The state practice of India and the development of international law : selected areas

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CHAPTER VI
INTERNATIONAL ENVIRONMENTAL LAW AND THE LORDS OF THE GREEN BENCH

6.1. Introduction

As far as international environmental law is concerned, India's contribution is vital in terms of the codification as well as progressive development.[557] This has been abundantly highlighted during the Stockholm Conference in 1972, the Rio Conference in 1992, Johannesburg in 2002, the Rio Conference in 2012 and various Climate Change conferences. India has played an active role in international forums and has been at the forefront of these forums for canvassing the needs, concerns and interests of developing countries at large. At national level, the executive and more importantly, the judiciary has been active in clarifying and implementing international environmental jurisprudence. In fact, the Indian judiciary, unlike other regimes of international law, has effectively and decisively read into emerging principles of international environmental law and has been successful in ensuring that the executive implements those norms. Post-independence India had to deal with immediate problems of socio-economic-political nature, and so its voice was significantly first heard at the Stockholm Conference in 1972, which is also considered to be the first and foremost major debate on international environmental law.[558] India's contribution can be found in international environmental law *per se*, and in all related disciplines with respect to sustainable development and climate change.[559] This chapter examines the following issues: How India has contributed to the emergence of international environmental law? How India has implemented the norms of international environmental law at domestic level specifically? What has been the role of the Indian judiciary in evolving various legislations and bye-laws? What has been the position and approach of the Indian judiciary in directing the compliance, implementation and enforcement of international environmental law norms at domestic level?

6.2. Evolution of environmental law in India

A brief review of various domestic acts, prior to Indian independence, suggests that these acts embody environmental concerns as well as remedial and penalty measures for the violations thereof. For example, the

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[557] C. M. Abraham, *Environmental Jurisprudence in India*, (The Hague: Kluwer Law International, 1999); Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh*, (The Hague: Kluwer Law International, 2004); Ambrose, David A., "International Environmental Law and India", In Bimal N. Patel (ed.) *India and International Law*, The Hague: Kluwer Law International, 249-64 (2005); Kisan Khoday, "Global Constitutionalism in a Multi-Polar World: China, India & the Shaping of International Environmental Law in the 21st Century", 5th International Conference of the *Indian SIL*, (New Delhi: 2007); S. C. Gupta, "Emerging International Environmental Regimes and India's Policy", 5th International Conference of the *Indian SIL*, New Delhi (2007); Sanjay Parikh, "Sustainable Development, International Environmental Law and the Legal Developments in India", In R. K. Dixit (ed.), 1 *International Law: Issues and Challenges* 268-279 (New Delhi: Hope Publications, (2009).

[558] The then Prime Minister of India Ms Indira Gandhi emphasised the interlinkages between economic, social and environmental issues, during Stockholm Conference. She outlined eight principles for securing global action which could achieve the interlinked goals.

[559] Indian position, at domestic, regional and global level is clear that "sustainable development, as illustrated by the Rio Declaration on Environment and Development, Agenda 21, the Johannesburg Plan of Implementation and multilateral environmental treaties, should be an important vehicle to advance economic growth." Sanya Declaration issued at the end of the Summit of the BRICS countries. Sanya (China), April 14, 2011

Indian Penal Code, 1860 prescribes punishment to people responsible for causing defilement of water at a public spring or reservoir with imprisonment or fines.[560] In addition, the Code also penalized negligent acts with poisonous substances that endangered life or caused injury. The Indian Easements Act, 1882 protected riparian owners against unreasonable pollution by upstream users.[561] The Indian Fisheries Act, 1897 penalized the killing of fish by poisoning water and by using explosives. The Indian Forest Act, 1927 granted the government uncontested rights over natural resources, with state governments authorized to oversee protection of the forests and grant licenses to lumber contractors.[562] In this regard, it may be noted that the Shore Nuisance (Bombay and Kolaba) Act of 1853,[563] was one of the earliest laws concerning water pollution, which authorized the collector of land revenue in Bombay to order removal of any nuisance below the high-water mark in Bombay harbors.

A major breakthrough in international environmental law regime started evolving significantly from 1972 with the United Nations Conference on the Human Environment, otherwise known as the Stockholm Conference.[564] Pursuant to Article 21 of the Summit Declaration, the Conference called upon and emphasized the need for enacting national legislations which can comprehensively address the health and safety issues of people, flora and fauna. This conference also marked a beginning of an important monitoring mechanism in the realm of international environmental law by calling upon all states to provide country reports.[565] For any country, health and safety issues of people, flora and fauna remain of vital importance, as Mrs. Gandhi, the then Prime Minister of India said,

> "On the one hand the rich look askance at our continuing poverty and on the other; they warn us against their own methods. We do not wish to impoverish the environment any further and yet we cannot for a moment forget the grim poverty of large numbers of people. Is not poverty and need the greatest polluters? For instance, unless we are in a position to provide employment and purchasing power for the daily necessities of the tribal people and those who live in and around our jungles, we cannot prevent them from combing the forest for food and livelihood; from poaching and from despoiling the vegetation. When they themselves feel deprived, how can we urge preservation of animals? How can we speak to those who live in villages and in slums about keeping the oceans, the rivers and the air clean when their own lives are contaminated at the

[560] Indian Penal Code, 1860 (Central Act 45 of 1860). The Indian Penal Code penalizes person(s) responsible for causing defilement of water of a public spring or reservoir with imprisonment or fines. In addition, the code also penalizes negligent acts with poisonous substances that endangered life or caused injury.

[561] Indian Easements Act, 1882, Act No. 5 of 1882, 17th February, 1882.

[562] The Indian Forest Act was a product of British rule in 1927. The legislation granted the government uncontested rights over natural resources, with state governments authorized to grant licenses to lumber contractors and oversee protection of the forests.

[563] The Shore Nuisances (Bombay and Kolaba) Act, 1853.Act No. 11 of1853.This Act relates to the removal of any obstruction, impediment or public nuisance affecting, or likely to affect the navigation of the port of Bombay. It aimed to facilitate the removal of nuisances and encroachments below high-water mark in the Islands of Bombay and Kolaba, in view of the large sea-shore in the islands of Bombay and Kolaba and with a view to the safe navigation of the harbor of Bombay, and to the public interests generally, to facilitate the removal of nuisances, obstructions and encroachments below high-water mark in the said harbor or upon or about the shores of the said islands.

[564] Bhabatosh Banerjee, *Corporate Environmental Management: A Study with Reference to India*, (New Delhi: Prentice-Hall, 2009); Gurdeep Singh, *Environmental Law in India*, (New Delhi: MacMillan, 2005); Alice Palmer and Cairo A. R. Robb, *International Environmental Law Reports: International Environmental Law in National Courts*, (Cambridge: Cambridge University Press, 2005); Philippe Sands and Paolo Galizzi, *Documents in International Environmental Law*, (Delhi: Manohar Publishers, 2004).

[565] Thomas E. Sulivan, "The Stockholm Conference: A Step towards Global Environmental Cooperation and Involvement" In 6 *Indiana Law Review* 2, 267-282 (1972).

> source? The environment cannot be improved in conditions of poverty. Nor can poverty be eradicated without the use of science and technology".[566]

India, forecasting that emerging norms will place a burden on the state machinery, speaking through the Prime Minister, argued that the ecological crises should not add to the burden of the weaker nations by introducing new considerations in the political and trade policies of rich nations. It would be ironic if the fight against pollution were to be converted into another business, out of which a few companies, corporations, or nations would make profit at the cost of the many. India's global voice representing developing countries kicked off from the highest political office and ever since then has always remained.

Since this time, the twin issue of environment and the economic development has surfaced in each and every national act passed by the Indian government. Another major development that occurred in terms of the coordination of environmental issues was that they were dealt with by different government departments and were seen as 'isolated' and requiring 'independent attention' before 1972, but since 1972 they came to fore at the Union level. As will be observed and analyzed in subsequent sections, Indian acts started making direct reference to the 1972 Conference. For example, the preamble of the Air Act[567] and the Environment Act[568] refer to the 1972 Conference. This needs to be seen in the context of interpretation of Article 253 of the Indian constitution which requires the Indian parliament to enact laws to fulfill international obligations. India effected 42nd amendment in 1976 which brought two important changes in the way the whole regime of international environmental law was to be implemented in India.[569] It introduced Article 48A11 and 51(A) (g) aimed at protecting and improving the environment. Furthermore, various entries included in the state list were transferred to the concurrent list, empowering the Union parliament to legislate on environmental issues such as forests, wildlife, population control etc.

In February 1972, a National Committee on Environmental Planning and Coordination (NCEPC) was set up in the Department of Science and Technology, which was established as National Committee on

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[566] Maurice F. Strong, "Hunger, Poverty, Population and Environment". The Hunger Project Millennium Lecture, April 7, 1999, Madras, India.<http//www.thp.org.reports/strong499.html> accessed on 12 Sept 2009.

[567] Air (Prevention and Control of Pollution) Act, 1981, No. 14 of 1981, the Preamble reads, "An Act to provide for the prevention, control and abatement of air pollution, for the establishment, with a view to carrying out the aforesaid purposes, of Boards, for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith…Whereas decisions were taken at the United Nations Conference on the Human Environment held in Stockholm in June 1972, in which India participated, to take appropriate steps for the preservation of the natural resources of the earth which, among other things, include the preservation of the quality of air and control of air pollution…"

[568] The Environment (Protection) Act, 1986, No. 29 of 1986, the Preamble reads, An Act to provide for the protection and improvement of environment and for matters connected there with: Whereas the decisions were taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972, in which India participated, to take appropriate steps for the protection and improvement of human environment…"

[569] Article 51(c) of the Constitution sets out a Directive Principle requiring the state to foster respect for international law and treaty obligations. Article 253 of the Constitution empowers Parliament to make laws implementing India's international obligations as well as any decision made at an international conference, association or other body. Article 253 states : 'Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body'. Entry 13 of the Union List covers: 'Participation in international conferences, associations and other bodies and implementing of decisions made thereat.' In view of the broad range of issues addressed by international conventions, conferences, treaties and agreements, Article 253 read with Entry 13 apparently gives Parliament the power to enact laws on virtually any entry contained in the State List.

Environmental Planning (NCEP) in April 1981, based on the recommendations of the Tiwari Committee.[570] The NCEPC functioned as an apex advisory body in all matters relating to environmental protection and improvement. However, due to bureaucratic problems, which NCEPC faced due to coordination with the Department of Science and Technology, it was replaced by a National Committee on Environmental Planning (NCEP) with almost the same functions. In terms of domestic acts, various developments took place.[571]

The Water Prevention and Control of Pollution Act, 1974 (The Water Act) has been considered as "India's pioneer legislation to deal with industrial pollution".[572] The Water Act contains elaborate provisions for the constitution of administrative agencies both at national and state level. It empowered the state governments to make rules prescribing conditions and standards to control water pollution to be achieved through a consent system of administration.[573] The Act itself did not initially bring about any change in the state of the environment. The Water Act more or less remained dormant, apart from the creation of a bureaucratic agency. Also, due to many inherent defects & various other reasons, this legislation was rendered inefficient and mostly unenforceable. There existed some very important provisions in India's Criminal Procedure Code and the Indian Penal Code. The most widely used provision was the Section 133 of the Criminal Procedure Code of 1973. This section empowers a District Magistrate or a Sub-divisional Magistrate to stop the nuisance on receiving the information.[574] But in case of disobedience of the order, the Court can impose penalties provided under Section 188 of Indian Penal Code which includes an imprisonment for a period of six years and fines up to 1,000 rupees. There have been instances of many judgments where these provisions have been used. The *Ratlam Municipality Case* holds great significance, where the Court used the provisions of the Criminal Procedure Code due to the fact that the Water Act and the Air Act do not provide the affected person a right to prosecute violators of the provisions. Another significant factor is that corporate bodies like companies and corporations can also be held responsible for pollution nuisance under these provisions. There were also other major decisions where this provision was successfully used. But a very important fact to be noticed is that all these cases had arisen during the 1980s and 1990s.

