

Judicial activism in  
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In his famous book "law in changing society" W. Friedman, while dealing with the interaction between law and the society, highlighted the controversy between those who believe that law should essentially follow not lead, and that it should do so slowly, in response to clearly formulated social sentiment and those who believe that law should be determined agent in the creation of new norms. The development of the environmental jurisprudence in India over the last two decades through the innovative judicial decisions of the Hon'ble Supreme Court and the High Courts is probably the great inspiration for those who believe that law is the initiator rather than reactor of the social change. Although after the Stockholm Conference, 1972 and the Bhopal Gas Leak Disaster, 1984, almost 200 Central and State legislations were enacted in order to ensure the all aspects of the environmental protection. But the failure on the part of the Governmental agencies to effectively enforce the environmental laws and the reluctance to use their statutory power against the polluters resulted in an accelerated degradation of the environment. Such large scale environmental degradation and the adverse effects on public health prompted the environmentalist and the residents of the polluted areas as well as the non-Governmental Organizations to approach the High Courts and the Supreme Court by way of public interest litigation for suitable remedies. In the process of adjudication on the environmental matters, the supreme Court, soon after the Bhopal Gas Leak incident, steps into the shoes of the administrators, marshalling the resources, issue directions to close down factories, requiring the implementation of the environmental norms, cutting of " Judges driven implementation" of the environmental administration and in doing so the <https://assignbuster.com/judicial-activism-in-developing-environmental-jurisprudence-in-india-politics-essay/>

Apex Court has adopted the various principles of international convention of environmental protection by environment-friendly interpretation of Articles 21, 48A and 51A(g) of the Constitution of India.

But such proactive role of Indian judiciary in environmental matters created new crisis and conflict between environmental protection and the economic development of the country inasmuch as thousands of the industries were closed down by the directions of the Courts on the ground of environmental protection specially in the era of

globalization those who are involved in market mechanism are under apprehension that environmental laws will act as a barrier to industrialization and thus strict adherence to the environmental norms will affect the smooth economic development of the country. Moreover in the developing countries like India where population explosion, unemployment and the poverty are fundamental problems of the day to day life, the closure of the several factories on the ground of environmental protection will not only affect the economic development of the country but also directly violates the right of livelihood of the common people. For instance, Delhi the capital of India is regarded by many as a huge gas chamber due to its heavy air population resulting in respiratory and other medical problems to vast section of the city. The Supreme Court of India has no doubt taken salutary steps to check this evil, but its directive to close down factories as also resulted in unemployment of ten thousands of workers.

In the present article the author is trying to focus the aforesaid conflict between the environment and the development in the human rights point of view and the significant role of the Indian Judiciary to resolve this conflict.

### **The conflict between environment and development in the human rights perspective:**

Development is a complex process in which economic development is significant with one common element wherein human being is both the subject and the beneficiary of the development process. The process of development is inhabitable and it involves exploitation of the natural resources and consequently makes an impact on the ecology and the environment. In the era of globalization the growth of economy in all its sphere in general and in the industrial efforts, in particular, necessarily leads to exploitation of the natural resources which in turn often gives rise to issues concerning environmental security. Thus while on the one hand science and industries have contributed significantly to the progress of mankind they have also created a sharp contradiction between natural environmental which was a gift of the nature and the artificial environment which is a creation of the industry. The biggest challenge facing the policy maker today is to avert the ecological crisis without compromising with the developmental needs of the present protection. Until very recently the human rights and the rights of environmental protection were regarded as distant areas of public policy by the Governmental Institutions and the Non-Governmental Organizations. The policy makers started to regard the both within a single bracket after cropping up the aforesaid conflict between environment and industrialization due to globalization. Actually the

relationship between environment justice and human rights is developed as both are the means to maximize human dignity and well being. But in the developing countries, poverty and unemployment make economic development priority which arises tensions between human rights activists and the environmentalists. Because, the human rights activists give preference to immediate basic human needs such as food, clothing and shelter over the long term environmental concerns.

But in the era of globalization, a paradigm shift towards non-state actors international human rights formulated a new concept of ' sustainable development' which provides the means to reconcile the aforesaid conflict. Let us discuss hereinafter how this new human rights jurisprudence is developed in international level.

### **International Conventions on Sustainable Development:**

The international community responded belatedly way back in 1972 to the ecological crisis by recognizing the question of environmental protection and improvement as a major issue which effect the well-being of the people and the economic development throughout the world. The Stockholm Conference in his declaration proclaim " both aspects of the environment, the natural and the man-made, being essentially to the well- being and to the enjoyment of the basic human rights have been the right to life itself 20 years later, the RIO SUMMIT, 1992, said the new agenda for sustainable development and adopted the agenda 21. In the Brundtland Report 1987, for the first time, formulated the new theory of sustainable development in order to resolve conflict between environment and development. The report titled " our common future" which proposed a definition of sustainable development by <https://assignbuster.com/judicial-activism-in-developing-environmental-jurisprudence-in-india-politics-essay/>

stating that sustainable development is the development that meets the need of the present without compromising the ability of future generation to meet their own need. In order to achieve sustainable development environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. The United Nations Conference on Environment and Development held in Rio de Janeiro in 1992 provided the fundamental principles for achieving sustainable development.

