “Polluter Pays Principle” i.e. the polluter is under an obligation to make good the damage caused to the environment.

Apart from the judiciary, the Parliament enacted the Public Liability Insurance Act, 1991, under which all industries having a capital value of rupees two lakhs to get insured is mandatory and the National Environment Tribunal Act, 1995 enacted incorporates this principle.

### 7.4 Public Trust Doctrine

The Public Trust Doctrine was originally espoused by Emperor Justinian, during the Roman Empire.\(^47\) It provided that ‘certain common properties such as rivers,
seashore, forests and the air were held by government in trusteeship for the free
and unimpeded use of the general public. This is formed the basis for the English
Common law Public Trust Doctrine. Under the English Law, the sovereign could
own these resources but the ownership was limited in nature, the Crown could not
grant these properties to private owners if the effect was to interfere with the
public interests in navigation or fishing. Resources that were suitable for these
uses were deemed to be held in trust by the Crown for the benefit of the public".48

As English Common Law extended this doctrine only to certain traditional uses
such as navigation, commerce, and fishing, American Courts expanded the
concept adopting the reasoning that protection of ecological values is among the
purposes of public trust, may give rise to an argument that the ecology and
environment protection is a relevant factor.49 In Indian legal system this doctrine
forms the crux on which Article 47 of the Constitution is based. In fact, the
objectives enshrined in the Preamble and DPSP impose an obligation on the state
as well as its citizens to preserve the environment and its use for the maximum
benefit of people. Section 2 of the Forest (Conservation) Act, 1980 reflects the
Public Trust Doctrine. And also as Indian legal system is essentially based on
English Common Law includes this doctrine as part of its jurisprudence.

However, it is apt to quote the prophetic words of V. R. Krishna Iyer, judges are
the trustees of the human estate, the world’s great heritage’ enunciated the Public
Trust Doctrine implicitly through a plethora of cases.50 According to Professor
Joseph L Sax51, there are certain restrictions on such properties that the court
identifies: the property subject to the trust must not only be used for a public

49 See National Audubon Society v. Superior Court of Alpine County 33 CAL 3d 419., (1997) 1 SCC 388,
50 Sahasranaman, note 47, p.35.
51 Shanthakumar, note 7, p. 109.
purpose, but it must be available for use by the general public; the property may not be sold, even for a fair cash equivalent; the property must be maintained for particular types of uses. Recognition of the public trust doctrine for the protection of natural resources is another judicial innovation. Even though, Indian court has not considered the protection of public trust resources for their favorable impacts on climate is a protected public use, the Supreme Court has manifested a clear concern for the ecological value of public trust resources, including forests, as well as a general willingness to expand the universe of protected public uses far beyond its traditional bounds.

In *M.C. Mehta v. Kamal Nath* case a wide interpretation of the doctrine was adopted in protecting a valuable river and forest area from private tourist enterprise. In this case the apex court approved this doctrine for the first time stating that the area being ecologically fragile should not have been permitted to convert into private ownership for commercial gains. In this case Justice Kuldip Singh has exhaustively gathered information on this Public Trust Doctrine from various juristic writings and decisions of the American Courts. Again in *M.I. Builders Pvt. Ltd. V. Radhey Shyam Sahu and others* case, the Court reiterated

52Sahasranaman, note 47, p. 37.
54 (1997) 1 SCC 388.
55 In this case the Minister for Environment and Forests, Kamal Nath, approved the project during his tenure but when the project commenced he ceased to hold this position. And he acknowledged that his family held a business interest but denied any management responsibility of the said company and denied any right, title or interest in the property.
56 AIR 1999 SC 2468.
the doctrine by stating that the proposed construction of an underground shopping centre below a park was in violation of the doctrine. The court held that the municipality of Mahapalika held the park on trust for the citizens of Lucknow and it could only manage the park and could not alienate it or convert it into something different from the park. Further in *K.M. Chinnappa v. Union of India* 57 case, The Supreme Court held that “the aesthetic use and the pristine glory cannot be permitted to be eroded for private, commercial or any other use unless the Courts find it necessary, in good faith, for public good and in public interest to encroach upon the said resources”. In this was brought before the court challenging the renewal of mining lease granted to Kudremukh iron Ore Company in the Kudremukh National park.

