CHAPTER - VI

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INTRODUCTION:

In developing countries like India, there has been environmental degradation due to over exploitation of resources, depletion of traditional resources, industrialization, urbanization and population explosion. Since, man is the creator and moulder of his environment, his conduct can be regulated through the instrument of law. In fact, India has always been in the fore-front of taking all possible steps for the protection and improvement of the environment and aiming at sustainable development. However, neither the law nor the environment static. The changing pace of the environment is so fast that in order to keep the law on the same wave-length either laws have to be amended quite frequently to meet the new challenges or it has to be given new direction by the judicial interpretation.

India has enacted various laws at almost regular intervals to deal with the problems of environmental degradation. Apart from the provisions under the Water Act\textsuperscript{433} and the Air Act,\textsuperscript{434} there exists a clear constitutional mandate for protection of environment including prevention of air and water pollution. By an activist interpretation of these provisions, the High Courts have substantially enriched environmental jurisprudence in India. Extricating itself from the principles

\textsuperscript{433} Water (Prevention and Control of Pollution) Act, 1974.
\textsuperscript{434} Air (Prevention and Control of Pollution) Act, 1981.
of locus standi\textsuperscript{435} and using the instrument of public interest litigation to the maximum effect, the apex court has laid down that sustainable development is a legal obligation of every government.

In the first environment case before the Supreme Court itself, it was held that no municipality could put forth lack of money as a ground for not discharging its primary duty of looking after the health and safety of its residents\textsuperscript{436}. The High Courts were the first to come up with direct and specific pronouncements on citizens’ Fundamental Right to Pollution Free Environment. Thus, the Andhra Pradesh High Court ruled in 1987 that nature’s gifts without which the life cannot be enjoyed. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should also be regarded as amounting to violation of Art.21 of the Indian Constitution\textsuperscript{437}. On the same lines, the Karnataka High Court pointed out that ‘Entitlement to clear environment is one of the recognized human rights’ and further held that ‘Right to life inherent in Art.21 of the Constitution of India does not fall short the requirement of quality of life which is possible only in an environment of quality’\textsuperscript{438}.

The Kerala High Court reiterated the position by holding that the Right to Sweet Water and the Right to Free Air are attributes of the Right to Life, for, these are the basic elements which sustain life itself. Following these pronouncements, the Supreme Court also recognized and asserted the Fundamental Right to Clean Environment under Art.21 of the Constitution in very categorical terms. At the same time the judiciary in India has played a significant role in interpreting the laws in such a manner which not only helped in protecting environment but also in promoting sustainable development. In fact, the judiciary in India has created a new

\textsuperscript{435} Locus Standi means, ‘A place of standing; standing in court. A right of appearance in a court of justice. A right of appearance in a court of justice, or before a legislative body, on a given question’, Black’s Law Dictionary, 6\textsuperscript{th} Edn, West Publishing Company.

\textsuperscript{436} Municipal Council Ratlam v. Vardhichand AIR 1980 SC 1622.


\textsuperscript{438} V. Lakshimipathy v. State, AIR 1992 Kant 57.
“environmental jurisprudence”\textsuperscript{439}. The problem of environmental degradation is a social problem\textsuperscript{440}. It is now well-settled principle of law that socio-economic conditions of the country cannot be ignored by a court of law because the benefit of the society ought to be the prime consideration of law courts. Thus the courts must take cognizance of the environmental problem\textsuperscript{441}.

In pursuance of United Nations Conference on Human Environment convened at Stockholm in 1972, the nations of the world decided to take appropriate steps to protect and improve human environment. The sequel to this, in India 42nd Amendment to the Indian constitution inserted articles 48-A directing the state to protect and improve the environment and to safeguard the forests and wildlife of the country and Article 51-A (g) mentioning fundamental duties of the citizens to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures. The 42nd Amendment to the Indian Constitution also made certain changes in the seventh Schedule to the Constitution. Originally forest was a subject included in list II, entry 19.

Since no uniform policy was being followed by the State in respect of protection of forests, now this subject has been transferred to List III and hence, now the parliament and state Legislature both may pass legislations. Protection of wild animals and birds has also been transferred from List II, Entry 20 to List III, Entry 17-B. 42nd Amendment Act for the first time inserted Entry 20-A in the List III which deals with population control and family planning because enormous increase in population is main cause for environmental problems. Under

Article 253 of the Indian Constitution, the parliament is empowered to make any law for implementing any treaty, agreement or convention with any other country or countries or even any decision made at international conference, association or other body, this power is limited to implantation of decision and that too for a limited period.

The broad language of Article 253 suggests that in the wake of Stockholm Conference in 1972, Parliament has the power to legislate on all matters linked to the preservation of natural resources. This 42nd Amendment to Indian Constitution and insertion of Article 48-A and 51-A (g) marked the beginning of Environmental protection in India. Environmental Jurisprudence includes the laws, both statutory and judicial, concerning varied aspects of environmental protection and sustainable development. In India various laws have been enacted for the protection of environment. But the movement to protect environment got momentum with the judicial vigil in 1980s and 90s. Armed with the power of judicial review and constitutional scheme of independence of judiciary the Indian judiciary has performed a stellar role in protecting the environment and spreading environmental awareness among the Indian people.

India has not only enacted various specific laws to control the environmental pollution but has also incorporated significant provisions for the protection of the environment into its constitution. Within the last three decades, the development of environmental jurisprudence in India, following these constitutional law changes, has been remarkable in the sense that it has led to the virtual creation of a fundamental right to a clean environment in Indian law. This forms part of the public law regime established by the constitution and appears to be based not only on

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442 Indian Constitution, 42nd amendment, 1976.
modern concepts of fundamental human rights but also on indigenous notions of social justice, constituting a unique human rights approach adopted through affirmative action\textsuperscript{443}.

The main aim to analyze this chapter is to focus the distinct nature of the outstanding contribution of Indian judiciary to prevent and protect water from pollution and the control of pollution within a broader constitutional and jurisprudential framework. In fact, the emerging Indian environmental jurisprudence had relied on three interconnected elements. First, it manifests the new Indian Constitutional law rationale which now clearly accords importance to public concerns rather than to protecting private interests. Secondly, it reflects certain aspects of Indian legal culture through implicit and explicit reliance on autochthonous values based on ancient, pre-colonial indigenous notions and concepts of law. Thirdly, it bears testimony to the uniquely activist role of the higher Indian Judiciary in promoting this new rationale. These three interconnected elements characterizes role of higher judiciary in the recent development of Indian environmental jurisprudence\textsuperscript{444}.

It is a paradox that despite the presence of such diverse laws, the pollution rate has crossed the dead line. This is probably because of the reason that the law is so complicated and vague that even the experts may not know the intricacies of it. The Judiciary in India has been taking steps for directing state agencies, to strictly adhere to the legislations in protecting the environment and totally arresting the various manmade disasters. The Judiciary has taken such steps especially, because of the various public interest litigations arisen out of manmade disasters such as Bhopal Gas tragedy etc. It was held in \textit{MC Mehta v. Union of India}\textsuperscript{445} and others, that

\textsuperscript{443} see, Pathak R.S; \textit{Human rights and the development of the environmental law in India}, (1988) .


\textsuperscript{445} AIR 1987 SC 1086.
one of the principles underlying environmental law is sustainable development. This principle requires development to take place which ecologically sustainable. It was further held that there are two essential features of sustainable development such as precautionary principle and polluter pays principle.

The precautionary principle was elucidated by the Supreme Court in *Vellore Citizens’ Welfare Forum v. Union of India*\(^446\) and other states that the state government and its agencies much anticipate, prevent, and attack the causes of environmental degradation. States should not take up any activity and measure which is not environmentally benign. It seems that lack of sufficient funds allocation to the Ministry of Environment and Forests, lack of sufficient number of qualified and trained staff such as academicians, legal professionals, medical experts and technologists in the Ministry and its subordinate offices all over the country, lack of commitment of the people and awareness about the environment protection and improvement, complicated procedures for approvals and authorizations of the Pollution Control Boards, are the main reasons for ineffective implementation of environmental laws. If proper reforms are made in this area, probably the environmental laws will be implemented effectively thereby ensuring problem free environment.

**Right to Water:**

Various courts have upheld that the right to clean and safe water is an aspect of the right to life. For instance, in *Narmada Bachao Andolan v. Union of India*\(^447\), the Supreme Court said that “water is the basic need for the survival of human beings and is part of right to life and

\(^{446}\) AIR 1996 SC 2715.

\(^{447}\) AIR 2000 SC 3751, pp3825, 3830.
human rights as enshrined in Article 21 of the Constitution of India”. Pollution caused by tanning industry, existed in *M.C.Mehta cases*\(^{448}\). Though there is no reference to the right to life, the main judgment took for granted that the fundamental right is violated by the alleged pollution, and that this violation entails the court to interfere and issue directions for a remedy despite the mechanisms available in the Water Act.