The salient feature of sustainable development according to RIO declaration are:-

“ Intergenerational equity use and conservation of the natural resources, environmental protection, the precautionary principles, polluters pay principle, obligation technology transfer on concessional rates to develop countries”. Moreover principles 3 and 4 of the Rio Declaration, 1992 are relevant for this issue which are set as under:-

### **Principle 3**

The right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generation.

### **Principle 4**

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

The Johannesburg SUMMIT in 2002 expanded the concept of sustainable development by underscoring the necessity of a better integration of the

three pillars of sustainable development namely economic development, social development and environmental protection. The concept of sustainable development was further defined in Article 3 (1A) of the convention for cooperation in the protection and sustainable development of the Marine and Coastal environment of the North Pacific, 2004.

“ For the purpose of this convention sustainable development means the process of progressive change in the quality of human being which place it as the centre and primordial subject of development, by means of economic growth with social security and the transformation of methods of protection and consumption patterns and which is sustained in the ecological balance and vital support of the region. This process implies respect for regional, national and local ethnic and cultural diversity, and full perspective of people in peaceful co-existence and in harmony with the nature without prejudice to an ensuring the quality of life of future generation”.

### **Role of Judiciary in the development of Environmental law in India:**

The judiciary a spectator to environmental exploitation for more than two decades has recently assumed a pro-active role of public educator, policy maker, super-administrator, and more generally, amicus environment. We can say environmental law in India as the story of India's judiciary responding to the complaints of its citizens against environmental degradation and administrative sloth.

The Judiciary looked to constitutional provisions to provide the court with the necessary jurisdiction to address specific issues. Disputes that are normally

matters of torts in other common law jurisdictions are treated as fundamental cases in India.

But the fundamental rights part of the constitution of India does not have any specific mention of the environmental matters. Here the Supreme Court played a pivotal role. The Supreme Court, in its interpretation of Article 21, has facilitated the emergence of the environmental jurisprudence in India. Supreme Court has essentially interpreted the right to life under Article 21 to include a right to healthy and pollution free environment.

A very importance case in this regard is the Subhash Kumar v. State of Bihar<sup>1</sup>.

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### **(1991) 1 SCC 598.**

It was observed that “ Rights to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of Constitution.

In the era of globalization Indian Supreme Court has made an adjustment with its earlier purely environment friendly attitude and under the influence of the Brundtland Report, 1987 and the Rio declaration, 1992 the Apex Court has introduced a new concept of sustainable development and its ancillary principles like precautionary principle, polluters pay principle and

intergenerational equity etc. In order to resolve the contemporary conflict <https://assignbuster.com/judicial-activism-in-developing-environmental-jurisprudence-in-india-politics-essay/>



between environment and development let us discuss hereinafter how our Apex Court has adopted and applied those principles of international convention in its several judicial pronouncement.

### **Supreme Court on Sustainable development:**

In *M. C. Mehta v. Union of India*<sup>2</sup> is one of the earliest case that the Supreme Court had indirectly dealt with question of Sustainable development and Supreme Court held that : “ Life, Public health and ecology has priority over unemployment and loss of revenue problem”.

One of the earliest cases in which the Supreme Court has to deal with the question of the Development v. Environment is *Rural Litigation and Entitlement Kendra v. Dehradun v. State of U. P.* <sup>3</sup>

In this case the matter related to illegal and unauthorized mining that was causing ecological imbalance and also causing environmental disturbance. The court rightly pointed out that “ it is always to be remembered that these are permanent assets and not to be exhausted in one generation” and thus holding that the environmental protection and ecological balance should also are equally important as the economical development of the country.

The Supreme Court after much investigation, ordered the stopping of mining work and held that: “ This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affection of air, water and environment”. This

judgment could be also considered in the context. This was first time such a question is coming before the Supreme Court.

The first case on which the apex court had applied the doctrine of 'Sustainable Development' was Vellore Citizen Welfare Forum vs. Union of India<sup>4</sup>

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**AIR 1997 SC 374.**

**(1987) Supp. SCC 487**

**AIR 1996 SC 2715.**

In the instant case, dispute arose over some tanneries in the state of Tamil Nadu. These tanneries were discharging effluents in the river Palar, which was the main source of drinking water in the state. This is considered to be the most important case as far as the evolving of the environmental law and the contribution of the Indian Supreme Court towards that direction.