Thus, 1972 is a watershed in the history of political, executive and legislative activities of India in the field of international environmental law. Since 1972, India is seen to have played a major role in the contribution to international environmental law debates and enactment and implementation of measures at domestic level, in commensurate with its international obligations or as a part of its well-orchestrated strategy of foreign policy in this area.[575]

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[570] The NCEPC was established to perform (i) preparation of an annual" State of Environment Report" for the Country, (ii) establishing an Environmental Information and Communication System to propagate environmental awareness through the mass media, (iii) to sponsor environmental research, (iv) arranging public hearings or conferences on issues of environmental concerns. In 1985, the NCEPC gradually evolved as a separate department of Environment and reached the full-fledged stage of Ministry of Environment and Forests.

[571] http://envis.mse.ac.in/Environmenta70's.asp accessed on 5 August 2013.

[572] Balram Pani, *Textbook of Environmental Chemistry, (*I. K. International Ltd. 2007).

[573] Control of water pollution is achieved through administering conditions imposed in consent issued under provision of the Water (Prevention & Control of Pollution) Act, 1974. These conditions regulate the quality and quantity of effluent, the location of discharge and the frequency of monitoring of effluents. William Howarth, "Water Pollution: Improving the Legal Controls", 1 *Journal of Environmental Law* 1, 25-38 (1989) at p. 25.

[574] Nuisance is defined in very liberal terms and includes construction of structures, disposal of substances.

[575] Tolba, Mostafa, *Global Environmental Diplomacy: Negotiating Environmental Agreements for the World, 1973-1992*. As former Executive Director of the UNEP, he illustrates with succinct memories how India took

The most important development was perhaps the introduction of public interest litigation and changes in the environmental justice system. Indian judiciary's stance with regard to environment and development was such that it started entering the domain of legislature.[576] In addition to interpretation, clarification and adjudication of environmental law related issues, it started laying down norms, principles and practices to protect the environment, reinterpreted environmental laws, created new institutions and structures, and conferred additional powers on the existing ones through a series of illuminating directions and judgments. Indeed, some critics of the Supreme Court of India describe the Court as the "Lords of Green Bench"[577] or "Garbage Supervisor". International legal experts have been unequivocal in terming the Indian Courts of law as pioneer, both in terms of laying down new principles of law and also in the application of innovative methods in the environmental justice delivery system.[578]

This chapter critically examines how the environmental legislation as well as jurisprudence grew hand in hand since 1972 and how it further made contribution to India's overall position at international debates and became a source of guidance to countries of similar position. India enacted the Air Prevention and Control of Pollution Act (the Air Act) in 1981 to combat air pollution. This Act was a corresponding enactment to the Water Act passed earlier. The preamble of the Act referred, as mentioned earlier to the 1972 Stockholm Conference, that it has been enacted to take appropriate steps for the preservation of the natural resources of the earth, which include the preservation of the quality of air and control of air pollution. It also contained elaborate provisions for constituting administrative bodies and empowering them to make rules for the purpose of

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leadership role in various negotiations in a number of landmark agreements such as the Vienna Convention on Ozone and its Montreal Protocol, the Basel Convention on Hazardous Wastes, and the Biodiversity Convention. India's contribution during the negotiations of these conventions indicate its role in bringing the concerns of developing countries as well as emerging economies of Asia to the world forums, especially, in light of development v. protection of environment concerns and technology transfers.

576 Tarumoy Chaudhari, "Relations of Judiciary and Executive in India", Social Science Research Network, 20 September 2007, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672222; Sinha, Shikhar, "Indian Judiciary – A Pillar Above All," http://legalservicesindia.com/article/print.php?art_id=238; Lal, Paresh, Bihar, Fencing The Parameters: (The Strongest Critique Of Judicial Activism: The Supreme Court); http://www.allindiareporter.in/articles/index.php?article=1218; Justice Markandey Katju in *State of U.P and Ors. V Jeet. S. Bisht and Anr*; (2007) 6 SCC 586; *Asif Hameed v State of Jammu and Kashmir*, AIR 1989 SC 1899; *Trop v. Dulles* (1958) 356 US 86; affirmed in *Manoj Sharma v State and Ors*., Criminal Appeal No. 1619 of 2008 (Arising out of S.L.P. (Crl.) No. 5265 of 2007); *Common Cause (A regd. Society) v Union of India*; (2008)5 SCC 517; *Divisional Manager, Aravali Golf Club and Anr. V Chander Haas and Anr*, 2007(14); *State of Uttar Pradesh and Anr. V Jeet Bisht and Anr*.; (2007) 6 SCC 586; Noorani, A.G, "Judicial Activism v Judicial Restraint", *SPAN*, April 1997; *Indian Drugs & Pharmaceuticals Ltd. v. The Workman of Indian Drugs and Pharmaceuticals Ltd.* (2007)1SCC408; *S.C. Chandra and Ors. v.State of Jharkhand and Ors*., AIR 2007 SC 3021.

577 However, India in 2009 started considering the removal of green bench. *Centre wants Green Bench disbanded*, a famous article published in the Times of India, a leading Indian News Paper, analyses how the judiciary interventions which earned applause is now being seen an unwanted intrusion in the executive domain, especially in the area of preservation of forests. http://timesofindia.indiatimes.com/India/Centre_wants_Green_Bench_disbanded/articleshow/2222042.cms accessed on 9 April 2010. Also see, Saha, Arpita, Judicial Activism in Curbing the Problem of Public Nuisance to Environment in India, Social Science Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1439704, accessed on 9 April 2010. India has been envisaging a new Environmental Monitoring and Assessment Authority, however, this is yet to be materialized.

578 Shyami Fernando Puvimanasinghe, "An Analysis of the Environmental Dimension of Public Nuisance, with particular reference to the role of the Judiciary in Sri Lanka and India", 9 *Sri Lanka Journal of International Law* June Issue, 143-171 (1997); Ayesha Dias, "Judicial Activism in the Development and Enforcement of Environmental Law: Some Comparative Insights from the Indian Experience", 6 *Journal of Environmental Law* 2, 243-262 (1994).

controlling air pollution along with empowering the governments of individual states of India to designate air pollution control areas and the type of fuel to be used in those areas. Section 21 of the Act provides that no person may operate certain kinds of industries without the consent of the State Board. In due course, the administrative agencies established under the Air Act, merged with the functionaries established under the Water Act to form the Pollution Control Boards at the centre and state. Introduction of Public Interest Litigation into environmental legal framework paved the way for executive and judiciary to make major pronouncements and take bold steps for the preservation of environment. Prior to the introduction of the Public Interest Litigation,[579] due to lack of *locus standi*,[580] third party could not resort to the court if it was not the directly affected party. But with the new mechanism, the court's approach changed and it has been ruled that any member of the public having sufficient interest, was allowed to initiate the legal process in order to assert diffused and meta-individual rights. Public Interest Litigation is one of the most important contributions which India has made to international environmental law and jurisprudence. This innovative mechanism, through institutions with civil society approach, shows India's contribution in this vital area. Several landmark cases, such as *Dehradun Lime Stone Quarrying* case,[581] *Ganga Water Pollution* Case,[582] *Delhi Vehicular Pollution* Case,[583] *Oleum Gas Leak* Case,[584] *Tehri Dam* Case,[585] *Narmada Dam* Case,[586] *Coastal Management* Case[587] *Industrial pollution in Patancheru*

[579] Public Interest Litigation is an Indian variant of judicial activism. As Upendra Baxi believes, "Judicial activism, of the type witnessed through the imposing Social Action Litigation (SAL), commonly miscalled Public Interest Litigation (PIL) has been made possible by the emergence of 'activists' , especially after the catharsis of the 1975-1976 emergency. All kinds of groups now activate courts through letters treated as writs (epistolary jurisdiction – a unique contribution of Indian jurisprudence to humankind)." Upendra Baxi, *Public Interest Litigation* (3rd edition), New Delhi: Ashoka Law House: 2012, p. 258. See also R. Venkatramani, *Restatement of Indian Law / Public Interest Litigation*, New Delhi: Universal Publishing House: 2012; Surya Deva, "Public Interest Litigation in India: A Critical Review", 28 *Civil Justice Quarterly* 1, 19-40 (2009); *Jamie* Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible? 37 *American Journal of Comparative Law*, 495-519 (1989).

[580] Susan D Susman, "Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation", 13 Wisconsin International Law Journal 1, 57-103 (1994).

[581] Rural Litigation and Entitlement Kendra v. State of U. P. (30.08.1998 – SC); Rural Litigation and Entitlement Kendra, Dehradun and Ors. V. State of U. P. and Ors. (12.03.1985 – SC).

[582] State of Uttaranchal vs. Balwant Singh Chaufal and Ors. (18.01.2010 - SC); D.D.A. vs. Rajendra Singh and Ors. (30.07.2009 - SC); U.P. Pollution Control Board vs. Dr. Bhupendra Kumar Modi and Anr. (12.12.2008 - SC).

[583] The Secretary and Curator, Victoria Memorial Hall vs. Howrah Ganatantrik Nagrik Samity and Ors. (09.03.2010 - SC); State of Uttaranchal vs. Balwant Singh Chaufal and Ors. (18.01.2010 - SC); Bharat Petroleum Corporation Ltd. vs. Sunil Bansal and Ors. (18.09.2009 - SC); Supri Advertising and Entertainment Pvt. Ltd. vs. Dr. Anahita Pandole and Ors. (02.09.2008 - SC); Ashoka Kumar Thakur vs. Union of India (UOI) and Ors. (OBC Judgment) (10.04.2008); In Re: Noise Pollution - Implementation of the Laws for restricting use of loudspeakers and high volume producing sound systems (18.07.2005 - SC); M.C. Mehta vs. Union of India (UOI) and Ors. (18.03.2004 - SC); M.C. Mehta vs. Union of India (UOI) and Ors. (Regd. Link Road Filling Station) (07.04.1998 - SC); M.C. Mehta vs. Union of India (UOI) and Ors.(24.03.1998 - SC); Dharam Pal Goel (dead) by L.Rs. vs. State of Haryana and others (13.01.1997 – SC).

[584] M.C. Mehta vs. Union of India (UOI) and Ors. (07.05.2004 - SC); Indian Council for Environ-Legal Action and Ors.vs. Union of India (UOI) and Ors. (13.02.1996 - SC); Charan Lal Sahu vs. Union of India (22.12.1989 - SC).