In the supporting judgment, however, KN Singh J noted that the pollution of river Ganga is affecting the life, health and ecology of Indo-Gangetic plain and concluded that although the closure of tanneries might result in unemployment and loss of revenue; life, health and ecology had greater importance. The first time when the Supreme Court came close to declaring the right to environment in art 21 was in the early nineties. In *Chhetriya Pardushan Mukthi Sangarsh Samati v. State of Uttar Pradesh*\(^{449}\), Sabyasachi Mukerjee CJ observed: Every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated in Art 21 of the Constitution of India\(^{450}\).

In *Subhash Kumar v. State of Bihar*\(^{451}\) K.N.Singh J observed that ‘Right to live… includes the right to enjoyment pollution free water and air for full enjoyment of life’. However, in both the cases, the court did not get an opportunity to apply the principles because the petitioners had made false allegations due to personal towards the respondent companies alleged to be polluting the environment. The real opportunity came before the Supreme Court in the year 1991 in

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\(^{448}\) *MC.Mehta v. Union of India* AIR 1988 SC 1037. The tanning industries located on the banks of Ganga were alleged to be polluting the river. The court issued directions to them to set up effluent plants within six months from the date of the order. It was specified that failure to do so would entail closure of business.

\(^{449}\) AIR 1990 SC 2060.

\(^{450}\) *Ibid*, p 2062.

\(^{451}\) AIR 1991 SC 420, p 424.
Bangalore Medical Trust v. B S Mudappa\(^{452}\), the court laid emphasis on the constitutional mandate for the protection of individual freedom and dignity and attainments of a quality of life, which a healthy and clean environment guarantees.

In Indian Council for Enviro-legal Action v. Union of India\(^{453}\), remedial action was sought for the loss received by the villagers of Bichari where the chemical industries for manufacture of toxic ‘H’acid were located. Although the respondents stopped producing the toxic material, they did not comply with various orders of the court in completely removing the sludge or storing them in a safe place\(^{454}\). All facts and materials were brought to the notice of the court\(^{455}\). The Court categorically fixed the responsibility on the errant industry and asked the Central Government to recover, in case the industry failed to take effective remedial action, the expenses for the action\(^{456}\). Further, it was stated that, it was a social action litigation on behalf of the villagers, whose right to life was seriously invaded and infringed by the respondents. When the industry is run in blatant disregard of the law to the detriment of life and liberty of the citizens living in the vicinity, it is self-evident that court shall intervene and protect the fundamental right and liberty of the citizens\(^{457}\).

\(^{452}\) AIR 1991 SC 1902.

\(^{453}\) AIR 1996 SC 1446, Sludge percolated into the earth, making the soil reddish and groundwater highly polluted. The water in wells became dark in colour, and was no longer fit for human consumption or by cattle. The leaves of the trees got stunted. Sludge flowed into irrigation canal. Crops were affected. In addition, the respondents without taking adequate measures were discharging untreated toxic water emanating from the sulphuric acid plant. Toxic water was flowing over the sludge. This was unauthorized.

\(^{454}\) AIR 1996 SC1446, p 1449.

\(^{455}\) NEERI prepared a report, which also contained the opinion of experts from the Ministry of Environment and Forests, and views of the pollution control board.

\(^{456}\) AIR 1996 SC 1446, p 1468.

\(^{457}\) AIR 1996 SC 1446, p 1460, 1461.
In *MC Mehta v. Kamal Nath*, it was made clear that ‘any disturbance of the basic environmental elements, namely, air, water, and soil, which are necessary for ‘life’, would be hazardous to ‘life’ within the meaning of art 21 of the Constitution’. But judgments do not constitute law or policy; at best, they provide directions for the formulation of laws and policies. As yet, no laws or policies have been formulated asserting that water is a fundamental and inviolable right enjoyed by every citizen of the country. The ‘right to water’ can therefore be obtained in India only on a case-by-case basis, by going to court.

**Right to Water and the Supreme Court of India:**

The Supreme Court in *Subhash Kumar v. State of Bihar*, held that, “[T]he right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life”.

In *State of Karnataka v. State of Andhra Pradesh*, the Supreme Court had pointed out that, “[T]here is no dispute that under the constitutional scheme in our country right to water is a right to life and thus a fundamental right”.

**Right to Water and the High Courts of various States:**

*F.K. Hussain v. Union of India*:

The right to life is much more than the animal existence and its attributes are many folds, as life itself. A prioritization of human needs and a new value system has been recognized in

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these areas. The right to sweet water, and the right to free air, are attributes of the right to life, for, these are the basic elements which sustain life itself [Para 7].

*Hamid Khan v. State of Madhya Pradesh*:462

The state “is also covered by Article 21 of the Constitution of India and it is the right of the citizens of India to have protection of life, to have pollution free air and pure water. Therefore, it was the duty of the state towards every citizen of India to provide pure drinking water” [para 6].

*Vishala Kochi Kudivella Samrakshan Samiti v. State of Kerala*:463

The failure of the state to provide safe drinking water to the citizens in adequate quantities would amount to a violation of the fundamental right to life enshrined in Article 21 of the Constitution of India and would be a violation of human rights. Therefore, every government, which has its priorities right, should give foremost importance to providing safe drinking water even at the cost of other development programmes” [para 3]. Besides the judgments of courts, however, there is relatively little in the legal and policy framework that recognizes the fundamental right to water.

The National Water Policy, 2002 calls water a ‘basic human need’ rather than a ‘right’.464

The National Rural Drinking Water Programme is concerned with the provision of safe water for

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462 AIR 1997 MP 191, where a public interest litigation was filed to protect the right to life of the villagers from the supply of polluted drinking water containing excessive fluoride contents. Thousands of villagers were suffering from bone diseases due to consumption of such polluted water. The court held that failure of the State to take proper precaution to provide proper drinking water to citizens amounts to failure of the State in discharging its responsibility under Article 47 of the Constitution. The Madhya Pradesh High Court further directed the State Government to give free medical treatment to such affected persons including free surgical treatment along with compensation as specified by the Court. See also Dr. Ashok v. Union of India, (1997) 5 SCC 10.

463 2006 (1) KLT 919; See also Shajimon Joseph v. State of Kerala, 2007 (1) KLT 368.

‘basic needs’ rather than water as a ‘fundamental right’. There are a large number of laws relate to water and water-based resources but they pay scant attention to the implementation of the right to water. Therefore, it may not be possible to hold the government legally liable for the failure to respect protect and fulfill the fundamental human right to water.

Unlike India, however, the constitutions of some countries expressly include access to water as a fundamental human right. South Africa (1996): Everyone has the right to have access to sufficient food and water (Article 27(1)). Uruguay (1967) (amended in 2004): Access to drinking water and access to sanitation constitute fundamental human rights (Article 47).

ENVIRONMENT PROTECTION AND THE JUDICIARY:

The right to live in a clean and healthy environment is not a recent invention of the higher judiciary in India. The right has been recognized by the legal system and the judiciary in particular for over a century or so. The only difference in the enjoyment of the right to live in a clean and healthy environment today is that it has attained the status of a fundamental right the violation of which, the Constitution of India will not permit. It was only from the late eighties and thereafter, various High Courts and the Supreme Court of India have designated this right as a fundamental right. Prior to this period, as pointed out earlier, people had enjoyed this right not as a constitutionally guaranteed fundamental right but as a right recognized and enforced by the courts under different laws like Law of Torts, Indian Penal Code, Civil Procedure Code, Criminal Procedure Code etc. In todays’ emerging jurisprudence, environmental rights which encompass a group of collective rights are described as third generation rights.

Principle 1, 1972 Stockholm Declaration affirms that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life
of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”. This shows that it has been internationally recognized that man's fundamental rights embraces the need to live in an uncontaminated environment but it also puts forth man's obligation to protect the environment for posterity.

The Supreme Court has laid down that the “Precautionary Principle" and the "Polluter Pays Principle" are essential features of "Sustainable Development". These concepts are part of Environmental Law of the country. The "Precautionary Principle" establishes that a lack of information does not justify the absence of management measures. On the contrary, management measures should be established in order to maintain the conservation of the resources. The assumptions and methods used for the determination of the scientific basis of the management should be presented.

The ‘polluter pays' principle came about in the 1970's when the importance of the environment and its protection was taken in world over. It was subsequently promoted by the Organization for Economic Cooperation and development (OECD). The ‘polluter pays' principle as interpreted by the Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation.

The Court has also evolved the special burden of proof in environmental cases. In the case of Vellore Citizens Welfare Forum v. Union of India\textsuperscript{465}, the Court has stated that:"The onus of proof is on the actor or the developer/industrialist to show that his action is environmentally benign". For the first time in the case of Subhash Kumar v. State of Bihar\textsuperscript{466}, the court declared

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\item \textsuperscript{465} AIR 1996 SC 2715.
\item \textsuperscript{466} AIR 1991 SC 420.
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that the right to life under Art 21 includes the right to clean water and air. In the same case, the rule of locus standi was enlarged so that the court could take cognizance of environmental degradation and regulate the prevention of the same in an effective manner.