In India, the Supreme Court and High Courts, more implicitly have given effect to this doctrine than the explicit with the traditional protection access to the common for public benefit. However now the doctrine is being applied even to prevent over exploitation of the environment. It is being used as a legal and planning tool for the fulfillment of sovereign’s role as Trustee of environment for future generations.58It is interesting to note that in *M P Ramababu v. District Forest Officer*59 case the Andhra Pradesh High Court observed that deep underground soil and water belong to the state, so any person uses his land in such a manner as to pollute the underground water or soil, the state can interfere and prevent contamination even in the absence of a specific law, under this doctrine.

57 AIR 2003 SC 724 (736).
58 Shanthakumar, note 7, p. 110.
59 AIR 2002 AP 256.
7.5 Doctrine of Sustainable Development

Like no other environmental issue, global warming threatens the well being of both developed and developing countries. While global warming is conspicuous by its near exclusion in the preparations for the World Summit on Sustainable Development (WSSD), energy an issue intimately linked to global warming is prominent on the WSSD agenda, and it needs to be addressed with global warming in mind.\(^{60}\) According to J. Kuldip Singh “Sustainable Development” is a balancing concept between ecology and development. \(^{61}\) And further he views that “Precautionary Principle” and “Polluter Pays Principle” are essential features of “sustainable development”. He says “polluter Pays principle means that the absolute liability for harm to the environment extends not only to compensate the victim of the pollution and the cost of restoring environmental degradation. It is a right approach to development at the cost of environment without regard for its restoration is not going to last forever.\(^{62}\) For more detail about this doctrine see the chapter II. However related cases are discussed in this heading.

In *Rural Litigation and Entitlement Kendra v. State of U.P.*\(^{63}\) interestingly it was the first case in India involving issues relating to environment and development. The Court said that *tapping of resources have to be done with the requisite attention and care so that ecology and environment may not be affected in any serious way, there may not be depletion of water resources and long term planning must be undertaken to keep up the national wealth*. Further in *M.C. Mehta v. Union of India*\(^{64}\) case, the Supreme Court said that *wherever certain*

\(^{60}\) see to detail A Center for International Environmental Law Issue Brief For the World Summit on Sustainable Development 26 August - 4 September 2002 available at http://www.ciel.org/Publications/climate.pdf


\(^{62}\) For details see chapter II

\(^{63}\) AIR 1985 SC 652.

\(^{64}\) AIR 1987 SC 965.
element of hazard or risk inherent in the very use of science and technology and it is not possible to totally eliminate such hazard or risk altogether, then can only hope to reduce the element of hazard or risk to the community by taking all necessary steps for locating such industries in a manner, which would pose least risk of danger to the community and maximizing safety requirements.

Again, in *Indian Council for Enviro-Legal Action v. Union of India*\(^ {65}\) case, the Supreme Court emphasized the doctrine as “While economic development should not be allowed to take place at the cost of ecology or by causing wide spread environmental destruction and violation; at the same time, the necessity to preserve ecology and environment should not hamper economic and other developments. Both development and environment must 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 environment.” New dimension to the sustainable development by the Supreme Court observation in *Vellore Citizens Welfare Forum v. Union of India*\(^ {66}\) case, that sustainable development has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco-system. Hence, the court strikes the balance between development activities and protection of environment.

Subsequently in Goa *Foundation v. Daksha Holdings Pvt. Ltd.*\(^ {67}\) Case, the court held that “no activities which would ultimately lead to unscientific and unsustainable development and ecological destruction should at all be allowed and the courts must scrupulously try to protect the ecology and environment”. It was

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\(^{65}\) (1996) 5 SCC 281.
\(^{66}\) (1996) 5 SCC 647.
\(^{67}\) AIR 2001 SC 184.
reaffirmed again in *State of Himachal Pradesh v. Ganesh Wood Products*\(^{68}\) that the obligation of sustainable development requires a proper assessment of the forest wealth, and the entitlement of industries based on forest produce should not only be restricted accordingly but their working should also be monitored closely to ensure that the required balance is not disturbed. Further forest based industries do not have an absolute or unrestricted right to operate their units where forest resources are scarce.