[585] N.D. Jayal and Anr. v. Union of India (UOI) and Ors.(01.09.2003 - SC); Continental Construction Ltd. vs. Tehri Hydro Development Corpn.Ltd. and Anr. (05.09.2002 - SC); Narmada Bachao Andolan vs. Union of India and Others (18.10.2000 - SC); Tehri Bandh Virodhi Sangarsh Samiti and Ors. Vs. State of U. P. and Ors. (7. 11.1990 – SC.).

[586] State of Kerala and Anr.vs. Peoples Union for Civil Liberties, Kerala State Unit and Ors. (21.07.2009 - SC); National Council for Civil Liberties vs. Union of India (UOI) and Ors. (10.07.2007 - SC); Intellectuals Forum, Tirupathi vs. State of A.P. and Ors. (23.02.2006 - SC); Narmada Bachao Andolan vs. Union of India (UOI) and Ors.(15.03.2005 - SC); Tessta Setalvad and Anr.vs. State of Gujarat and Ors. (12.04.2004 - SC);

Case[588] and *T.N. Godavarman* Case[589] bear testimony to the importance of the public interest litigation. Each of these cases has made specific contribution to the implementation of statutory acts and constitutional provisions to protect environment and have sought to enforce fundamental rights and codified Indian practice at national level. Over the period of time, the Indian judiciary has interpreted the Right to Environment as a part of the fundamental Right to Life such as public nuisance as a challenge to the social justice component of the rule of law, no economic growth achievement at the cost of environmental destruction and people's right to healthy environment, thus expanding the scope of the existing fundamental Right to Life. Furthermore, it has read into that the Right to Life includes Right to live in healthy environment with minimum disturbance of ecological balance and without avoidable hazard to them and to their cattle, house and agriculture land and undue effects of air, water and environment. It has also suggested that the Right to Life includes the right to defend the human environment for the present and future generations. Environmental pollution and industrial hazards are not only potential civil torts, but also violation of right to health. These clarifications have led the Indian judiciary to convert formal guarantees into positive human rights. This indeed is a landmark contribution made by any judiciary in the world. Unlike other areas of international law, in this field, the Indian judiciary has played all-in-one role of a legislative, executive and judiciary.

6.3. Right to healthy environment

The right to healthy environment as a fundamental Right to Life may at one instance, appear to be impossible in a developing country like India. However, the Indian judiciary has read into this and reviewed the fundamental Right to Life to include different strands of environmental rights that are at once individual and collective in character. Thus, through environmental jurisprudence, India has made an important contribution to international laws on human rights. As can be observed in the case of Spain, Portugal, Brazil and Ecuador, it is possible that

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M.C. Mehta vs. Union of India (UOI) and Ors.(18.03.2004 - SC); Chairman and M.D., B.P.L. Ltd. vs. S.P. Gururaja and Ors.(13.10.2003 - SC); N.D. Jayal and Anr.vs. Union of India (UOI) and Ors. (01.09.2003 - SC); In Re: Arundhati Roy (06.03.2002 - SC); BALCO Employees Union (Regd.) vs. Union of India and Ors. (10.12.2001 - SC); J.R. Parashar, Advocate and Ors.vs.PrasantBhushan, Advocate and Ors. (28.08.2001 - SC); A.P. Pollution Control Board Ii vs. Prof. M.V. Nayudu (Retd.) and Ors.(01.12.2000 - SC); Narmada BachaoAndolan vs. Union of India and Ors.(23.11.2000 - SC); Narmada BachaoAndolan vs. Union of India and Others (18.10.2000 - SC); Narmada BachaoAndolan vs. Union of India (UOI) and Ors. (15.10.1999 - SC); M/s. M.K. Shah Engineers & Contractors vs. State of Madhya Pradesh (05.02.1999 - SC); M.P. Dwivedi and others (11.01.1996 - SC); KhedatMazdoorChetnaSangath vs. State of M.P. and others (09.09.1994 - SC).

[587] Goan Real Estate and Construction Ltd. and Anr.vs.People's Movement for Civic Action and Ors.(31.03.2010 - SC); Goan Real Estate and Construction Ltd. and Anr.vs.People's Movement for Civic Action and Ors.(31.03.2010 - SC); Goan Real Estate and Construction Ltd. and Anr.vs.Union of India (UOI) through Secretary, Ministry of Environment and Ors. (31.03.2010 - SC); M. Nizamudeen vs. Chemplast Sanmar Limited and Ors. (10.03.2010 - SC); State of Uttaranchal vs. Balwant Singh Chaufal and Ors. (18.01.2010 - SC); M.K. Balakrishnan and Ors.vs. Union of India (UOI) and Ors.(28. 04. 2009 - SC); Fomento Resorts and Hotels Ltd. and Anr.vs.Minguel Martins and Ors.(20.01.2009 - SC); Goan Real Estate and Construction Ltd. and Anr.vs.People's Movement for Civic Action and Ors.(28.08.2008 - SC).

[588] Akhil Bharat Gosewa Sangh vs. State of A.P. and Ors.(29.03.2006 - SC); Akhil Bharat Gosewa Sangh and Ors.vs. State of A.P. and Ors.(25.10.1994 - SC).

[589] Maruti Clean Coal and Power Ltd. vs. Alok Nigam and Anr. (31.03.2010 - SC).T.N. Godavarman Thirumulpad vs. Union of India (UOI) and Ors.(08.10.2009 - SC); All India Anna Dravida Munnetra Kazhagam vs. L.K. Tripathi and Ors.(01.04.2009 - SC); Nature Lovers Movement vs. State of Kerala and Ors.(20.03.2009 - SC); Veeru Devgan vs. State of Tamil Nadu and Anr.(11.09.2008 - SC); A. Chowgule and Co. Ltd. vs. Goa Foundation and Ors.(18.08.2008 - SC); Patel Rajnikant Dhulabhai and Anr.vs. Patel Chandrakant Dhulabhai and Ors. (21.07.2008 - SC); M.C. Mehta vs. Union of India (UOI) and Ors. (14.05.2008 - SC); T.N. Godavarman Thirumulpad vs. Union of India (UOI) and Ors.(28.03.2008 - SC).

the legal system may guarantee a constitutional Right to Environment and statutes may accord the right to participate in environmental protection for citizens. However, when no methods for their participation are made available, they are as good as non-existent. Although there is no direct articulation of the Right to Environment anywhere in the Indian Constitution or, for that matter, in any of the laws concerning environmental management in India, the Indian judiciary, with environmental institutions, have found ways to construct environmental rights. It should be noted, however, that the expansion of the fundamental right by the Court, recognizing the Right to Environment as a part of the Right to Life has neither been statutorily established nor has it been recognized in national environmental policy programmes. Therefore, it is interesting to analyse how an individual judge and case has achieved the above objective. The judges have tried their maximum and used various techniques, such as visit of towns,[590] dam sites to provide justice by using the existing legal principles, but altering them so as to make these principles relevant to give more effective and efficient remedies. The Indian courts have also utilized a tool of *mandamus*[591] by which the Court issues a series of directions to the administration, to implement within a time-frame, and report back to Court from time to time about the progress in implementation, to ensure the implementation of court order.

During the 1980s, India adopted far-reaching legislations and undertook stringent measures for environmental protection, especially in the aftermath of the Bhopal Gas Tragedy. The Government of India established the Ministry of Environment and Forests (MoEF). MoEF was more comprehensive and institutionalized, and had a Union Minister and Minister of State, two political positions answering directly to the Prime Minister. Environment Protection Act, 1986, was an umbrella legislation designed to provide a framework for the Union Government to coordinate the activities of various central and state authorities established under previous laws, such as the Water Act and Air Act. It was also an enabling law, which articulated the essential legislative policy to frame necessary rules and regulations. The Act served to back a vast body of subordinate environmental legislation in India. During the intervening years, it addressed acts of specific

[590] Municipal Council *Ratlam v. Vardhichand* and ors. , AIR 1980, SC 1622. "In this case, the Supreme Court through J. Krishna Iyer, upheld the order of the High Court and directed the Municipality to take immediate action within its statutory powers to construct sufficient number of public latrines, provide water supply and scavenging services, to construct drains, cesspools and to provide basic amenities to the public. The Court also accepted the use of sec. 133 Criminal Procedure Code for removal of public nuisance. A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability". http://www.ceeraindia.org/documents/caselawsummary.htm accessed on 5 August 2013.

[591] *T.N. Godavarman v. Union of India*, AIR 2005 SC 4256. Mandamus is a command issued by a court asking a public authority to perform a public duty belonging to its office. "For example, when a tribunal omits to decide a matter which it is bound to decide, it can be commanded to determine the question which it has left undecided. Mandamus can be granted only when a legal duty is imposed on the authority in question and the petitioner has a legal right to compel the performance of his duty". Sanjeev Sirohi, *Writ of Mandamus: A Brief Analysis*, http://www.legalera.in/blogs/entry/writ-of-mandamus--a-brief-analysis; *Mysore vs. Chandrasekhara*, AIR 1965 SC 532; *NHRC vs. State of Arunachal Pradesh* AIR 1996 SC 2351; *N.S. Ziyauddin Ahmed vs.Union of India*, AIR 1995 Mad 129; *K. Vaithianathan vs. Union Territory of Pondicherry*, AIR 1995 Mad.197; *Parry & Co., vs. Commercial Employees Ass.*, AIR 1952 SC 179; *Bhopal Sugar Industries vs. Income Tax Officer*, AIR 1961 SC 182; *Madhya Pradesh vs. Mandavar*, AIR 1954 SC 493; *SohanLal vs .India*, AIR 1957 SC 529; *K.V. Rajyalakshmi Setty vs. Mysore*, AIR 1967 SC 993; *T.G. Goakarvs.R.N. Shukla*, AIR 1968 SC 1050; *Bombay Union of Journalists vs. State of Bombay*, AIR 1964 SC 1617.

issues, such as, the Atomic Energy Act[592] and the Wild Life Protection Act,[593] which were passed. The Atomic Energy Act governs the regulation of nuclear energy and radioactive substances. Under this Act the Union Government is required to prevent radiation hazards, guarantee safety of public and of workers handling radioactive substances, and ensure the disposal of radioactive wastes. The Wild Life Protection Act provides a statutory framework for protecting wild animals, plants and their habitats. The Act adopts a two−pronged conservation strategy: protecting specific endangered species regardless of location, and protecting all species in designated areas called sanctuaries and national parks.[594]

The Indian judiciary has also been proactive and quick enough to underline the importance of the emerging environmental principles, namely, the *Polluter Pays* and *Precautionary Principle* which have assumed a great significance as part of sustainable development in the recent times with a growing awareness amongst the common masses for the preservation of environment and biological diversities.[595] Beginning from the *State of Himachal Pradesh V. Ganesh Wood Products* case in 1995, the Supreme Court, in a number of cases, has included within the purview of sustainable development the *Polluter Pays Principle* and *Precautionary Principle*.[596]

With the onset of liberalization regime in India, India started reducing the industrial regulation, lowered international trade and investment barriers and encouraged export-oriented enterprise. MoEF completed its Environmental Action Plan to integrate environmental considerations into developmental strategies, which, among other priorities, included industrial pollution reduction. It also decided to shift from concentration to load-based standards. This would add to a polluter's costs and remove incentives to dilute effluents by adding water, and strengthen incentives for adoption of cleaner technologies. It also issued water consumption standards, which were an additional charge for excessive water use. Targeting small-scale industries has been an important task since these facilities greatly added to the pollution load. The Ministry provides technical assistance and limited grants to promote the setting up of central effluent treatment plants. It has also created industrial zones to encourage clusters of similar industries in order to help reduce the cost of providing utilities and environmental services.