In *Virender Gaur v. State of Haryana*[^67], the Apex Court confirmed that for every citizen, there exists a constitutional right to healthy environment and further conferred a mandatory duty on the state to protect and preserve this human right. Another landmark and revolutionary judgement is *Indian Council for Enviro-Legal Action vs. Union of India*[^68], a case concerned serious damage by certain industries producing toxic chemicals to the environment of Bichchari District in Rajasthan. Directions for the closure of the industry were given and the decision in the *Oleum Gas Leak case*[^69] regarding absolute liability for pollution by hazardous industries was reaffirmed. Moreover, the polluter pays principle was explicitly applied for the first time in the Bichchari case.

A foundation for the application of the Precautionary Principle, the Polluter Pays Principle and Sustainable Development, having been laid down, the three principles were applied together for the first time by the Supreme Court in *Vellore Citizens Welfare Forum v. Union of India*[^70], a case concerning pollution being caused due to the discharge of untreated effluents from tanneries in the state of Tamil Nadu. The Court, referring to the precautionary principle, polluter pays principle and the new concept of onus of proof, supported with the constitutional provisions of Art.21, 47, 48A and 51A (g) and declared that these doctrines have become part of the environmental law of the country.

[^68]: (1996) 5 SCC 647.
[^69]: M.C. Mehta v. Union of India, AIR 1987 SC 965, 982, and 1086.
[^70]: AIR 1996 SC 2715.
The Public Trust Doctrine, evolved in *M.C. Mehta v. Kamal Nath*\(^{471}\), states that certain common properties such as rivers, forests, seashores and the air were held by Government in Trusteeship for the free and unimpeded use of the general public. Granting lease to a motel located at the bank of the River Beas would interfere with the natural flow of the water and that the State Government had breached the public trust doctrine.

The Patna High Court in *Rajiv Ranjan Singh v. State of Bihar*\(^{472}\), held that failure to protect the inhabitant of the locality from the poisonous and highly injurious effects of the distillery's effluents and fumes amounted to an infringement of the inhabitants' rights guaranteed under Arts. 14 and 21 read with Arts. 47 and 48-A of the Constitution of India. The Court further directed in this case that if any person has contracted any ailment, the cause of which can be directly related to the effluent discharged by the distillery the company shall have to bear all the expenses of his treatment and the question of awarding the suitable compensation to the victim may also be considered.

Following a long course of active interpretation of constitutional and legislative clauses by the judiciary and vigorous efforts of some green citizens, the Indian environmental scenario has undergone a positive change. The Indian environmental jurisprudence was in a deep slumber. But today, the environmental consciousness imported by the courts, mingled with subsequent legislative efforts in the later years, introduced the right to environment as a fundamental right.

The law relating to environment under Article 21 is thus evolving in a phase wise manner and is getting shaped into a well defined commandment. The extended view of Article 21 recognizes an individual's right to live in a pollution free environment as it contributes towards

\(^{471}\) (1997) 1 SCC 388.
\(^{472}\) AIR 1992 Pat 86.
improving one's quality of life. Thus any citizen can resort to filing writ petitions under Article 226 or Article 32 to take recourse against environmental pollution as it is detrimental to the quality of life.

DOCTRINES AND PRINCIPLES EVOLVED BY COURTS:

The doctrines evolved by courts are a significant contribution to the environmental jurisprudence in India. Article 253 of the Constitution of India indicates the procedure on how decisions made at international conventions and conferences are incorporated into the legal system. The formulation and application of the doctrines in the judicial process for environmental protection are remarkable milestones in the path of environmental law in India. It is interesting to note that all such cases arose out of public interest litigation. The important doctrines evolved are,

- Public Trust Doctrine.
- Doctrine of Sustainable Development
- Polluter Pays Principle.
- Precautionary Principle.

Public Trust Doctrine:

Indian legal system is essentially based on common law, and 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 seashore, running waters, airs, forests, and ecologically fragile lands. The state as trustee is under a legal duty to
protect the natural resources. These resources meant for public use cannot be converted into private ownership.\textsuperscript{473}

In \textit{M.C.Mehta v. Kamal Nath}\textsuperscript{474}, the Supreme Court applied this doctrine for the first time in India to an environmental problem. It took notice of a news item in the Indian Express newspaper dated 2 February 1996. The respondent’s family had direct links with Span Motel, which owned a resort, Span Resorts. The family floated another venture, Span Club, encroaching upon a land, including forestland. It is reported that regularization of this encroachment was made when the first respondent was the Minister of Environment and Forest in the Central Government. Span Resorts management used bulldozers and earthmovers to control the course of river Beas, and to keep the high intensity of flow away from the motel. It is feared that this change caused landslides and floods. Once the diversion of the river is complete, the Span management has plans to go in for landscaping. In his counter affidavit, the Minister had denied the allegations against his involvement, and described the allegation as exaggerated and mischievous.

According to the Supreme Court, the public trust doctrine primarily rests on the principle that certain resources like air, sea waters and 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 court continued that 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 purposes.


\textsuperscript{474} (1997) 1 SCC 388.
The court reiterated the principal that one who pollutes the environment must pay to reverse the damage caused by his acts. The court directed that the motel shall pay compensation by way of cost for the restitution of the environment, and ecology of the area. Kamal Nath case is not confined to ordering removal of hindrance to the environment. It went a step further, and emphasized that violators of the environment should be asked to restore it to the original position. In certain cases, these two steps may perhaps be part of the one and the same measure, but there are violations beyond redemption.

In *MP Rambabu v. Divisional Forest Officer*\(^ {475}\), interesting questions were dealt with. To whom does deep sub-soil and water belong? Is it a no-man’s land or a region that belongs to everybody? In this case, Andhra Pradesh High Court had to deal with the problem of salinity of underground water. It was feared that digging bore wells and excessive usage of agricultural lands for aquaculture caused salinity. The court said that deep underground soil and water belong to the state in the sense that the doctrine of public trust extends to them. Manifestly, their use is subject to the state regulation even in the absence of a specific law. The underground water can be used only for a purpose for which the superjacent land is held. If it is used for a different purpose and causes pollution of underground water or soil, the state can interfere and prevent contamination. Applying the proposition to a person, who holds lands for agricultural purpose, the court held that under no circumstances, he can be permitted to restrict flow of water to the neighboring lands or discharge the effluents in such a manner so as to affect the right of his neighbor to use water for his own purposes. On the same analogy he does not have any right to contaminate the water to cause damage to the holders of the neighboring agricultural fields\(^ {476}\).

\(^{475}\) AIR 2002 AP 256.
\(^{476}\) Ibid, p 267.
According to the court, not only the owner or occupier, but also anybody who makes the adjoining property defective can be proceeded against in an action for nuisance.

The applicability of the public trust doctrine to groundwater was discussed in a recent case Perumatty Grama Panchayat v. State of Kerala\textsuperscript{477}, and Hindustan Coca-Cola Beverages (P) Ltd. v. Perumatty Grama Panchayat\textsuperscript{478}. The issue is not yet resolved and the appeal against the decision of the High Court of Kerala is pending before the Supreme Court.

**Plachimada and Coco Cola Case**

The Plachimada panchayat decided not to renew the exploitation license granted to the Coca Cola Company because of the lowering of the water table and decreasing water quality. The Panchayat has refused to renew the license of the company by exercising its power under the Kerala Panchayat Raj Act, 1994. The panchayat also ordered the closure of the plant on the ground that over-exploitation of water had resulted in acute shortage of drinking water. The company challenged the panchayat’s authority before the High Court of Kerala. The major legal issue was the right of a landowner to extract groundwater from his land and the power of the panchayat (or local bodies in general) to regulate the use of groundwater by private individuals.

The Single Judge observed that even without groundwater regulation, the existing legal position was that groundwater is a public trust and the state has a duty to protect it against excessive exploitation. The judge also made a link between the public trust and the right to life and thus recognized that a system which leaves groundwater exploitation to the discretion of landowners can result in negative environmental consequences. However, on appeal, the

\textsuperscript{477} 2004 (1) KLT 731.
\textsuperscript{478} 2005 (2) KLT 554.
Division Bench asserted the primacy of landowners’ control over groundwater in the absence of a specific law prohibiting extraction. The issue is now pending before the Supreme Court.

The issue in Plachimada remains unsettled. The victims are waiting for remedial action. The deterioration of groundwater in quality and quantity and the consequential public health problems and the destruction of the agricultural economy are the main problems identified in Plachimada. An examination of all these issues exposes several lacunae in the legal regime such as the absence of a specific and comprehensive groundwater laws, an efficient implementation of the pollution control laws or any desire in the judiciary to appreciate the legal transformation of decentralization of power. Despite the existence of the more competitive authority, that is, the Pollution Control Board, the Panchayat was the only authority that took some actions against the company. The victims of Plachimada have to wait for the Supreme Court decision for legal remedies. At the same time there is a need for strengthening the existing laws and the efficient implementation of the laws as the viable methods to regulate the groundwater use in the future and to avoid another Plachimada.