Later in *M.C. Mehta v. Union of India*\(^{69}\) case, the Supreme Court emphasized the significance of the principle of sustainable development and held that sustainable development is one of the principles underlying environmental law and that precautionary principle and polluter pays principle are two essential features of sustainable development. In the court’s view, far greater tragedies than those of Bhopal gas leak lie dormant in the governmental neglect over CNG. The continuing air pollution does have a more devastating effect on the people and present oil companies who present international desirable standards produce low quality petrol and diesel at the cost of public health.

In *K.M. Chinnappa v. Union of India*\(^{70}\) case, the Supreme Court observed that “it cannot be disputed that no development is possible without some adverse effect on the ecology and environment, and the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment. The balance has to be struck between the two interests. Where the commercial venture or enterprise would bring in results, which are far more useful for the people, difficulty of a small number of people


\(^{70}\) AIR 2003 SC 724.
has to be by passed. The comparative hardships have to be balanced and the
cvenience and benefit to a larger section of the people has to get primacy over
comparatively lesser hardship.

In situations of this kind there are certain restrictions on such properties such as
the property subject to the trust must not only be used for a public purpose, but it
must be available for use by the general public; the property may not be sold, even
for a fair cash equivalent; the property must be maintained for particular use.\textsuperscript{71}

\section*{7.6 Inter-generational Equity Principle}

The inter-generational equity aims at preserving the nature and its systems for not
only the present generation but also the future generations in the same quality.
Every generation owes a duty to all succeeding generations to develop and
conserve the natural resources of the nation in the best possible way. More
pressure on the present generation to take minimum but contribute maximum to
the environment and to the other way leaving degraded environment for the
coming generation.\textsuperscript{72} Because all man’s progress in civilized world is being made
at the expense of damage to the environment, which he cannot repair and cannot
foresee. \textsuperscript{73}

We can remember here that Principles 1, 2, and 6 of the Stockholm Declaration.
Principle 1 says about solemn responsibility of men to protect and improve the
environment for the present and future generations and Principle 2 about planning
and management aspect which says that the natural resources of the earth must be
safeguarded for the benefit of present and future generations through careful

\textsuperscript{71} Sahasranaman, note 47, p. 37.
\textsuperscript{72} Shanthakumar, note 7, p.113.
\textsuperscript{73} Jariwala,note 1, p. 186.
planning and management, as may be appropriate. Principle 6 specifically refers to the obligation to halt the discharge of toxic and other substances in excess of the capacity of the environment to render them harmless, “to ensure that serious or irreversible damage is not inflicted upon ecosystems”. Applying intergenerational equity the, global warming evidences all three types of intergenerational equity problem which may arise in the use of planetary resources: depletion of resources for future generations; degradation in the quality of resources available for future generations; and reduced or barred access to the use and benefit of resources passed on from previous generations. The obligation resting on this generation is to leave the atmosphere in no worse condition than it received it, and to improve it if degraded, which requires strategies to minimize input of CO$_2$ into the atmosphere and focus on alternatives to fossil fuels and prevention of deforestation. This principle is emphasized in *State of Tamil Nadu v. Hind Stone* case, where in the Supreme Court opined that “every generation should leave water, air and soil resources as pure and unpolluted as and when it came to earth. Each generation should leave undiminished all the species of minerals it found existing on earth.” In *K.M. Chinnappa v. Union of India* case, the Supreme Court held that while thinking of the developmental measures the needs of the present and the ability of the future to meet its own needs and requirements have to be kept in view.