6.4. India's contribution to the important international environmental law principles

Strict and absolute liability

The case-law analysis below will aim to show that the Indian judiciary has deviated from the principles enunciated in *Ryland v. Fletcher*[597] judgment and has scraped the defences so as to make a company carrying

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[592] The Atomic Energy Act, 1962, No. 33 of 1962 - an Act to provide for the development, control and use of atomic energy for the welfare of the people of India and for other peaceful purposes and for matters connected therewith.

[593] The Wildlife (Protection) Act, 1972, No. 53 of 1972. An Act to provide for the protection of [Wild animals, birds and plants] and for matters connected therewith or ancillary or incidental thereto.

[594] Aryal, Ravi Sharma, The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) & Nepalese position, 15 *NLR* 1-2, 220-30 (2002).

[595] Andri G. Wibisana, *Three Principles of Environmental Law: The Polluter-Pays Principle, the Principle of Prevention and the Precautionary Principle in Environmental Law in Development: Lessons from the Indonesian Experience*, (Elgar, 2006).

[596] *Himachal Pradesh v. Ganesh Wood Products*, AIR 1996, SC 149.

[597] Australian High Court held by a majority that the rule in Rylands having attracted many difficulties, uncertainties, qualifications and exceptions, should now be seen, for the purposes of Australian Common

hazardous activity responsible for any damage caused because of that activity. This principle of higher liability was imposed because the judiciary felt that the decades old principle of *Ryland v. Fletcher* case would not hold good in the present scenario where science and technology has advanced to the extent that they could be used to prevent or avoid any such accident.

6.5. Indian Judiciary

Prior to the Bhopal Gas Tragedy, the judiciary used to rely on Section 133 of the Code of Criminal Procedure[598] and Section 188 of the Indian Penal Code[599] to impugn the liability. However, the Bhopal gas leak disaster in 1984 brought to forefront the inadequacy of the existing legal framework for imparting responsibility especially with regard to the computation of compensation and criminal liability. In addition to huge loss of life, the absence of a clear legal framework to bring relief to the victims was an important wake up-call to India.

6.5.1. Bhopal Gas Disaster and its Importance on the International Environmental Law and Jurisprudence:[600] The Union of India enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act of 1985[601] and took upon itself the right to sue for compensation on behalf of the affected parties and filed a suit for realization of compensation. Following the Bhopal Gas Tragedy, India suffered yet another chemical disaster, leakage of lethal gas from a fertilizer company in New Delhi in 1985. These major accidents led the judiciary to impose stringent liability with regard to any industry carryings that were hazardous and inherently dangerous.[602] In view of the importance of clarification of this principle, it is useful to note the opinion of the former Chief Justice of India P. N. Bhagwati, who while deciding the liability in *Oleum Gas Leak* case held that:

> "We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm

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Law, as absorbed by the principles of ordinary negligence, *Burnie Port Authority v. General Jones Pvt. Ltd*., (1994) 179 CLR 520.

598 Section 133 of the Code of Criminal Procedure, 1973, provides a speedy and summary remedy in case of urgency where damages to public interest or public health etc. are concerned. The order under this section is only conditional and no final order is passed under section 133.

599 Cases are registered under this Section of the Indian Penal Code for any kind of act of disobedience or order issued by a public servant who is legally authorized to promulgate such orders.

600 Abraham, C. S. and Abraham, Sushila, "The Bhopal Case and the Development of International Law in India", 40 *International and Comparative Law Quarterly* 2 (1991), pp. 334-365; _____, *Environmental Jurisprudence in India*, The Hague: Kluwer Law International (1999); Chopra, Sambhu, *The Bhopal Gas Tragedy: Issues and Options: A Case Study*, Bhopal (1992).

601 Bhopal Gas Leak Disaster (Processing of Claims) Act of 1985, Act No. 21 of 1985. An Act to confer certain powers on the Central Government to secure that claims arising out of, or connected with, the Bhopal gas leak disaster are dealt with speedily, effectively, equitably and to the best advantage of the claimants and for matters incidental thereto.

602 David L. MacFadden, "A Selected Bibliography on Hazardous Activities, Technology and the Law: Bhopal and Beyond", 19 *International Lawyer* 1459-75 (1985).

> and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm, the enterprise must be held strictly liable for causing such harm as a part of the social cost for carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profits, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not….We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in *Ryland v. Fletcher* .”[603]

Further the Court held that the measure of compensation in the preceding paragraph must be correlated to the magnitude and capacity of the enterprise so that such compensation must have a deterrent effect.[604] The larger and more prosperous the enterprise, greater must be the amount of compensation payable by it for the harm caused due to an accident in the conduct of the hazardous or inherently dangerous activity by the enterprise. Summarizing the judgment of *Oleum Gas Leak* Case the Supreme Court, in its final hearing, held that[605]: (1) any company carrying on hazardous or inherently dangerous activity for private profit would have to indemnify all who suffer on account of such activity, (2) such liability would be absolute and no defense of *force majeure* or due care etc. would be available to the company and (3) while computing compensation, prosperity of the company would be taken into account. So, a company who earns more by creating risk for others would have to bear equally high level of compensation. Though the Supreme Court refused to entertain petitions due to lack of jurisdiction, the Court devised a new principle of liability, i.e. absolute liability applicable to industries which carry on hazardous activities.

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603 *M.C. Mehta v. UOI*, 1987 1 SCR 819

604 Paul R. Kleindorfer and Kunreuther Howard, *Insuring and Managing Hazardous Risks: From Seveso to Bhopal and Beyond*, (Berlin: Springer, 1987); Allin C. Seward III, “After Bhopal: Implications for Parent Company Liability”, 21 *The International Lawyer* 695-707 (1987); Lori Ann Olejniczak, “Bhopal Disaster Litigation: A Jurisdictional Odyssey”, 2 *Emory Journal of Int Dispute Resolution* 205-221 (1987).

605 AIR 1996 SC 1446: Para 59. Bhat,J., however, points out that in the said decision, the question whether the industry concerned therein was a 'State' within the meaning of Article 12 and, therefore, subject to the discipline of Part-Ill of the Constitution including Article 21 was left open and that no compensation as such was awarded by this Court to the affected persons.

6.5.2. Absolute Liability Principle: With regard to the principle of absolute liability, the Indian judiciary analysed its applicability in an Indian scenario. Here the court compared the English and Australian scenario, in which the England courts follow the principle of strict liability as devised in *Ryland v. Fletcher case,* whereas the Australian Courts follow the principle of ordinary principle of negligence.[606] After analysing the foreign scenario, the Court held that:

> "...we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country. We are convinced that the law stated by this Court in *Oleum Gas Leak* Case is by far the more appropriate one - apart from the fact that it is binding upon us. According to this rule, once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. ……It is that the enterprise [carrying on the hazardous or inherently dangerous activity] alone has the resource to discover and guard against hazards or dangers - and not the person affected and the practical difficulty [on the part of the affected person] in establishing the absence of reasonable care or that the damage to him was foreseeable by the enterprise."[607]

Thus this case has accepted the principle of absolute liability as binding. This judgment was used for impugning liability in further cases. Principle 21 of the Stockholm Declaration stresses that "[S]tates have the responsibility to ensure that activities under their jurisdiction or control, do not cause damage to the environment of other states or areas beyond their jurisdiction". Principle 22 of the Stockholm Declaration states that the "[S]tates shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction". The Stockholm Conference resulted into the Stockholm Declaration on Human Environment, a statement having 26 principles and 109 recommendations, from which a body of international environmental law has developed over the period of decades. Principles 21 and 22 are most important for the purposes of studying the evolution of liability regime in international environmental law. It is important to note that the Rio Declaration built upon the principles 21 and 22 of the Stockholm Declaration which resulted into further development of the law bearing on environmental liability and compensation. Furthermore, while the Stockholm Declaration refers to international law, the Rio Declaration goes beyond and stipulates requirement to govern the regime of liability at national as well as international level. Taken together the work of the International Law Commission, especially its Draft Principles on Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, and the 2010 UNEP Guidelines for the Development of Domestic Legislation on Liability, Response Action and Compensation for Damages Caused by Activities

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[606] Australian High Court held by a majority that the rule in Rylands having attracted many difficulties, uncertainties, qualifications and exceptions, should now be seen, for the purposes of Australian Common Law, as absorbed by the principles of ordinary negligence, *Burnie Port Authority v. General Jones Ptv. Ltd*., (1994) 179 CLR 520. *Research Foundation for Science Technology and Natural Resources Policy v. Union of India and Anr*, JT 2007 (11) SC 49; *Deepak Nitrite Ltd. v. State of Gujarat and Ors*, (2004) 6 SCC 402.

[607] *Ibid.*

Dangerous to the Environment,[608] the international and (national) legislative process concerning the principle of liability which was first stipulated in 1972 has been coming to the realization slowly but steadily after the passage of nearly 40 years. Thus, it can be argued that the developments ushered in a process of assimilation of rules of State Responsibility into international environmental law, in a gradual manner.[609]

6.6. Sustainable development

The earliest public interest litigation in which the Supreme Court recognized the concept of sustainable development was S*tate of Himachal Pradesh and others etc. v. Ganesh Wood and others* in 1996.[610] The Supreme Court, in this case, for the first time, acknowledged the existence of the concept of sustainable development. It appreciated the report of the World Commission on Environment and Development constituted by the United Nations and chaired by the then Prime Minister of Norway, Gro Harlem Brundtland and quoted the same;

> "There has been a growing realization in national governments and multilateral institutions that it is impossible to separate economic development issues from environment issues; many forms of development erode the environmental resources upon which they must be based, and environmental degradation can undermine economic development. Poverty is a major cause and effect of global environmental problems. It is therefore futile to attempt to deal with environmental problems without a broader perspective that encompasses the factors underlying world poverty and international inequality...Meanwhile, the industries most heavily reliant on and polluting environmental resources are growing most rapidly in the developing world, where there is both more urgency for growth and less capacity to minimize damaging side effects. Ecology and economy are becoming ever more interwoven - locally, regionally, nationally, and globally - into a seamless net of causes and effects…The other great institutional flaw in coping with environment-development challenges is government's failure to make the bodies, whose policy actions degrade the environment, responsible for ensuring that their policies prevent that degradation."[611]

The Court also noted the observation of the Commission which *inter alia* was that "developing countries face the challenges of desertification, deforestation, and pollution, and endure most of the poverty associated with environmental degradation - the next few decades are crucial for the future of humanity. Pressures on the Planet are now unprecedented and are accelerating….".[612] The Court for the first time recognized the challenges faced by governments and their duty to balance economic development with environment protection. The Court also referred to Article 51-A of the Constitution which makes it a duty of every citizen to protect and improve the

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[608] UNEP Guidelines for the Development of Domestic Legislation on Liability, Response Action and Compensation for Damage Caused by Activities Dangerous to the Environment, Annex to Decision SS.XI/5 B (2010).