**Doctrine of Sustainable Development:**

Environmental pollution and degradation is a serious problem nowadays. Judiciary to being a social institution, has a significant role to play in the redressal of this problem. The progress of a society lies in industrialization and financial stability. But, industrialization is contrary to the concept of preservation of environment. These are two conflicting interests and their harmonization is a major challenge before the judicial system of a country. The judiciary, in different pronouncements, has pointed out that there will be adverse effects on the country’s

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economic and social condition, if industries are ordered to stop production. Unemployment and poverty may sweep the country and lead it towards degeneration and destruction. At the same time, polluting industries impend the stability of the environment.

The judiciary was, therefore, of the opinion that the pollution limit should be within the sustainable capacity of the environment. In fact, Roscoe Pound’s concept of social engineering which advocates for the resolution of conflicting interests, whereby there will be maximization of interest with minimum fiction and waste, is quite appropriate in these cases. The court further added that there should be a balanced approach in the fulfillment of the social needs, through industrialization and preservation of environment, because the polluted environment is the major cause of health hazards, especially of persons working in the factories or residing in the surrounding areas. It, may, therefore, be asserted that the Judiciary in India has found its appropriate answers in the concept of sustainable development.

In Vellore Citizens Welfare Forum v. Union of India, the Supreme Court opined, ‘the traditional concept that development and ecology are opposed to each other, is no longer acceptable, ‘sustainable development’ is the answer’. The genesis of the concept of sustainable development was in the Stockholm Declaration in 1972. Subsequently, the World Commission on Environment and Development 1987 (known as the Brundtland Report) in its report, called ‘Our Common Future’, gave a definite shape to this concept. In 1992, at the Rio Conference it was reaffirmed and contended that the implementation of this concept of sustainable development is the true mode of achievement of development. The court accepted the definition of sustainable development given by this commission. It reads as, ‘Sustainable Development that

See MDA Freeman Lloyd’s, Introduction to Jurisprudence, Sweet & Maxwell, sixteenth edn, pp524-31.

AIR 1996 SC 2715.
meets the needs of the present without compromising the ability of the future generation to meet their own needs’.

The court ascertained that sustainable development is a balancing concept between ecology and development. Its salient features were yet to be finalized by the jurists. However, they deliberated upon that aspect and said that from the Brundtland Report and other international documents, it appears that sustainable includes the following features:

- Inter-generational Equity;
- Use and conservation of Natural Resources;
- Environmental Protection and Precautionary Principles;
- Polluter Pays Principle;
- Obligation to assist and co-operate;
- Eradication of poverty and financial assistance to the developing countries.

The Supreme Court, in the instant case, enumerated that ‘precautionary principle’ and ‘polluter pays principle’ are the two most essential features of sustainable development. As it is a well settled principle of law that if a rule of customary international law does not contradict with the municipal law, it could be incorporated in the domestic law of the land\textsuperscript{482}, the court, therefore, tried to read these principles in constitutional and statutory provisions of this country. It said that, Art 21 of the Constitution of India guarantees the protection of life and personal liberty. The fundamental duties, Art 51A(g), and the directive principles, Arts. 47 and 48A, provide that it is the duty of the citizen as well as the state, to protect the material environment

\textsuperscript{482} To support this contention the courts referred to HR Khanna J’s opinion in Addl Dist Magistrate’s Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.
and ecology of the country. The other post-independent legislations and precisely the anti-pollution laws mandate the state to protect the environment and prevent its depletion. The latter have established implementing machineries in the form of Central and State Pollution Control Boards to obviate the possibility of environment degradation.

**Polluter Pays Principle:**

The countries moving towards the industrial development had to face the serious problems of giving adequate compensation to the victims of pollution and environmental hazards. 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. In the post *Bhopal Gas Leak* case, this principle was received great attention by and it has almost pushed the government and its institutions, including the judiciary.

In *M.C.Mehta v. Union of India*\(^{483}\), a petition was filed under Article.32 of the Constitution of India, seeking closure of a factory engaged in manufacturing of hazardous products. While the case was pending, oleum gas leaking out from the factory injured several persons. One of the persons died. Applications were filed for award of compensation. Although the court avoided a decision on these applications by asking the parties to file suits before the subordinate courts; the significance of the case lies in its formulation of the general principle of liability of industries engaged in hazardous and inherently dangerous activity.

The rule in *Rylands v. Fletcher*\(^{484}\), was evolved in the year 1866. It provides that a person who for his own purpose brings on to his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he fails to do so, is prima facie

\(^{483}\) AIR 1987 SC 1086.
\(^{484}\) (1866) LR & HL 330, pp 339,340
liable for the damage which is the natural consequence of its escape. The liability under this rule is strict liability. The Supreme Court was quite sure that the exceptions evolved in England to Rylands rule of strict liability in subsequent decisions are not applicable at present in a rapidly developing country like India. These principles were formulated at a time when developments of science and technology had not taken place. Science and technology could not afford any guidance for evolving standards of liability consistent with constitutional norms, and the needs of current economy and social structure. Observing that law has to grow in order to keep abreast with the economic developments taking place in the country, the Supreme Court emphasized on their responsibilities in the following words,

‘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 constructed by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order.’ The court thought that it should not hold its hand back and it ventured to evolve a new principle of liability known as absolute liability, which English courts had not done.

In Indian Council for Enviro-Legal Action v. Union of India485, it was held that the Central Government is empowered under the Environment Protection Act486, ‘to take all measures as it deems necessary or expedient for the purpose of protecting and improving the quality of environment’. In the present case, the said powers will include giving directions for the removal of sludge, for undertaking the remedial measures on the offending industry, and to utilize the amount so recovered for carrying out remedial measures.

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485 AIR 1996 SC 1446.
486 Section 3 of the Environment Protection Act, 1986.
The court did so by reiterating the *MC Mehta case* principle of absolute liability of hazardous and inherently dangerous industry. The court explained the ‘*polluter pays principle*’, according to which the responsibility for repairing damage is that of the offending industry. In the circumstances, the task of determining the amount required for carry out remedial measures is placed upon the Central Government.

**Precautionary Principle:**

The precautionary principle or precautionary approach states that if an action or policy has a suspected risk of causing harm to the public or to the environment, in the absence of scientific consensus that the action or policy is harmful, the burden of proof that it is not harmful falls on those taking the action. This principle allows policy makers to make discretionary decisions in situations where there is the possibility of harm from taking a particular course or making a certain decision when extensive scientific knowledge on the matter is lacking. The principle implies that there is a social responsibility to protect the public from exposure to harm, when scientific investigation has found a plausible risk. These protections can be relaxed only if further scientific findings emerge that provide sound evidence that no harm will result.

Principle 15 of the Rio Declaration states, ‘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 full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.’

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Thus, the precautionary principle got international recognition in the Rio Conference on Environment and Development 1992 and it has been reiterated in Rio Declaration, 2012 also.

In *Indian Council for Enviro-Legal Action v. Union of India* case discussed above accepted this principle along with the ‘polluter pays principle’ as part of the legal system. In *Vellore Citizens Welfare Forum v. Union of India*[^488] and *Andhra Pradesh Pollution Control Board v. MV Nayudu*[^489], the Supreme Court applied the precautionary principle directly to the facts of the cases.

In *Vellore Citizens Welfare case* the Supreme Court was appraised of the pollution caused by the enormous discharge of untreated effluent by tanneries and other industries in the state of Tamil Nadu. The petitioner highlighted the evil on the strength of reports from Tamil Nadu Agricultural University Research Centre, an independent survey conducted by non-government organizations, and a study by two lawyers deputed by the Legal Aid and Advice Board of Tamil Nadu. The main allegation was that the untreated effluents contaminated the underground water resulting in non-availability of potable water, thereby causing immense harm to agriculture. Despite the persuasion of the Tamil Nadu Government and the Board, and despite the Central Government’s offer of subsidy to construct common treatment plant, most of the tanneries hardly take any steps to control pollution. The court referred to its earlier orders. It also quoted extensively from the report of NEERI to bring to light the seriousness of the problem.

Petitioner, the Vellore Citizens Welfare Forum, filed this action to stop tanneries in the State of Tamil Nadu from discharging untreated effluent into agricultural fields, waterways, open lands and waterways. Among other types of environmental pollution caused by these tanneries, it

[^488]: AIR 1996 SC 2715.
[^489]: AIR 1999 SC 812.
is estimated that nearly 35,000 hectares of agricultural land in this tanneries belt has become either partially or totally unfit for cultivation, and that the 170 types of chemicals used in the chrome tanning processes have severely polluted the local drinking water. It was considered by the court that the industry is a Foreign Exchange Earner. It does not mean that this industry has the right to destroy the ecology, degrade the environment or create health hazards.