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74 Weiss, Edith Brown (1989), *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, Tokyo: United Nations University Press, pp. 245-289 and also see McCaffrey, Stephen (2009), *Global issues in Environmental Law*, American Casebook Series, West Thomas Reuters Business, pp.21-23 wherein the author opined that Professor Edith Brown Weiss outline the contours of intergenerational equity with three significant components: conservation of options (each generation should be required to conserve the diversity of the natural and cultural resource base), conservation of quality (each generation should be required to maintain the quality of the planet), and conservation of access (each generation should provide its members with equitable rights of access to the legacy from past generations).

75 Redgwell, note 12, p.54.

76 AIR 1981 SC 711.

77 AIR 2003 SC 724 (737).
Judiciary does not lean always towards the environment protection even it balanced conflicting values for many times with giving directions for disciplining the developmental processes, keeping in view the demands of ecological security and integrity. Again judiciary most of the time tried to fill the gaps in law and lacunae in administration. Further the apex Court imposed monitoring of the anti-pollution laws responsibility on the high courts. However, the inherent limitations of the judicial system to review substantive questions relating to the environment make it desirable to establish an alternative forum, with an alternative strategy. Conferring environmental decision making power entirely on scientists and administrators is untenable in a rule of law society. Perhaps the observation made by Mc Auslan is more apt when he said that “fusion of diverse expertise in planning, science, technology, environment, law and public policy into a new institution for environmental decision making is essential for integrating environmental values with developmental issues.”

7.7 National Green Tribunal Act, 2010

The court’s ability to handle complex issues has always been a matter of debate. This has led to demand of an alternative environment dispute resolution

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80 Anti pollution laws have been passed by the Parliament in order to provide for a clean and healthy environmental regime and these Acts impose obligation on authorities i.e. Central Pollution Control Board and State Pollution Control Boards to take effective steps for proper preservation of natural resources and abatement of pollution. See Indian Council for Environ-legal Action v. Union of India, (1996) 5 SCC 281, p. 301, Vellore Citizens Welfare Forum v. Union of India, AIR 1986 SC 2715, p.2727.
mechanism. The need for environmental court was first advocated by former P.N. Bhagawati J in *M.C. Mehta v. Union of India (Oleum Gas Leak Case)*\(^{83}\) that the cases involving issues of environmental pollution, ecological destruction and its conflicts over natural resources involved assessment and evolution of scientific data and, therefore, there was an urgent need of involvement of experts in the administration of justice. This view was supported by Jagannadha Rao J in *Indian Council for Enviro-Legal Action v. Union of India*\(^{84}\). Later in the year 2001, the apex court requested the Law Commission of India to examine this matter.\(^{85}\)

Accordingly, the Law Commission, in its 186 the Report 2003 recommended, inter alia, setting up of environmental courts having original and appellate jurisdiction related to environmental laws. The Ministry of Environment and Forests set up the National Environment Appellate Authority under the National Environment Appellate Authority Act, 1997 to review the administrative decisions on Environment Impact Assessment, but remain in paper as no judicial member was appointed. In addition to it, the National Environment Tribunal Act was not notified both remain only paper.

Now, by repealing the above stated enactments, the National Green Tribunal has been established on 18\(^{th}\) October 2010 under the National Green Tribunal Act 2010 for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto. It is a specialized body equipped with the

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\(^{83}\) AIR 1987 SC 965,982.

\(^{84}\) (1996) 2 SCC 212, 252.

\(^{85}\) *A.P. Pollution Control Board v. M.V. Nayudu II*, 2001 (2) SCC 62.
necessary expertise to handle environmental disputes involving multi-disciplinary issues. The Tribunal shall not be bound by the procedure laid down under the Code of Civil Procedure, 1908, but shall be guided by principles of natural justice.

The Tribunal has exclusive jurisdiction for environmental matters to provide speedy justice and reduce the burden of the higher courts. The Tribunal has to dispose the applications or appeals within 6 months of filing of the same. The NGT is set up at five places of sittings and New Delhi is the principal place of sitting of the Tribunal. Bhopal, Pune, Kolkata and Chennai are the four other places of sitting of the Tribunal.86

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86 For further reading see National Green Tribunal, available at http://www.greentrabunal.in/