[609] M. Gandhi, "State Responsibility and International Environmental Law", B. N. Patel (ed.) India and International Law, Vol. 1 (Leiden, Nijhoff: 2005), p. 226. Gandhi argues that "Academic writings are replete with commentaries on the evolution of international environmental law of State responsibility hinting at the emergence of stronger rules including the strict liability rule against a State for the pollution caused by it to the places outside the State territory. This view is built upon the soft law instruments which sprang out of the political process in the Stockholm and Rio conferences., *ibid. p. 228.*

[610] *State of Himachal Pradesh v. Ganesh Wood Products*, AIR 1996 SC 149.

[611] Report of the World Commission on Environment and Development: Our Common Future, paragraph 15.

[612] *Ibid.*

natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures. The Court observed that it:

> "…was necessary to put in proper perspective the obligation of the State and the significance of the concept of sustainable development and inter-generational equity vis-à-vis the legal submissions made on the basis of principles of natural justice, estoppel…".

In *Bichri village* case,[613] the Court accepted the *Polluter Pays* principle which is known today as an important element of sustainable development. It noted that in *Vellore Citizens Welfare Forum v. Union of India and others,*'[614] the Court discussed in depth the principle of sustainable development and noted its emergence in the international arena. It noted that;

> "… The traditional concept, that development and ecology are opposed to each other, is no longer acceptable. Sustainable Development is the answer. In 1991 the World Conservation Union, United Nations Environment Programme and World Wide Fund for Nature, jointly came out with a document called "Caring for the Earth …"[615]

This is a strategy for sustainable living. In June, 1992, the Earth Summit held at Rio saw the largest gathering of world leaders hitherto ever in the history - deliberating and chalking out a blue print for the survival of the planet. The Rio Conference witnessed the opening for signature of the Biodiversity Convention and Climate Change Convention.[616] The delegates at the Rio Conference also approved by consensus three non-binding documents namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a Programme of Action into the 21st century in areas like poverty, population and pollution. Thus, it is seen that during the two decades from Stockholm to Rio, Sustainable Development has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life by living within the carrying capacity of the supporting ecosystems. Sustainable Development as defined by the Brundtland Report means, development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.[617] Rio+20 Summit, of 2012 had sustainable development as one of the objectives, having three pillars, economic development, social development and environmental protection.[618] The Summit identified seven priority areas, namely, jobs, energy, cities, food, water, oceans and disasters. India, as per its development plan and trajectory focused on better and reasonable access to transfer of

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[613] *Indian Council for Environment-Legal Action v. Union of India (UOI) and Ors*., (1996) 5 SCC 281.

[614] AIR 1996 SC 2715.

[615] Caring for the Earth: A Strategy for Sustainabl Living. International Union for Conservation of Nature and Natural Resources, United Nations Environment Programme, published in partnership by IUCN, UNEP and WWF (1991).

[616] Shalini Bhtani, and Ashish Kothari, "The biodiversity rights of developing nations: a perspective from India", 32 *Golden Gate University Law Review* 4, 587-627 (2002).

[617] Lei Shen, Shengkui Cheng, Shuzong Gu and Yao Lu, "Environmental policy and law for sustainable natural resources development: issues and challenges", 32 *Environmental Policy Law* 2, 91-98 (2002).

[618] In the backdrop of emergence of G20 as a forum to deal with immediate global financial crisis and Rio+20 pledging to salve sustainable development agenda, it is important to note that India (together with China, Brazil and Russian Federation) faced criticisms from environmental and sustainable development civil society institutions for pledging $ 75 billion through the IMF to save the failing Eurozone economy from imminent collapse and relying on the unsustainable consumption of the western economies for their own obsession with perverse growth makes, making the BRIC nations willing accomplices. "India, Russia, Brazil, South Africa, China are no victims, they just seem eager to sustain the lifestyles of the rich. Lifestyle emissions today account for nearly two thirds of total emissions." http://www.dnaindia.com/analysis/1709255/column-climate-change-meets-global-hypocrisy accessed on 22 July 2013.

green technology, stimulus package for green environment, resistance on subsidy as well as eco-tax reform and independence in sectoral priorities. Sustainable development, according to Indian Prime Minister Dr. Manmohan Singh, "… mandates the efficient use of available natural resources. We have to be much more frugal in the way we use natural resources. A key area of focus is energy. We have to promote, universal access to energy, while, at the same time, promoting energy efficiency and a shift to cleaner energy sources by addressing various technological, financial and institutional constraints…"[619]

The Indian Judiciary has almost implied that it has no hesitation in holding that sustainable development, as a balancing concept between ecology and development, has been accepted as a part of the customary international law, though its salient features have yet to be finalized by the international law jurists. The Judiciary has observed that some of the salient principles of sustainable development, as culled-out from the Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays principle, Obligation to assist and cooperate, Eradication of Poverty and Financial Assistance to the developing countries. The Judiciary has also observed that remediation of the damaged environment is part of the process of sustainable development. One of the significant directions given by the Supreme Court was contained in an order passed in 1995 whereby some of the industries were required to set up effluent treatment plants. It is to be noted here that the Court suspended all the initial orders of closure of tanneries and stated that only those which fail to pay the fine shall be closed down. Therefore, the Court did not adopt an orthodox opinion on environment protection of directly ordering closure of all the tanneries. In fact, it was amongst the first few cases that a balanced far-sighted approach was followed by directing for establishment of effluent treatment plants prior to tanneries. In *S. Jagannath v. Union of India and others Case*,[620] the Court clarified that sustainable development of shrimp aquaculture should be guided by the principles of social equity, nutritional security, environmental protection and economic development with a holistic approach to achieve long-term benefits. In *M. C. Mehta v. Kamal Nath and Ors*.Case,[621] the Court, promulgating public trust doctrine, contributed to the aim of sustainable development. In the *Taj Trapezium* Case, the Court clarified that:

> "The old concept that development and ecology cannot go together is no longer acceptable. Sustainable development is the answer. The development of industry is essential for the economy of the country, but at the same time the environment and the eco-systems have to be protected. The pollution created as a consequence of development must commensurate with the carrying capacity of our eco-systems."[622]

In *Narmada Bachao Andolan v. Union of India and Ors.* case, the Court said that sustainable development means the type or extent of development, which can be sustained by nature/ecology with or without mitigation. It took an interesting approach towards applicability of the principle, stating that

> "…where the effect on ecology or environment of setting up of an industry is known, what has to be seen is that if the environment is likely to suffer, then what imitative steps can be taken to offset the same. Merely because there will be a change is no reason to presume that there will be ecological disaster. It is when the effect of the project is known then the principle of

[619] Statement by the Prime Minister of India at the Rio+20 Summit, 23 June 2012.
[620] AIR 1997 SC 811.
[621] (1999) 4 CompLJ 44 (SC).
[622] *M.C. Mehta v. Union of India and others*, AIR 1997 SC 734.

> sustainable development would come into play which will ensure that imitative steps are and can be taken to preserve the ecological balance…".[623]

In *A. P. Pollution Control Board v. Prof. M. V. Nayadu (Retd.) & Others*[624] case, it noted that "environmental concerns… are …of equal importance as Human Rights concerns". In fact both are to be traced to Article 21 which deals with fundamental right to life and liberty. While environmental aspects concern 'life', human rights aspects concern 'liberty'. In *M. C. Mehta v. Union of India & Ors.*, the Court stated that:

> "While it is true that in a developing country there shall have to be developments, but that development shall have to be in closest possible harmony with the environment, as, otherwise, there would be development but no environment, which would result in total devastation, though however, may not be felt in presently but at some future point of time, but then, it would be too late in the day, however, to control and improve the environment. Nature will not tolerate us after a certain degree of its destruction and it will, in any event, have its toll on the lives of the people. Can the present-day society afford to have such a state and allow the nature to have its toll in future - the answer shall have to be in the negative. The present-day society has a responsibility towards the posterity for their proper growth and development so as to allow the posterity to breathe normally and live in a cleaner environment and have a consequent fuller development. Time has now come therefore to check and control the degradation of the environment and since the Law Courts also have a duty towards the society for its proper growth and further development, it is a plain exercise of the judicial power to see that there is no such degradation of the society and there ought not to be any hesitation in regard thereto...".[625]

In *K.M. Chinnappa and T.N. Godavarman Thirumalpad v. Union of India (UOI) and Ors.,*[626] the Court while making observations on the provisions of the 1992 Biological Diversity Convention, noted that the fundamental requirement for the conservation of biological diversity is the *in-situ* conservation of ecosystems and natural habitats and the maintenance and recovery of viable population of species in their natural surroundings.[627] In its view, sustainable development is essentially a policy and strategy for continued economic and social development without any detriment to the environment and natural resources on which continued activity and further development depend. The Court emphasized that current citizens owe a duty to future generations and a bleak tomorrow cannot be countenanced for a bright today. The Court further emphasized that there is a dire need to learn from the mistakes for a better future. Most importantly the Court noted that a duty has been cast upon the Government to protect the environment under Article 21 of the Constitution and it highlighted that India has acceded to the Convention on Biological Diversity and therefore, it ought to implement the same. Substantiating this position, it stated that

> "As was observed by this Court in *Vishaka and Ors. vs. State of Rajasthan and Ors.,* in the absence of any inconsistency between the domestic law and the international conventions, the rule of judicial construction is that regard must be had to international convention and norms

[623] 2002 (4) SCC 353.
[624] AIR 1999 SC 812.
[625] AIR 2001 SC 1544.
[626] AIR 2003 SC 724.
[627] Chudal, Kumar, "Convention on biological diversity: some thorniest issues for developing countries", 15 *NLR* 1-2, 144-158 (2002).

> even in construing the domestic law. It is, therefore, necessary for the Government to keep in view the international obligations while exercising discretionary powers under the Conservation Act, unless there are compelling reasons to depart from there." [628]

This case made direct reference to the need for the construction of domestic laws in a manner fulfilling international obligations of the Indian State and emphasized explicitly on the duty of the State to implement the same. Although the previous judgments based their decisions upon the internationally accepted principle of sustainable development, the need for implementation was never an obligation to the international community rather than the continued economic progress of the country for many years to come, in order to compete with other developed nations of the world. In *N. D. Jayal and Anr. v. Union of India (UOI) and Ors,*[629] the Court made important observation regarding the Right to Development,[630] wherein it stated that it encompasses, with its definition, guarantee of fundamental human rights and the adherence of sustainable development as *sine qua non* for the maintenance of balance between rights to environment and development. In another judgment, the Supreme Court clarified that disaster management cannot be separated from sustainable development.[631] In *Bombay Dyeing and Mfg. Co. Ltd. v. Bombay Environmental Action Group and Ors,* the Court discussed in detail the sustainable development and planned development vis-à-vis Article 21 of the Constitution of India. It opined that:

> "It is often felt that in the process of encouraging development the environment gets side-lined. However, with major threats to the environment, such as climate change, depletion of natural resources, the eutrophication of water systems and biodiversity and global warming, the need to protect the environment has become a priority. At the same time, it is also necessary to promote development. The harmonization of the two needs has led to the concept of sustainable development, so much so that it has become the most significant and focal point of environmental legislation and judicial decisions relating to the same."[632]

In *Research Foundation for Science Technology and Natural Resource Policy v. Union of India (UOI) and Ors*.,

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[628] AIR 1997 SC 3011.

[629] (2004) 9 SCC 362.

[630] Arjun Sengupta, "On the theory and practice of the right to development", 24 *Human rights Quarterly* 4, 837-889 (2002).