Also it was considered that one moot point is whether all the cost of the lives of lakhs of people with increasing human population the activities of the tanneries should be encouraged on monetary considerations. They found that the tanners have absolutely no regard for the healthy environment in and around their tanneries. The effluents discharged have been stored like a pond openly in the most of the places adjacent to cultivable lands with easy access for the animals and the people. Sustainable development, and in particular the polluter pays principles and the precautionary principle, have become a part of customary international law. Even though Environment Protection Act\(^{490}\) allows the Central Government to create an authority with powers to control pollution and protect the environment, it has not done so. Thus, the Court directed the Central Government to take immediate action under the provisions of this act.

The Court ordered the Central Government to establish an authority to deal with the situation created by the tanneries and other polluting industries in the State of Tamil Nadu. This authority shall implement the precautionary principle and the polluters pays principle, and identify the

(1) Loss to the ecology/environment;

(2) Individuals/families who have suffered because of the pollution;

\(^{490}\) Section 3(3) of Environment Protection Act, 1986.
and then determine the compensation to reverse this environmental damage and compensate those who have suffered from the pollution. The Collector/District Magistrates shall collect and disburse this money.

If a polluter refuses to pay compensation, his industry will be closed, and the compensation recovered as arrears of land revenue. If an industry sets up the necessary pollution control devices now, it is still liable to pay for the past pollution it has generated. Each tannery in the listed district is subject to a Rupees 10,000 fine which will be put into an "Environment Protection Fund". This fund will be used to restore the environment and to compensate affected persons. Expert bodies will help to frame a scheme to reverse the environmental pollution. All tanneries must set up common effluent treatment plants, or individual pollution control devices, and if they do not, the Superintendent of Police and the Collector/District Magistrate/Deputy Commissioner in each of the respective districts is authorized to close the plants down. No new industries shall be permitted to be set up within the listed prohibited areas.

The court also explained the "Precautionary Principle" in the context of the municipal law as under –

- Environmental measures by the state government and statutory authorities. They must anticipate, prevent and attack the causes of environmental degradation.
- Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
- The "onus of proof" is on the actor or developer/ industrialist to show that his action is environmentally benign.
It was directed that a ‘Green Bench’ would be constituted to deal with this case and other environmental matters. In Andhra Pradesh Pollution Control Board case\textsuperscript{491} the court relied on the Vellore case\textsuperscript{492} before pondering over the various dimensions of the precautionary principle. The court pointed out that earlier, the concept was based on the ‘assimilative capacity’, which assumed that science could provide the information and means necessary to avoid encroaching upon the capacity of the environment to assimilate impacts, and that relevant technical expertise would be available when environmental harm was predicted. In the UN General Assembly Resolution on World Charter for Nature, the emphasis shifted to the ‘precautionary principle’\textsuperscript{493}. This was reiterated in the Rio Declaration in its Principle 15\textsuperscript{494}. 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. Environmental protection should not only aim at protecting health, property, and economic interest, but also protect the environment for its own sake; precautionary duties must not only be triggered by the suspicion of concrete danger, but also by (justified) concern or risk potential\textsuperscript{495}.

In an article\textsuperscript{496}, it is commented that the ‘precautionary approach’ is a principle meant to avert environmental disaster. The Supreme Court was of the view that it is better to err on the side of caution and prevent environmental harm than to run the risk of irreversible harm. The principle involves anticipation of environmental harm, adoption of preventive measures, and

\footnotesize{\textsuperscript{491} Andhra Pradesh Pollution Control Board v. MV Nayudu, AIR 1999 SC 812.  
\textsuperscript{492} Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 2715.  
\textsuperscript{493} Principle 11 of the UN General Assembly Resolution on World Charter for Nature, 1982  
\textsuperscript{494} Principle 15 of the Rio Declaration: 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 full scientific certainty shall not be used as a reason for proposing cost-effective measures to prevent environmental degradation.  
\textsuperscript{495} Andhra Pradesh Pollution Control Board v. MV Nayudu, AIR 1999 SC 812, pp 820,21.  
choice of the least environmentally harmful activity. The commentators went on to say that the Stockholm Declaration in 1972 laid emphasis on the assimilative principle, which assumed that the environment has the capacity, to some extent, to assimilate substances so as to render harmless the much quoted epigram ‘the solution to pollution is dilution’. The Rio Conference in 1992 has recognized the precautionary approach as a norm for various nations to pursue.

The precautionary approach is said to promote development of clean technology. Looking at its acceptance in the past, the precautionary approach is said to be a principle ‘born before it was conceived’. Indian courts started tending the 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. Extensive, semi-intensive, and intensive aquaculture was ordered to be dismantled to prevent possible disaster on coastal eco-system. Closure of tanneries in certain districts of Tamil Nadu was directed with a view to preventing, among other things, serious damage to groundwater\textsuperscript{497}.

In \textit{Vijayanagar Education Trust v. Karnataka State Pollution Control Board, Karnataka}\textsuperscript{498} the Karnataka High Court accepted that the precautionary doctrine is now part and parcel of the Constitutional mandate for the protection and improvement of the environment. The court referred to \textit{Nayudu cases}\textsuperscript{499} which laid down that the burden to prove the benign nature of the project is on the developer if it is found that there are ‘uncertain and non-negligible’ risks. However, Andhra Pradesh High Court made an attempt to distinguish \textit{Nayudu case}\textsuperscript{500} from

\begin{thebibliography}{9}
\bibitem{498} AIR 2002 Kant 123.
\bibitem{499} \textit{Andhra Pradesh Pollution Control Board v. MV Nayudu}, AIR 1999 SC 812.
\bibitem{500} \textit{Ibid.}
\end{thebibliography}
Vijayanagar case. In Nayudu case, the Apex Court had every reason to believe that the potential dangers to the environment were ‘non-negligible’. In the present case, the Board had not examined whether the risk involved could be said to be ‘non-negligible’. In applying the precautionary principle, it is absolutely necessary to identify the nature of the pollutant, and to find out whether it would cause ‘non-negligible’ environmental risk. When it refused consent, the Board did not adopt such an analysis, nor did it make a reference to any pollutants that be emitted by the hospital, which would have caused non-negligible risk. The court held that it is impossible to draw inference of non-negligible danger to the environment.

Precautionary Principle and Sustainable Development:

In Narmada Bachao Andolan v. Union of India, the precautionary principle came to be considered by the majority judges in this case. The court took the view that the doctrine is to be employed only in cases of pollution when its impact is uncertain, and non-negligible. The majority is of the view that the doctrine has to be put on back burner when the impact of a development project is certain and can be quantified. Sustainable Development means what type or extent of development can take place, which can be sustained by nature/ecology with or without mitigation. The Court noted that the question in the Narmada Bachao Andolan case is not concerned with the polluting industry, and the effects of the project are already known.

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501 Vijayanagar Education Trust v. Karnataka State Pollution Control Board, Karnataka, AIR 2002 Kant 123.
502 AIR 2000 SC 3751.
503 Ibid.
504 In the words of the court: what is being constructed is a large dam. The dam is neither a nuclear establishment nor a polluting industry. The construction of a dam undoubtedly would result in the change of environment but it will not be correct to presume that the construction of a large dam like the Sardar Sarovar will result in the ecological disaster. India has an experience of over 40 years in the construction of dams. The experience does not show that construction of a large dam is not cost effective or leads to ecological or environmental degradation. On the contrary there has been ecological upgradation with the construction of large dams. What is the impact on environment with the construction of a dam is well known in India and, therefore, the decision in AP Pollution Control Board’s case will have no application in the present case.
Contribution of Doctrines to Environmental Jurisprudence:

The application of the doctrines in the judicial process for environmental protection are remarkable milestones in the path of environmental law in India. It is interesting to note that all such cases arose out of public interest litigation. Undue influence of political bigwigs who make environmentally malign decisions is blocked. Skeletons in the governmental and administrative cupboards were revealed. Illegal contracts with adverse impact on ecology will be invalidated. The court directed to apply this jurisprudence when an entire village in Rajasthan was under an ecological catastrophe from non-disposal of hazardous wastes\(^{505}\).

JUDICIAL ACTIVISM:

The term judicial activism is used to refer to the ‘extended arm of judiciary’ or the increasing active interest that the judiciary is taking in our everyday life. This ‘activism' on the part of the judiciary derives its constitutional legitimacy from Art. 141 of the Constitution which lays down that the Supreme Court's declaration of law is final and Art.13 which empowers the judges to declare any law null and void if it was found to be against the provisions of Part III of the Constitution. Its areas of activity are widening such as Public Interest Litigation, Writ Petitions under Art. 32, interpretation of Arts. 12, 14, 19, 21 etc.