[631] In 2005 question pertaining to applicability of Precautionary Principle and Polluter Pays Principle arose over presence of hazardous waste oil in 133 containers lying at Nhava Sheva Port and other questions relating to illegal import of the same in *Research Foundation for Science Technology and Natural Resources Policy v. Union of India (UOI) and Anr*., (2005)13SCC186 . The Court here went on to discuss in depth the precautionary and polluter pays principles and in turn the concept of sustainable development, they explicitly stated the precautionary principle to be *"a part of principle of sustainable development, it provides for taking protection against specific environmental hazards by avoiding or reducing environmental risks before specific harms are experienced.* The Court relied upon the *Vellore Citizens' Welfare Forum case* which accepted the principles to be a part of our domestic law. Reference was also made to *A.P. Pollution Control Board* which emphasized upon principle of good governance an accepted principle of international and domestic laws. Reference was also made to Article 7 of the draft approved by the working group of the International Law Commission in 1996 on Prevention of Trans-boundary Damage from Hazardous Activities‟ to include the need for the State to take necessary ‗legislative, administrative and other actions' to implement the duty of prevention of environmental harm. Environmental concerns have been placed at same pedestal as human rights concerns, both being traced to Article 21 of the Constitution of India. After considering the above Precautionary principle and Polluter Pays Principle were held to be fully applicable and a direction was given for destruction of 133 containers expeditiously by incineration at the cost of importers. The importers were held liable on basis of precautionary principle and polluter pays principle.

[632] AIR 2006 SC 1489.

the Court clarified the concept of balance under the principle of proportionality and sustainable development. According to Justice Pasayat,

> "…while applying the concept of sustainable development one has to keep in mind the principle of proportionality based on the concept of balance. It is an exercise in which we have to balance the priorities of development on one hand and environmental protection on the other hand."[633]

It also stated that recycling is a key element of sustainable development and dismantling should be given importance considering the fact that it was an industry with high return. Increasing economic gains, it can be noted, was given essential importance, and the activity was regularized in order to avoid compromise with the environment. In *T.N. Godavarman Thirumalpad v. Union of India (UOI) and Ors*, the Court observed that development needs of the present without compromising the ability of the future generations to meet their own needs is called sustainable development, a concept based on the principle of inter-generational equity. Furthermore, in the same case and in *Re: Vedanta Aluminum Ltd*,[634] it held that adherence to the principle of sustainable development is now a constitutional requirement. In *M. C. Mehta v. Union of India (UOI) and Ors*.,[635] the Court held that the natural sources of air, water and soil cannot be utilized if it results in irreversible damage to environments. There has been accelerated degradation of environment primarily on account of lack of effective enforcement of environmental laws and non-compliance of the statutory norms. In *Narmada Bachao Andolan* Case, the Court held that the

> "Development and the protection of environments are not enemies, if without degrading the environment or minimizing adverse effects thereupon by applying stringent safeguards, it is possible to carry on development activity applying the principles of sustainable development. In that eventuality, the development has to go on because one cannot lose sight of the need for development of industries, irrigation resources and power projects etc. including the need to improve employment opportunities and the generation of revenue. A balance has to be struck."[636]

In *Andhra Pradesh Pollution Control Board* Case, while discussing the concept of sustainable development, the Court, referring to the Principal 15 of Rio Conference of1992, observed that,

> "…If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to economic interest. In case of doubt, however, protection of environment would have precedence over the economic interest…"[637]

The Court, in this case also held that Right to Life is a fundamental right, guaranteed under Article 21, included within its purview the right to pollution free water and air for full enjoyment of life. Since mining operations are hazardous in nature, as they impair ecology and people's right to natural resources, the Court declared that although measures for protecting environment could be undertaken without stopping mining operations, considering enormous degradation of environment, safer and proper course needed to be adopted.

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633 JT 2007 (11) SC 49.
634 (2008) 2 SCC 222.
635 2009 (6) SCC 142.
636 AIR 2000 SC 3751.
637 AIR 2005 SC 4256.

In sum, the Indian judiciary has accepted the concept of sustainable development through these judgments and has made it an essential part of Indian environmental jurisprudence; by adopting a balanced approach in environmental pollution matters and taking into account both economic development and environment protection concerns.

6.7. Precautionary and Polluter Pays Principle

6.7.1. The Precautionary Principle was first of all used in the Second North Sea Ministerial Conference in 1987 with respect to marine pollution but its scope was widened later in many international documents, like the Montreal Protocol on Substances That Deplete the Ozone Layer (1987), the Convention on Biological Diversity (1992), the Framework Convention on Climate Change (1992) and Rio Declaration on Environment and Development (1992).

One can observe that the development of these concepts has been an outcome of judicial development rather than legislative one. The Supreme Court, since the inception of its use in India, has given them a very frequent and wide application. The Principles of Polluter Pays and Precautionary Principle have contributed a lot in environment protection through judicial interpretations. The Polluter Pays Principle was brought out in *M. C. Mehta v. Union of India* [*Oleum Gas Leak* case][638] for the first time. It was used for determining the amount of compensation and fixing the liability of the polluter in absolute terms. In the words of the Constitution Bench of the Supreme Court, "such an activity can be tolerated only on the condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not".[639] The Constitution Bench also assigned the reason for stating the law in the said terms that the enterprise [carrying on the hazardous or inherently dangerous activity] alone has the resource to discover and guard against hazards or dangers - and not the person affected - and the practical difficulty [on the part of the affected person] in establishing the absence of reasonable care. The Court appreciated the suggestions put forth by the Report and went on to discuss the principle. It observed,

> "The Polluter Pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution. Under the principle it is not the role of government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer."[640]

The Court emphatically held that the law stated by Supreme Court in *Oleum Gas Leak* Case was by far the more appropriate one - apart from the fact that it is binding upon the present. It held that once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The Court went to the extent of straightforwardly holding that the law declared in the said decision was the law governing this case. The Court recognized the principle as an internationally accepted one and thus acknowledged its Indian obligation. The polluter industries were asked to close down and pay the amount for the

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[638] *M.C. Mehta v. UOI*, 1987 1 SCR 819.
[639] *Ibid.*
[640] *Ibid*.

loss to environment and the cost of restoration. The Court asked the government to decide the amount and to recover it in accordance with law. In *Vellore Citizens Welfare Forum v. Union of India and others*, the Court made it clear that the Precautionary Principle and the Polluter Pays principle are essential features of sustainable development.[641] It went on to define the Precautionary Principle in the context of the municipal law as: (i) "Environmental measures - by the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental degradation, (ii) 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, and (iii) the onus of proof is on the actor or the developer/industrialist to show that his action is environmentally benign."

The Polluter Pays principle was highlighted by the Court by referring to the matter of *Indian Council for Environ - Legal Action v. Union of India*.[642] The Court held that as the polluters are absolutely liable to compensate for the harm caused by them to villagers, soil and the underground water in the affected area, they are bound to take all necessary measures to remove sludge and other pollutants lying there. The Polluter Pays' principle as interpreted by Court meant that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also to restore the environmental degradation. Remediation of the damaged environment is part of the process of sustainable development and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. The Court went on to declare the Principles as having been accepted as part of the law of the land. It referred to Article 21 of the Constitution of India which aims to guarantee protection of life and personal liberty. Regard was also paid to Article 47,[643] 48A7[644] and 51A (g)[645] of the Constitution which are the duties of state for protecting the environment and maintaining a decent standard of living.

In view of the above mentioned constitutional and statutory provisions, the Court held that the Precautionary principle and the Polluter Pays principle are part of the environmental law of the country. Even otherwise, the Court held that, once these principles are accepted as part of the customary international law there would be no difficulty in accepting them as part of the domestic law. It is an almost accepted proposition of law that the 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. Similar steps were also taken by the Apex Court in the next *M. C. Mehta v. Union of India*, wherein the Court reiterated that the precautionary principle and the polluter pays principle have been accepted as part of the law of the land. The Supreme Court has thus settled that one who pollutes the environment must pay to reverse the damages caused by his acts. The

[641] AIR 1996 SC 2715.
[642] 1996 (5) SCC 281.
[643] Article 47- Duty of the State to raise the level of nutrition and the standard of living and to improve public health. - The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the State shall endeavour to bring about prohibition of the consumption except from medicinal purposes of intoxicating drinks and of drugs which are injurious to health.
[644] Article 47- Duty of the State to raise the level of nutrition and the standard of living and to improve public health. - The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the State shall endeavour to bring about prohibition of the consumption except from medicinal purposes of intoxicating drinks and of drugs which are injurious to health.
[645] Article 51A(g)- To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

landmark decision with regard to these principles is *A.P. Pollution Control Board v. Prof. M.V. Nayadu (Retd.) & Others*.[646]

6.7.2. Precautionary Principle Replacing the Assimilative Capacity Principle:

In a matter pertaining to the pollution caused by the by-products of a company called M/s Surana Oils and Derivatives (India) Ltd., which was denied the No Objection Certificate essential for the production of certain products, after referring to the case of *Vellore Citizen's* Case, the Court held that it was necessary to explain their meaning in more detail, so that Courts and tribunals or environmental authorities can properly apply the said principles in the matters which come before them. The Court went on to trace how the concept of Precautionary Principle replaced the Assimilative Capacity principle.[647] It observed that a basic shift in the approach to environmental protection occurred initially between 1972 and 1982. Earlier the concept was based on the 'assimilative capacity rule' as revealed from Principle 6 of the Stockholm Declaration of the U.N. Conference on Human Environment, 1972. The said principle assumed that science could provide policy-makers with the information and means necessary to avoid encroaching upon the capacity of the environment to assimilate impacts and it presumed that relevant technical expertise would be available when environmental harm was predicted and there would be sufficient time to act in order to avoid such harm. Further the Court traced that in the 11th principle of the U.N. General Assembly Resolution on World Charter for Nature, 1982,[648] the emphasis shifted to the 'Precautionary Principle', and this was reiterated in the Rio Conference of 1992 in its Principle 15. With regard to the cause for the emergence of this principle, the Court referred to an article by Charmian Barton, which said:

> "There is nothing to prevent decision makers from assessing the record and concluding there is inadequate information on which to reach a determination. If it is not possible to make a decision with "some" confidence, then it makes sense to err on the side of caution and prevent activities that may cause serious or irreversible harm. An informed decision can be made at a later stage when additional data is available or resources permit further research. To ensure

[646] AIR 1999 SC 812.

[647] The use of economic instruments, tradable pollution rights and environmental standards all assume that the environment has a certain capacity to absorb waste materials without long-term damage: in other words, they assume that the environment has an assimilative capacity. This idea is based on the fact that some wastes, such as organic wastes that occur naturally, will decompose and break down in the environment if there are not too many of them in the one place at the one time. Other materials, such as some metals, may exist naturally in the environment at very low concentrations. http://www.uow.edu.au/sharonb/STS300/science/regulation/infoprinciple.html accessed on 23 June 2011.

[648] Activities which might have an impact on nature shall be controlled,and the best available technologies that minimize significant risks to nature or other adverse effects shall be used; in particular: (a) Activities which are likely to cause irreversible damage to nature shall be avoided; (b) Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed; (c) Activities which may disturb nature shall be preceded by assessment of their consequences, and environmental impact studies of development projects shall be conducted sufficiently in advance, and if they are to be undertaken, such activities shall be planned and carried out so as to minimize potential adverse effects; (d) Agriculture, grazing, forestry and fisheries practices shall be adapted to the natural characteristics and constraints of given areas;(e) Areas degraded by human activities shall be rehabilitated for purposes in accord with their natural potential and compatible with the well-being of affected populations.

> that greater caution is taken in environmental management, implementation of the principle through judicial and legislative means is necessary."[649]

It also observed that the inadequacies of science result firstly from identification of adverse effects of a hazard and then working backwards to find the causes. Secondly, clinical tests are performed, particularly where toxins are involved, on animals and not on humans, that is to say, are based on animal studies or short-term cell testing. Thirdly, conclusions based on epidemiological studies are flawed by the scientist's inability to control or even accurately assess past exposure of the subjects and do not permit the scientist to isolate the effects of the substance of concern. The latency period of many carcinogens and other toxins exacerbates problems of later interpretation. The timing between exposure and observable effect creates intolerable delays before regulation occurs. It then observed that inadequacies of science are the real basis that has led to the precautionary principle of 1982. It is based on the theory that it is better to err on the side of caution and prevent environmental harm which may indeed become irreversible. It observed that the principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. The Court asserted that environmental protection should not only aim at protecting health, property and economic interest but also the environment for its own sake. Precautionary duties must be triggered both by the suspicion of concrete danger and (justified) concern or risk potential.[650] Further tracing the development, the Court observed that the precautionary principle was recommended by the UNEP Governing Council (1989). The Bamako Convention also lowered the threshold at which scientific evidence might require action by not referring to "serious" or "irreversible" as adjectives qualifying harm.

6.7.3. Precautionary Principle and Burden of Proof

The Supreme Court discussed the special burden of proof referred to in the *Vellore Citizens* case. The Court here vehemently observed that while the inadequacies of science have led to the 'precautionary principle', they said 'precautionary principle' in turn, has led to the special principle of burden of proof in environmental cases where burden as to the absence of injurious effect of the actions proposed, is placed on those who want to change the status. This is often termed as a reversal of the burden of proof, because otherwise in environmental cases, those opposing the changes would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the *status quo* by maintaining a less-polluted state should not carry the burden of proof and the party, who wants to alter it, must bear it. Further, the Court opined that the precautionary principle suggests that,

> "Where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution as major threat to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment. It is also

[649] Barton Charmian "The Status of the precautionary Principle in Australia*"*, 22 *Harvard Environmental Law Review* 509-511 (1988).

[650] Harald Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law: The Precautionary Principle: International Environmental Law between Exploitation and Protection*, (London: Graham &Nijhoff, 1994); Luciano Butti, *The Precautionary Principle in Environmental Law: Neither Arbitrary nor Capricious if Interpreted with Equilibrium*, (Milan: Giuffre, 2007); Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law*, (the Hague: Kluwer, 2002); David Freestone, *The Precautionary Principle and International Law: The Challenges of Implementation*, (the Hague: Kluwer, 1996).

> explained that if the environmental risks being run by regulatory inaction are in some way "certain but non-negligible", then regulatory action is justified. This will lead to the question as to what is the non-negligible risk'. In such a situation, the burden of proof is to be placed on those attempting to alter the status quo. They are to discharge this burden by showing the absence of a 'reasonable ecological or medical concern'. That is the required standard of proof. "The required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a 'reasonable persons' test."[651]

Thus, this case came up as the first case which discussed at length the jurisprudential aspect of the Precautionary Principle. The need for such a detailed discussion by the Supreme Court was long felt by the lower courts as there was no fixed standard for applying the burden of proof for the application of Precautionary and Polluter Pays Principles. Such a standard for burden of proof becomes necessary especially when an absolute liability has been attached to the polluter. The analysis on the point of inconsistencies of science was essential for establishing a reason for application of precautionary principle when there has been no fully certain scientific proof. This perspective is of a very relevant nature when the courts are faced with the cases where no scientific study has been conclusive for determining the cause of the pollution.

In 2000, the Indian government endorsed that maintaining the ecological balance of the environment is the responsibility of every human being. It ambitiously proposed a National Environmental Policy in order to bring about sustainable development. The Narmada Bachao Andolan stirred the environmental consciousness of the people. However, the judiciary's laxity with regard to protecting the environment was surfaced when it apparently flawed in ruling that the construction of the dam should continue which is contrary to the precautionary Principle. It was only in 2004 that the Precautionary Principle was again discussed in *N.D. Jayal and Anr. V. Union of India (UOI) and Ors*.[652] In this case, a petition under Article 32 of the Constitution of India was filed in connection to the safety and environmental aspects of Tehri Dam before the Supreme Court. The petitioners urged to issue necessary directions to conduct further safety tests so as to ensure the safety of the dam. They also alleged that the Respondents have not complied with the conditions attached to environmental clearance. The Court in this case referred to the *A.P. Pollution Control Board v. Prof. M.V. Nayudu (Retd.) and Ors.*[653] and *Narmada Bachao Andolan* case.[654] The Court on the safety aspect of the dam said that since location of the dam is in a highly earthquake - prone zone in the valleys of Himalayas, all additional safeguards are required to be undertaken on the precautionary principle as contained in the Rio Declaration on Environment and Development as India is bound by it. The Court further held that the precautionary principle in Rio Declaration reads:

> "In order to protect the environment, the precautionary approach shall be widely applied by State according to their capabilities. Where there are threats of series of reversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environment degradation. The precautionary principle, accepted by India being a party and signatory to international agreement and understandings in the field of

[651] *Ibid.*
[652] 2004 (9) SCC 362.
[653] 2000 Supp 5 SCR 249.
[654] AIR 2000 SC 3751.

> environment, has become part of domestic law i.e. Environmental (Protection) Act. The Governmental authorities in India cannot be permitted to set up plea of scientific uncertainty of 3-D Non-Linear Analysis of the dam. On the safety aspect, pleas like *res judicata* based on earlier decision of the Supreme Court cannot be allowed to be raised when further developments and events in the course of the project require further precautions to be taken before filling the dam to the optimum capacity."

In *M.C. Mehta v. Union of India* (Trapezium matter),[655] the Supreme Court applied that Polluter Pays principle and Precautionary principle of International law as law of the land of India as India being party to the United Nation Conference and signatory to International Declarations and Agreements.

It can be thus concluded that in this judgment the Court accepted the Precautionary principle as a well - recognized international law principle which has been acknowledged by other countries. The Court explicitly accepted that precautionary principle and polluter pays are to be treated as laws of the land of India. This effort of the Supreme Court is laudable because the judiciary through this ruling has made it clear that it is the duty of the state to apply and adhere to the principles. It has emphasized upon the obligations of the country which come with ratification of international conventions. The Court referred to the concepts of precautionary principle and polluter pays discussed in *Vellore Citizens' Welfare Forum v. Union of India and Ors*[656] and the *Environ-Legal Action v. Union of India.*[657] The Supreme Court, referring to Articles 48A and 51A (g) of the Constitution of India, observed that the aforementioned principles are part of the constitutional law. It also referred to *Intellectual Forum, Tirupathi v. State of A.P. and Ors*., wherein it was stated,

> "In the light of the above discussions, it seems fit to hold that merely asserting an intention for development will not be enough to sanction the destruction of local ecological resources. What this Court should follow is a principle of sustainable development and strike a balance between the developmental needs which the respondents assert, and the environmental degradation, that the appellants allege. Consequently the polluting industries are absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas".[658]

The Polluter Pays Principle as interpreted by the Supreme 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. Thus, the Indian judiciary has made contribution by clarifying that remediation of the damaged environment is part of the process of sustainable development and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. Though the doctrine of sustainable development indeed is a welcome feature, a delicate balance between ecological impact and the necessity for development must be struck. When it is not possible to ignore inter- generational interest, it is also not possible to ignore the dire need which the society urgently requires. The Supreme Court has further clarified that in a case of this nature,

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[655] AIR 2002 SC 1696.
[656] AIR 1996 SC 2715.
[657] 1996 (3) SCC 212.
[658] AIR 2006 SC 1350.

> "An endeavour should be made in giving effect to the intention of the legislature. For the said purpose, it is necessary to ascertain the object the legislature seeks to achieve. It may also be necessary to address questions regarding the nature of the statute. Does the statute *ex facie* point out degradation of the environment? Would, by change of user envisaged by the legislature, the existing open space be decreased? Would it be necessary in view of the legislative scheme to invoke the precautionary principles? Answers to the said questions in this case are to be rendered in the negative. The main purpose of the legislation is revival of industry *inter alia* by modernization and shifting of industry. Article 21 guarantees a right to a decent environment and, thus, what should be the parameters therefore would essentially be a legislative policy. Undoubtedly, different criteria may be laid down to achieve different purposes. When the discretionary power under a statute is arbitrarily exercised, one can say that evidently the court will not tolerate the same and strike it down."[659]

6.8. Polluter Pays Principle

The question of liability of the respondents to defray the costs of remedial measures can be looked into from another angle, which has come to be accepted universally as a sound principle, viz., the 'Polluter Pays' principle. The Polluter Pays principle demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the polluting goods. As per this principle, it is not the role of Government to meet the costs involved in either prevention of such damage, or in carrying out remedial action, because it would shift the financial burden of the pollution incident to the taxpayer. The 'Polluter Pays' principle was promoted by the Organization for Economic Cooperation and Development (OECD) during the 1970s when there was great public interest in environmental issues. During that time there were demands on Governments and other institutions to introduce policies and mechanisms for the protection of the environment and the public from the threats posed by pollution in a modern industrialized world. Since then there has been considerable discussion of the nature of the Polluter Pays principle, but the precise scope of the principle and its implications for those involved in potentially polluting activities have never been satisfactorily agreed, also not in Indian court judgments.

In the Rio Conference of 1992 great concern was shown about sustainable development- development which can be sustained by nature with or without mitigation. In other words, it is to maintain delicate balance between industrialization and ecology. While development of industry is essential for the growth of economy, the environment and the ecosystem are also required to be protected. The pollution created as a consequence of development must not exceed the carrying capacity of ecosystem. The Courts in various judgments have developed the basic and essential features of sustainable development. In order to protect sustainable development, it is necessary to implement and enforce some of its main components and ingredients such as- Precautionary Principle, Polluter Pays and Public Trust Doctrine. One can trace foundation of these ingredients in number of judgments delivered by the Supreme Court and the High Courts in India after the Rio Conference, 1992.