Different interpretations are being given to the term judicial activism. Justice Kuldip Singh has said that the term judicial activism was a misnomer as the judiciary was only doing what the Constitution had enjoined upon it. P.P. Rao, a Supreme Court lawyer and a jurist felt that the basic cause of judicial activism is the non-existence of effective government, whereas Rajeev Dhawan felt that activist judiciary was one which was dedicated to mould the law and its interpretations to achieve social justice and rule of law aims of the Constitution. Meera

\(^{505}\) Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1446.
Sapatnekar, on the other hand feels that the object of the judiciary is to clear out all social, political and national maladies of the country as the executive has failed to perform its duties and made it necessary for the judiciary to intervene to give justice to the people and the nation. The Vice-President of India\textsuperscript{506}, has attributed the over-activism of the judiciary mainly to the ‘downward spiral' of the rule of law and malfunctioning of the institutions of the State, particularly the executive.

Governance, as we all know, is a decision making process, which has always existed since the dawn of human civilization. The role of judiciary lies in protecting the interest of individuals and others against the misuse of power by public authorities. Despite judicial review and Public Interest Litigation, there is an erosion of public confidence in the system itself due to lack of effective access to justice, huge backlog of cases and long delay in decisions.

"The keys to good governance, as articulated by the United Nations Development Programme, are rule of law, participation, and accountability and transparency." The role of the judicial branch of government is critical in ensuring the implementation of the principles of both the rules of law and accountability. Firstly, the functioning of a society according to the rule of law is based on the judiciary. Secondly, the judiciary ensures the accountability of other institutions of government and individuals.

In the case of environmental governance, the judiciary also has the difficult role of considering not only environmental instruments, but also economic, developmental and political as well as social instruments. The compliance and enforcement of sustainable development instruments also serves in the promotion of synergies or inter-linkages among multiple issues,

\textsuperscript{506} Honourable Vice- President Mr. Mohammad Hamid Ansari, the fourteenth Vice-President of India. For details see, www.presidentofindia.nic.in, last accessed on 18\textsuperscript{th} May 2015.
also known as the inter-linkages approach. This is because compliance and enforcement requires cooperation and coherence in policies across multiple departments and branches of government.

On environmental law interpretation and law making, although most people would argue that judges are there merely to interpret legislation and not to make laws, several distinguished jurists have pointed out that the judiciary also contributes to defacto "law making" through precedents. On the capability of jurists, several issues need attention, but one possible solution is the enhancement of their awareness and knowledge of global and regional environmental issues viewed from a wider context of sustainable development\footnote{In the Johannesburg Principles, the global judiciary expressly recognized this fact and called on UNEP and other organizations within and outside the United Nations to actively support a major capacity building programme for judges, prosecutors, enforcement officers and representatives of civil society organizations that are engaged in safeguarding the environmental rights of citizens. For details see, Dr.S.R.Myneni, Environmental Law, New Edition, (2008), Asia Law House, p.845.}.

Judicial awakening and activism for protection of the environment in India began formally after the 1972 Stockholm Conference on Human Environment. The term judicial activism denotes a process where at one end there are the logically principled rules in the hands of court and at other end there are demands, desires for expectations of society pressing it to accommodate with the framework of law. This process of accommodation by court is called the civilization of law and in term is known as activism. Environmental provisions are introduced in the Constitution of India by its 42nd amendment in 1974 under Article 48 (A) and 51-A (g) as a “fundamental duty” for every state and citizen of India to protect and improve the natural environment. Several laws pertaining to the protection of the environment were enacted in India prior to it. There were a number of public laws existed which had environmental overtones. The Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973 dealing with “public nuisance” assume special significance in this regard.
The Environmental Protection Act, (EPA) of 1986 against industrial pollution and the Conservation of Forest and Natural Ecosystems Act of 1994 to stop deforestation and habitat destruction are, among others, good pieces of legislation for the protection of the environment in India. Public Interest Litigation (PIL) to prevent environmental degradation has been increasing in India and the judiciary has come to rescue the people on a number of occasions. There are several historic judicial decisions serving both man and environment in India. It can be seen that the Supreme Court of India has moulded a far-reaching and innovative environmental jurisprudence which no other constitutional court anywhere in the world has ever given shape to.

The High Courts have also contributed their bit in developing this jurisprudence. In fact due to its proactive role in administering environmental law, the higher judiciary in the country has emerged as the exclusive dispenser of environmental justice. By doing so, they have succeeded to a great extent in altering the common man’s perception of law courts as being mere fora for dispute adjudication thereby carving out a niche for itself as a unique human right friendly institution in justice dispensation.

The ever increasing number of PILs being filed in the Supreme Court and in the High Courts over every conceivable environmental problem by public interest groups and individuals, bear testimony to this unshaken faith which the public has reposed in the system and in this context, the role essayed by the superior judiciary can be gauged at two levels\(^{508}\). The increasing intervention of Court in environmental governance, however, is being seen as a part of the pro-active role of the Supreme Court in the form of continual creation of successive strategies to uphold rule of law, enforce fundamental rights of the citizens and constitutional propriety aimed at the protection and improvement of environment. Unlike other litigations, the frequency and

\(^{508}\) One as facilitator seeking to ensure better enforcement of the laws and secondly as pathfinder trying to wriggle its way out of the redundant obstacles thereby providing a panacea to the environmental ills plaguing the country.
different types of orders/directions passed periodically by the Supreme Court in environmental litigation and its continuous engagement with environmental issues has evolved a series of innovative methods in environmental jurisprudence.\textsuperscript{509}

A number of distinctive innovative methods are identifiable, each of which is novel and in some cases contrary to the traditional legalistic understanding of the judicial function.\textsuperscript{510} These innovative methods, for instance, include entertaining petitions on behalf of the affected party and inanimate objects, taking suo motto action against the polluter, expanding the sphere of litigation, expanding the meaning of existing Constitutional provisions, applying international environmental principles to domestic environmental problems, appointing expert committee to give inputs and monitoring implementation of judicial decisions, making spot visit to assess the environmental problem at the ground level, appointing amicus curiae to speak on behalf of the environment, and encouraging petitioners and lawyers to draw the attention of Court about environmental problems through cash award. It is important to note that these judicial innovations have become part of the larger Indian jurisprudence ever since the Court has started intervening in the affairs of executive in the post emergency period.

The innovative methods initiated in resolving environmental litigation, however, have been almost entirely dominating the environmental jurisprudence process for more than the last thirty years. The expansion of judicial activism through environmental cases, in particular, is widely debated and discussed in India. On the one hand, critics of the theory of separation of


\textsuperscript{510} See, Jamie Cassel's, \textit{Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?}, 37(3) The American Journal of Comparative Law 495 (1989).
power view this kind of judicial activism as a sign of hope to correct shortcomings on environmental issue. On the other hand, the advocates of theory of separation of power argue that the intervention of Court in the affairs of implementing agency to protect the environment and enforce fundamental rights is violating the principle of separation of powers as the theory of separation of power suggests that each organ of the government has to perform within the prescribed limits as designed by the Constitution of India.

In a number of cases, the Court has gone beyond its adjudication function to protect the environment thereby violating the principle of separation of powers and creating problems for other organs of the State. Its continuous intervention in the affairs of executive, questioning the validity of government policy and resuming administrative powers to protect the environment aggressively has invited steadfast resistance from administrative branches. The examination of the implications of Supreme Court’s innovations for environmental jurisprudence reveals that the application of innovative methods to resolve environmental disputes and implement Court orders is certainly a deviation from the usual adjudicating function of the Court.

While the procedural innovations have widened the scope for environmental justice through recognition of citizens’ right to healthy environment, entertaining petitions on behalf of affected people and inanimate objects and creative thinking of judges to arrive at a decision by making spot visit, substantive innovations have redefined the role of Court in the decision-making process through application of environmental principles and expanding the scope of environmental jurisprudence. The judicial activism in environmental issues has increased people’s faith in the judiciary of the county. Though there are number of laws dealing with various environmental issues, the judiciary has to perform the role of executive by issuing orders for enforcement of environmental laws and judicial orders for the protection of rights of people.
The credit goes to the Supreme Court for implementation of principles of sustainable development in India.

The words of laws were mere letters but the judicial interpretation of these laws has given life and blood to them. We also cannot deny the criticism leveled against this activism that the judiciary has forgotten its role of adjudicator and taken the responsibility of executive and legislature as a law maker and law enforcer in India. These questions compel us to assess the critical role of Indian judiciary in development of environmental jurisprudence in India and legitimacy of judicial activism in environmental jurisprudence.

Despite the absence of a concise environmental regulatory framework with respect to soil and groundwater contamination in India, progress in protecting the environment has been made through application and expansion of existing environmental laws, use of proactive concepts including the polluter pays principle and the precautionary principle, and aggressive use of public interest litigation (PIL).