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[659] *Ibid.*

6.9. Concluding remarks

The analysis of the various judicial pronouncements leads to the conclusion that the role of the judiciary has been immense in the arena of environmental law. The judiciary has persistently tried over the decades to imbibe the international environmental principles in domestic environmental jurisprudence. The Indian judiciary has been a pioneer and can be credited for introducing new principles such as the 'Absolute Liability principle.' The judiciary, while doing so, had not only deviated from the settled international principle of strict liability but also evolved stringent new principle providing no exception. These are the major grounds on which this principle of strict liability has been criticized. In fact the Indian judiciary itself in *UCC v. UOI*[660] did not accept the principle on the ground that it is not internationally accepted and would not be in conformity with due process as per US laws. However, it can be concluded that the principle which was devised by the Indian judiciary is appropriate in the contemporary affairs. The rule of strict liability which evolved decades ago would not be apt in today's world where with the advancement of science and technology it is not impossible to prevent accidents and hence defences of *force majeure* etc. should not be allowed to be taken. Moreover, it should be noted that this liability was basically developed for the acts which does not fall under category of wrong which are neither intentional nor result of gross negligence. Basically this principle takes the victim into account, with a motive that no one should suffer because of dangerous activity carried on by others for personal profit. This principle requires any person who carries out the hazardous and inherently dangerous act to indemnify all who would be affected by such act, whether the damage was done intentionally or not. Further this principle has been criticized being repulsive to foreign investment and economic development. It can be argued that strict and absolute liability is imposed not to punish the legal persons but is to indemnify the common people from any damage caused by such activity. Indeed it places much higher degree of responsibility on the legal persons but this is done in order to strike a proper balance between economic development and environment protection. Moreover, this principle is to be applied only in cases of hazardous and inherently dangerous activity and thus is not a general rule of imposing liability. Concerns regarding environment protection arise due to increased interaction between humans and environment. Human - environmental interaction depends upon the level of technology and institutions nurtured by a society. The development in technology facilitates economic advancement and this in turn accelerates human involvement with environment which causes environmental imbalance and degradation. This is when sustainable development as a concept gains importance. An analysis of the cases challenging acts causing environment degradation reveals that the Supreme Court has gathered the concept of sustainable development from international instruments and has not hesitated in applying the same in India. The Supreme Court in its judgments has discussed the evolution of the concept of sustainable development and has stated that India's international obligations demand the application of the concept in Indian scenario. An examination of the decisions relating to sustainable development reveals a trend in the judicial approach. The Court has, in rare circumstances, outrightly directed for permanent closure or relocation of activities that pollute the environment, such as the *Tehri Dam* Case. Had similar tendency been followed in most decisions, the approach would have been an orthodox one, blindly supporting environment conservation and giving a setback to economic advancement. Moreover if the judiciary had blatantly supported the liberalization policy of the 1990s, it would have led to economic progress at an advanced pace initially, which would have later suddenly been put to rest due to exhaustion of resources essential for development. The judiciary probably realized this in the early 1990s.

[660] AIR 1990 SC 273275.

In most of the decisions it can be observed that although temporary injunctions were always granted to stop any further harm to the environment, the final judgments usually gave certain regulations and guidelines, whereby the industries were permitted to continue with their activities by following the same. The judiciary has followed a balanced approach towards environmental concerns and gave prime importance to the principle of sustainable development. Consequently, in the decisions made by the Supreme Court it can be noticed that the judiciary has always attempted to issue guidelines first, that could resolve issues regarding pollution or unsustainable use of resources, and only when situations reached a stage wherein the activity could not be carried on without further degrading the environment, the Court ordered for closures or relocation of the same. Therefore, in the first attempt of the Court to resolve the matters, development took precedence over environment protection, though not absolutely, in consonance with the economic situation existing in India.

Although there are several judgments which can have not discussed in depth the jurisprudence of the concept of sustainable development before applying it to the issue before the Court, it can however be noticed that the approach followed by the Supreme Court in almost all the decisions beginning in 1995 has been a strategically adopted one. It has kept in mind the essential fact that India then and even today is a developing country[661] which has to fulfill the needs of an ever rapidly increasingly population without compromising on its Gross Domestic Production (GDP) and overall economic progress in order to enable itself to stand in league with the developed nations of the world, while not compromising with environment for achieving the same. The Supreme Court by accepting the positive obligations under the international environmental instruments has rendered itself greatly prone to the uncertainties of these international principles.[662] The precautionary principle has been widely accepted to be rather vague and unclear, which caused its sluggish development, and in turn gone on to deter the courts from applying it. In India the courts have discussed this principle but have not been

[661] Although according to the United Nations and for all official purposes India is a developing country, analysis of official statements coming from governmental sources and Indian population clearly consider that India should be recognised as a great power by virtue of its history, culture, economic prowess, democratic institutions, population and like to cherish a dream of rising power status. Undoubtedly, India has achieved remarkable economic progress in the last decade, especially but, it is not at all an exaggeration to state that at least few decades would require before India would be able to become a significantly modern and developed state. See more analysis on this remark in the chapter concerning India and the UN Reforms below.

[662] ICJ, in its judgment on the *Pulp Mill Case*, interpreting the 1975 Statute between Argentina and Ecuador clarified that, "…The purpose of the provision in Article 41 *(a)* is to protect and preserve the aquatic environment by requiring each of the parties to enact rules and to adopt appropriate measures. Article 41 *(a)* distinguishes between applicable international agreements and the guidelines and recommendations of international technical bodies. While the former are legally binding and therefore the domestic rules and regulations enacted and the measures adopted by the State have to comply with them, the latter, not being formally binding, are, to the extent they are relevant, to be taken into account by the State so that the domestic rules and regulations and the measures it adopts are compatible ("con adecuación") with those guidelines and recommendations. However, Article 41 does not incorporate international agreements as such into the 1975 Statute but rather sets obligations for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and preservation of the aquatic environment of the River Uruguay. Under Article 41 *(b)* the existing requirements for preventing water pollution and the severity of the penalties are not to be reduced. Finally, paragraph *(c)* of Article 41 concerns the obligation to inform the other party of plans to prescribe rules on water pollution." The Court further observed that "it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations laid down by the 1975 Statute."

very successful in their approach.[663] The reason, for one, could be that the judiciary takes cognizance of the matter only when the situation has become very grave or almost irreversible. What could possibly be the use of the Precautionary Principle if there is nothing left to take precautions about? Secondly, even when the judiciary does take such matters into consideration it passes such orders which are difficult to be realized. For instance, in the *Bichhri Village case*,[664] the Supreme Court had ordered for the treatment of the water in the wells which had become black, thanks to the hazardous factory effluents. The scientific community had voiced their serious doubts about the possibility. Further, the Court failed to look into the point that the farmers had to use the same water for the irrigation purposes, which would spoil even the top layer of soil, as if not enough damage has already been done. The course for the Polluter Pays principle has been a more effective one. The judiciary has not been very eager about putting any amount of compensation. It has taken reasonable and rational steps for deciding the amount. The Supreme Court has not limited itself to just a simple notion that the polluter shall pay for the damage caused. It has extended the concept to include even the cost of restoration and reversal of environmental degradation. This idea has been repeated in almost all the cases of environment in the past four decades, with appreciable judicial response, till now, but certain questions still need to be answered. What will be the judicial response when the polluters belong to small informal sectors and do not cause pollution to seek any benefits but to carry on the only vocation to which their primary education has exposed them? The damages are bound to result in an increased price. How does the judiciary plan to solve the problem when the result of this is seen in the exports sector where the demand is already dwindling? The path ahead does not look very easy. The judiciary has thus been instrumental in filling the loopholes created by the executive and the legislature. Through various instruments like public interest litigation and writ petition the judiciary has successfully fulfilled the role of imparting justice.

It has been the judiciary which took the forefront in applying international environmental law principles into the environmental jurisprudence of the country. It has successfully used these international principles in accordance with the socio-economic conditions of the Indian society. In fact it is because of the active role taken by the judiciary that the common man is able to seek his redresses through these principles. It also leads to appraisal of the environmental consciousness of the people of India. The environmental principles which evolved in the Stockholm and Rio declaration have been implemented in the domestic laws only due to the vibrant role played by the judiciary. Despite the drawbacks of the judiciary, the role played by it in shaping the environmental law jurisprudence in India is worth emulating by countries in similar situations.[665] The chapter shows the often conflicting and complimenting approaches of India as to what, within the field of environmental

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663 Joakim Zander, *The Application of the Precautionary Principle in Practice: Comparative Dimensions*, (Cambridge: Cambridge University Press, 2010); Nicolas De Sadeleer, "The Precautionary Principle as a Device for Greater Environmental Protection: Lessons from EC Courts", 18 *Review of European Community and International Environmental Law* 1, 3-10 (2009); Andri G. Wibisana, "Three Principles of Environmental Law: the Polluter-Pays Principle, the Principle of Prevention and the Precautionary Principle" In Michael Faure (ed.), *Environmental Law in Development: Issues from the Indonesian Experience*, 24-76 (Cheltenham: Elgar, 2006).

664 AIR 1996 SC 1446.

665 J. Otto, "International Law and Environmental Legislation in Developing Countries with Special Reference to India and Indonesia", 4 *Leiden JIL* 1, 110-117 (1991); Kilaparti Ramakrishna, "The Emergence of Environmental Law in Developing Countries: A Case Study of India", 12 *Ecology Law Quarterly*, 907-935 (1985); Bharat Desai, (ed.), *Environmental Laws of India*: *Basic Documents*, (New Delhi: Lancers Books, 1994); Eileen N. Wagner, "Bhopal's Legacy: Lessons for Third World Host Nations and for Multinational Corporations", 16 *North Carolina Journal of International Law and Commercial Regulation* 3, 541-585 (1991).

law, constitutes "rules" or "principles"; what is "soft law"; and which environmental treaty law or principles have contributed or shaped its particular approach.[666] Proving customary international law requires evidence of consistent state practice, which practice will only rarely provide clear guidance as to the precise context or scope of any particular rule. The time India took to ratify some of the important international environmental instruments and enact corresponding domestic legislations, statements made at various international forums shows the difficulties faced by the Indian executive in implementing positive international obligations in the area of environmental law.

Based on the analysis and interpretation of laws by the Indian judiciary, this Chapter has demonstrated that, in the field of international environmental law, India's contribution is mainly through the Indian judiciary rather than legislative and executive organs. Not only the Judiciary has clarified various emerging and existing principles of environmental law but it has treaded into the territory of legislative through its judicial activism in the area of environmental law. One could therefore see a tension between the judiciary and the executive as far as enforcement of environmental norms are concerned, the former being establishing high standards and the latter being in a difficult situation to adhere to judiciary on the one hand and need to reconcile environmental concerns with economic developmental needs on the other. This tension is likely to continue. However, it has been observed that the Indian judiciary will be paying more attention to the executive concerns in the light of latter's need to deliver economic governance. While the tension between two organs of the state will remain to exist at national level, India is likely to push for softer environmental standards at international level in its negotiations with developed world. It is, furthermore, likely that civil society institutions which have been empowered by the public interest litigation mechanism, and actively using it to address environmental issues, will continue to add into the tension between the judiciary and executive.[667] Civil society institutions in the area of environment and development need to be more sensitized to the developmental needs of the country, without, however, compromising the concerns of preservation of clean environment. Until and unless, these organs and civil society institutions work in tandem, India's contribution at international level in the development of international norms will continue to be inadequate.

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[666] Philippe Sands (ed.), *Principles of International Environmental Law*, (Cambridge: Cambridge University Press, 2003), p. 112.

[667] Lavanya Rajamani, "Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability", 19 *Journal of Environmental Law* 3, 293-321 (2007); Shaikh, "Environment and Sustainable Development: the Evolution of Public Interest Litigation by the Supreme Court of India", Indian Society of International Law, *Fifth International Conference on International Environmental Law*, 8-9 December 2007, 572-590 (2007); Jona Razzaq, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (the Hague: Kluwer Law International 2004); Bharat Desai, "Enforcement of the Right to Environment Protection through Public Interest Litigation" 33 *Indian JIL*, 27-40 (1993).