PUBLIC INTEREST LITIGATION:

Public Interest Litigation has had a profound effect on the development of environmental law in India. PIL allows any bona fide person to take a matter of public interest to the higher judiciary, even when the person who is supporting the cause is not personally or directly affected by the interest that is being brought to the courts.

The concept of public interest litigation (PIL) is well entrenched in India contrary to the past practices\textsuperscript{511}, today a person acting bonafide and having sufficient interest can move the

\textsuperscript{511} Locus standi was the biggest hurdle. *JM Desai v. Roshan Kumar AIR 1976 SC 578* is as an illustration. The District gave no objection certificate for a cinema house close to a burial ground, compost depot, a school and public

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courts for redressing public injury, enforcing public duty, protecting social and collective rights and interests, and vindicating public interest\textsuperscript{512}. In the eighties and nineties, a wave of environmental litigation was witnessed. Most of such cases were in the form of class action and PIL, as environmental issues relate to diffusing of interests, rather than to ascertainable injury to individuals.

The concept of class action is embodied in the Code of Civil Procedure 1908\textsuperscript{513}, where if numerous persons have common interests, one or more of such persons can file a suit. A recent example of class action is the Bhopal Gas Leak disaster litigation\textsuperscript{514}. This community interest can also be agitated under the law of public nuisance incorporated in the CrPC. An individual, a group of individuals, or an executive magistrate, suo motu, can move the courts. This provision has proved to be a potent weapon for regulatory measures\textsuperscript{515}, as well as affirmative action\textsuperscript{516} by the government and local bodies for protection of the environment, provided that the executive magistrates exercise their discretion independently without undue influence from their bureaucratic or political superiors.

These PILs have given the judiciary enormous scope for intervening in environmental matters. Indian courts have been categorical in their adoption of the values of sustainable development and the “precautionary principle,” which asserts that a lack of scientific certainty

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\textsuperscript{513} Order 1, Rule 8. It is an amplification of the concept of class action with the permission of the court. When a representative suit is filed, notice by personal service or by advertisement is to be given. The court has discretion to allow impleading a party. The decree will be binding on all parties on whose behalf or for whose benefit they sue.

\textsuperscript{514} Union Carbide Corporation v. Union of India AIR 1990 SC 273.


\textsuperscript{516} Municipal Council, Ratlam v. Vardhichand, AIR 1980 SC 1622, where local bodies were directed to provide amenities.
should not be used as a reason for postponing measures to prevent environmental degradation where there are threats of serious and irreversible damage if the action is not taken. The range of issues addressed by PIL has been very broad. It extends from compassion to animals, privileges of tribal people and fishermen, to the ecosystem of Himalayas and forests, ecotourism, land use patterns, and vindication of an eco-malady of a village. The cause of environment being taken up through PIL was championed by a wide spectrum of people in society. Lawyers, association of Lawyers, environmentalists, groups and centres dedicated to environmental protection and forest conservation, welfare forums including those for tribal welfare, societies registered under the Societies Registration Act and consumer research centres have successfully agitated environmental issues before courts. Urban social activists, the women’s wing of a society for animal protection, chairman of rural voluntary associations and residents of housing colonies were also involved in advocating

517 Satyavani v. Andhra Pradesh Pollution Control Board, AIR 1993 AP 257.
527 Nagarahole Budakattu Hakku Sthapana Samithi v. State of Karnataka, AIR 1997 Kant 288
531 Satyavani v. Andhra Pradesh Pollution Control Board, AIR 1993 AP 257.
environmental issues. While in some cases letters\textsuperscript{534} were considered as writ petitions and in some others paper reports\textsuperscript{535} induced judicial action. The powers of the Supreme Court to issue directions under Article 32 and those of High Courts to issue directions under Article 226 have attained great significance in environmental litigation.

To summarize the environmental issues that have been brought to the courts under PILs in the past include,

- Riverine pollution by tanneries, industrial effluents, and untreated sewage;
- Soil and groundwater pollution;
- Indiscriminate mining;
- Protection of forests;
- Fencing of parks and sanctuaries;
- Preservation of monuments of archaeological and historical significance and their protection from vandalism and industrial pollutants; and
- Automobile pollution.

The judicial prescriptions have included

- Remedial measures offered by cleanup technologies;
- Liability measures based on application of the “polluter pays principle”;
- Monetary penalties; and
- Revised environmental standards.

TANNERIES AND DISCHARGE OF EFFLUENTS:

Under the laws of the land the responsibility for treatment of the industrial effluents is that of the industry. However, it has been noticed that various tanneries operating in different parts of the country have not been complying with the laws of the land. They have been discharging effluents without any treatment and thus becoming one of the major sources of pollution. The courts in such cases have issued directions to such tanneries to either install primary treatment plant or stop working. The judiciary in India has followed the path of sustainable development in such case as well.

In *M.C. Mehta v. Union of India*[^536^], (popularly known as Ganga Water Pollution case or Kanpur tanneries case), a public interest litigation was filed for the issuance of directions restraining the tanneries from discharging trade effluent into the river Ganga till such time they put up necessary treatment plants for treating the trade effluents in order to arrest the pollution of water in the said river. The tanneries discharging effluents in the river Ganga did not set up primary treatment plant in spite of being asked to do so for several years. Nor did they care to put up an appearance in the Supreme Court expressing their willingness to set up pre-treatment plant. Consequently, the Supreme Court directed them to stop working.

K.N. Singh, J., who delivered concurring but separate judgement in this case, issued directions for the closure of those tanneries which have failed to take minimum steps required for the primary treatment of industrial effluent. It was further pointed out that closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance.

to the people\textsuperscript{537}. Thus, the concern of the Court for the life and health of the people and the ecology is evidence from the above observation.

\textit{Vellore Citizens Welfare Forum v. Union of India}\textsuperscript{538}, (popularly known as T.N. Tanneries case), is a landmark judgement of the Supreme Court where the principle of sustainable development has been adopted by the court as a balancing concept. This case was also filed as public interest litigation (PIL) and was directed against the pollution which was being caused by enormous discharge of untreated effluents by the tanneries and other industries in the State of Tamil Nadu. The Supreme Court pointed out that the traditional concept that development and ecology are opposed to each other is no longer acceptable. “Sustainable Development” is the answer\textsuperscript{539}.

The Supreme Court after explaining the salient principles of sustainable development expressed the view that “The Precautionary Principle” and “The Polluter Pays Principle” are essential features of sustainable development and that they have been accepted as part of the law of the land\textsuperscript{540}. The Supreme Court also held that in view of the constitutional provisions contained in Articles 21, 47, 48-A, 51-A (g) and other statutory provisions contained in the Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act, 1986, it had “no hesitation in holding that the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the country”\textsuperscript{541}. The Court further observed:

\begin{footnotesize}
\begin{enumerate}
\item (1996) 5 SCC 647.
\item \textit{Ibid}.
\item \textit{Ibid}, at pp 658-59.
\item \textit{Ibid}, at pp 660-61.
\end{enumerate}
\end{footnotesize}
Even otherwise once these principles are accepted as part of the Customary International Law there should be no difficulty in accepting them as part of the domestic law. It is almost an accepted proposition of law that rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law. The Supreme Court issued so many directions in this case and also requested the Madras High Court to constitute a special Bench—“Green Bench” to deal with this case and other environmental matters. Finally the Supreme Court also directed the State of Tamil Nadu to pay Rs. 50,000 towards legal fee and other out of pocket expenses incurred by Mr. Mehta who was the petitioner in this case.

The Supreme Court in continuation of the Kanpur Tanneries Case, took up the issue of Calcutta tanneries which were discharging untreated noxious and poisonous effluents into Ganga river and thus polluting the land and the river. In the case of MC Mehta v. Union of India, (popularly known as Calcutta Tanneries case), it was found that the Calcutta tanneries were not co-operating in their relocation to new complex even after giving clear undertaking in that behalf to the Supreme Court.

The Court held that even otherwise, these tanneries had been operating in violation of the mandatory provisions of the Water (Prevention and Control of Pollution) Act, 1974 and Environment (Protection) Act, 1986. The Court applied one of the essential principle of sustainable development, i.e., the “Polluter Pays Principle” and accordingly issued various directions including for unconditionally closure of the tanneries on 30-9-97, their relocation,

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543 M.C. Mehta v. Union of India, AIR 1988 SC 1037.
544 (1997) 2 SCC 448.
payment of compensation by them for reversing the damage to the ecology and for rights and benefits to be made available by them to their workmen\textsuperscript{545}. In view of the comprehensive directions issued for achieving end result and the fact that “Green Bench” was already functioning in the Calcutta High Court, the Supreme Court directed that the further monitoring of the case was to be done by the Calcutta High Court. The Supreme Court also imposed the cost of Rs.25,000 on the Calcutta tanneries.

In \textit{M.C.Mehta v. Union of India}\textsuperscript{546}, the Supreme Court directed the State of West Bengal to file an affidavit indicating the steps taken by them to comply with the directions issued earlier by the Supreme Court in the Calcutta Tanneries Case and to specify the names of the defaulters, if any. In \textit{Ambuja Petrochemicals Ltd. v. A.P.Pollution Control Board}\textsuperscript{547}, the effluent treatment plant of the industry was not in operation and thereby causing water pollution resulting in danger to public life. The Pollution Control Board ordered the industry to be closed. It was held that the order of the Board was neither disproportionate nor excessively severe.

In order to treat the effluents from the industries the Supreme Court has always stressed that Central Effluent Treatment Plant (CETP) should be established wherein the effluents from the different industries could be treated. In \textit{M.C.Mehta v. Union of India}\textsuperscript{548}, the Supreme Court clarified that towards the construction of Central Effluent Treatment Plant, contribution must be made by all industries in the area concerned and construction of Sewage Treatment Plants (STP) by individual industries cannot be a substitute for CETP.

\textsuperscript{545} \textit{Ibid}, at pp 430-33.
\textsuperscript{546} (1998) 9 SCC 448.
\textsuperscript{547} AIR 1997 AP 41.
The Supreme Court had been passing orders from time to time to control the pollution due to industrial effluents. In News item “Hindustan Times” *A.Q.F.M. Yamuna v. Central Pollution Control Board*\(^{549}\), the Supreme Court considered the affidavit filed by the Central Pollution Control Board, which showed continuous discharge of polluting effluent/sewage into the river Yamuna, which indicated that the dissolved oxygen in the water was nil. The Court pointed out that the Government is expected to take curative as well as preventive measures. If any such measures had been taken then they clearly were not enough to ensure water of quality, which would justify the river Yamuna being classified as Class “C” which means whose water is fit for drinking with conventional treatment followed by disinfection. Therefore, the Court issued notice to the National Capital Territory Delhi to show cause as to why appropriate fine should not be levied for non-compliance of the order of the Court.

In *U.P. Pollution Control Board v. Mohan Meakins Ltd.*,\(^{550}\) the company was polluting the streams and rivers by discharging trade effluents into river Gomati and raising pollution level beyond permissible limits. Managers and Director of the company were also included in array of accused as it was alleged that they were responsible for contamination of the river water. In this case more than 17 years had elapsed after the filing of the complaint. The Supreme Court held that lapse a very long time is no reason to absolve the accused from the trial. The Court also held that the managers and the Director of the company if found liable can also be prosecuted under the Water Act of 1974.


\(^{550}\) (2000) 3 SCC 745.
An analysis of the above cases shows that the Supreme Court has not only developed the essential principles of sustainable development but also actually applied them while dealing with environmental litigations. In view of the above cases, the concept of “Sustainable Development” has become a part of our “New Environmental Jurisprudence” and the law of the land.

**Environmental Ethics:**

The first international conference on human environment was held in 1972\footnote{Stockholm Declaration on Human Environment, 1972. The declarations made in this conference are known as Magna Carta on human environment.}, and since then it takes place after every ten years\footnote{Second was held in 1982 at Nairobi, third in 1992 at Rio de Janeiro, fourth in 2002 at Johannesburg and fifth in 2012 at Rio de Janeiro. For details see, Satish C. Shastri, *Environmental Ethics Anthropocentric to Eco-Centric Approach: A Paradigm Shift*, Journal of the Indian Law Institute, Vol. 55, No. 4, Oct-Nov 2013.}. The focal theme of the first international conference based on anthropocentric approach which was the crux of the declaration has been repeatedly followed in all other international conferences\footnote{In Rio Declaration, 1992, Principle 1 declared that, ‘Human beings are at the centre of concern for sustainable development. They are entitled to a healthy and productive life in harmony with nature.’ Principle 6 of the Rio Declaration on Sustainable Development of 2012 observed that ‘We recognize that people are at the centre of sustainable development and in this regard we strive for a world that is just, equitable and inclusive, and we commit to work together to promote sustained and inclusive economic growth, social development and environmental protection and thereby to benefit all’.} which were held during last four decades. According to the anthropocentric approach other components or natural things are being maintained, preserved or protected as they are essential for the existence of human beings. The ‘need’ for mankind is the sole criterion to safeguard the natural resources and to maintain the quality of them. This approach to maintain the ecological balance and prevent environmental degradation safeguarding Homo sapiens was adopted worldwide and the Supreme Court of India also reiterated it in many of its pronouncements.
The Supreme Court has always emphasized on the need to preserve the quality of the various components of environment-vegetation cover\(^{554}\), air\(^{555}\), water\(^{556}\), fauna\(^{557}\), underground water\(^{558}\), etc. It was from the M.C. Mehta case to till Vellore Tanneries case or even thereafter the approach of the Supreme Court was only on anthropocentricism. But, recently there is a paradigm shift from anthropocentricism to eco-centricism. This eco-centric approach stresses on the intrinsic values of all the naturally present things and that they, if preserved and protected, would preserve and protect other forms of life on earth. The Supreme Court of India has adopted and implemented this eco-centric approach recently\(^{559}\).

The court also stated the necessity to change the approach from anthropocentric to eco-centric keeping in mind the vulnerability of the species. Therefore, this approach must be adopted to safeguard the existence of vulnerable, endangered species on the verge of extinction. Enormous number of species have been destroyed by human activities, but whatever is left must be preserved and looked after by this generation and for progeny. Thus the apex court has pronounced various landmark judgments for protecting the environment for the sake of preserving the interests of human beings. However, the Supreme Court’s pronouncements in the

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\(^{555}\) M.C. Mehta v. Union of India, AIR 2002 SC 1696; M.C. Mehta v. Union of India, AIR 1997 SC 734.

\(^{556}\) M.C. Mehta v. Union of India, AIR 1998 SC 1037, 1088, 2340.

\(^{557}\) Consumer Education & Research Society v. Union of India, AIR 2000 SC 975.

\(^{558}\) Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1446.

\(^{559}\) Some of the noteworthy decisions of the Supreme Court are as follows: First one is T.N. Godavarman Thirumulpad case, (2012) 3 SCC 277, the second one is T.N. Godavarman Thirumulpad v. Union of India, (2012) 4 SCC 362, 374, and the third one is Centre for Environment Law, WWF-I V. Union of India, (2013) 8 SCC 234 decided on April 15, 2013. The first case was about protection and preservation of the ‘Asiatic wild Buffalo’, second one was about the preservation of ‘Red Sandalwood’ and the third case was relating to safeguard the ‘Asiatic wild Lion’ an endangered species. Generally speaking, these three do not carry any value or are not of much use to human beings, but looking to their intrinsic value and that they are representative samples of nature, the court ordered for taking necessary safeguards to preserve and look after them as they are part of the nature-wildlife.
above stated cases revealed that it come out with the new philosophy for the protection of environment which includes water, a precious natural resource.

**SUMMARY:**

The formulation and recognition of various doctrines and strategies signify a judicial awareness on the need for reconciliation of the developmental, socio-economic, and ecological conflicts in the present day Indian society. This awareness is reflected in the cases that came before the courts for review. Man must live and he must live well, in a healthy and safe atmosphere – this has been the judicial dictum and its entire efforts have been directed towards achieving that goal. It has, therefore, evolved diverse principles such as absolute liability, and public trust doctrine to preserve the human environment and to uphold man’s right to live in a wholesome environment. It has ordered the closure of hazardous industries, the shifting of the place of industrial operation and the imposition of criminal responsibility on directors, for their failure in taking necessary anti-pollution measures.

The court has also directed the payment of compensation to victims of environmental calamities. It has clearly specified that there can be no compromise with environmental preservation; it has to be done to ensure the survival of the coming generations and to give them a life with human dignity. The Apex Court has also opined that the High Court has the proper authority to consider what should be the appropriate remedy for such type of cases. The decisions of the Apex Court, while strengthening the application of the principle of polluter pays, also adds new dimension regarding the qualification of punishment under this principle, though, the Apex Court has been silent about developing sound principles of quantification of pecuniary liability.
On the whole, one may appreciate the bold attempts made by the Indian Judiciary to ensure the establishment of a clean, pollution-free environment. The recent pronouncements of the Supreme Court have stated about its new approach based on eco-centricism for the purpose of maintaining environmental ethics. However, the problem of locus standi is still to be sorted out. Protection and improvement of the environment is the constitutional commitment. It is pity if this public cause is lost on the ground of bias, prejudices and malafides of the litigant approaching the court. In several instances proponents make heavy investments for eco-unfriendly projects and attempt to raise the plea of fait accompli. Although the courts have expressed concern on this aspect, a more bold and consistent judicial policy has to emerge for the purpose of strengthening the regime of environment in the country. The problem of environmental justice cannot be solved only by giving the opportunity to access the court for seeking justice unless and until the judicial pronouncements are enforced effectively to provide environmental justice and put justice in place of injustice done to the public. Therefore, there is a need for fair, honest, competent and responsive enforcement machinery.