In this case the Judgment given by Justice Kuldeep Singh is of utmost importance, he has observed in his judgment that " the traditional concept that development and ecology are opposed to each other, is no longer acceptable. ' Sustainable Development' is the answer". He goes on to explain about the development of Sustainable development as well accepted principle in the international level. Justice Kuldeep Singh observes that " We have 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....".

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While accepting ' Sustainable Development' as the part of the environmental law of the land the reasoning given by Justice Kuldip Singh shows great power. Supreme Court has to make the law rather than just to interpret the law. Justice Kuldip Singh held that " Once these [here sustainable development] 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 almost accepted proposition of law that the rule of customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic and shall be followed by the Courts of law".

It was also observed " Our legal system having been founded on the British Common Law the right of a person to pollution free environment is a part of the basis jurisprudence of the land".

In T. N. Godavaram Thimmalapad v Union of India<sup>5</sup>, the Supreme Court reiterated what have been said in the Vellore case and has declared that precautionary and sustainable development principles are two salutary principles that govern the law of the environment.

In N. D. Jayal v. Union of India<sup>6</sup>, the Supreme Court has declared that ' the adherence to sustainable development is a sine qua non for the maintenance of Symbiotic balance between the right to development and development. This concept is an integral part of life under Article 21.

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**(2002) 10 SCC 606 at page 613**

**(2003) 6 SCC 572 at page 586**

**The ancillary principle of sustainable development developed by our Apex court :**

Inter-Generational Equity:- The principle talks about the right of every generation to get benefit from the natural resources. Principle 3 of the Rio declaration states that:

“ The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”. The main object behind the principle is to ensure that the present generation should not abuse the non-renewable resources so as to deprive the future generation of its benefit.

This principle was used in the case of and has also been recognized by the Supreme Court of India in the M. C. Mehta -vs- Union of India (Taj Trapezium case)<sup>7</sup>. In State of Himachal Pradesh v. Ganesh Wood Products<sup>8</sup>, the Supreme Court invalidated forest- based industry, recognizing the principle of inter- generational equity as being central to the conservation of forest resources and sustainable development.

The Court also noted in Indian Council for Enviro-Legal Action v. Union of India (CRZ Notification case)<sup>9</sup> that the principle would be violated if there were a substantial adverse ecological effect caused by industry.

The Precautionary Principle : This principle has widely been recognized as the most important principle of Sustainable Development. Principle 15 of the Rio declaration states that: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.

Polluter Pays Principle:- Principle 16 of the Rio declaration states that:” National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment”.

The object of the above principle was to make the polluter liable not only for the compensation to the victims but also for the cost of restoring of environmental degradation. Once the actor is proved to be guilty, he is liable to compensate for his act irrelevant of the fact that whether he is involved in development process or not.

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**AIR 1997 SC 374.**

**AIR 1996 SC 149**

**(1996) 5 SCC 281**

The Supreme Court in various cases has held that the importance of having borrowed the precautionary principle and the polluter pay principle and these principles are now the law of the land. In the case of Vellore Citizen Welfare Forum vs. Union of India<sup>10</sup> the Supreme Court through Justice Kuldeep Singh had opined “..... We have no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environment law of the country”. As elucidated in this case, precautionary principle includes the following points.

Environmental measures by the State Government and the local authority must anticipate, prevent and attack the causes of environmental degradation.

Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

The ‘onus of proof’ is on the actor or the developer to prove that his action is environmentally benign.

In doing this Justice Kuldeep Singh has actually looked into the constitutional provisions and statutory provisions. Justice Kuldeep Singh goes on to say that

even otherwise also this principles could be read into the law of the land this is by the way of reading the customary international law that is not in conflict with the domestic law shall be deemed to be the part of the domestic law.

## **Balancing of Interest concept**

A very important jurisprudential concept of the Balancing of Interest concept could be actually used to evaluate the cases in which the Sustainable development concept is being used. In this process of interpretation, the Court is more concerned with weighing the competing values of a free society. In the course of rendering decisions, judges are to aim at accommodation or balance of society's conflicting interest. The very process of balancing competing social interests based on the constitutional values, demonstrates the essential similarities between judges and legislative character of the legislature. This again takes us into the realm of reality of the judicial law making. But it is of well acceptance that the court should not assume the role of a super-legislature. This is in another way described as "judicial restraint".

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### **AIR 1996 SC 2715**

This principle of judicial self-restraint should not be stretched too far and too often to convert the court into a virtual rubber stamp of a legislature. The reason is that the concept of democracy includes provision of those rights, which make it possible for minorities to become majorities. A system that is founded on a doctrine such of the " separation of powers" and " checks and  
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balances” necessarily calls for cooperation among governing institutions in policy making.

A very relevant discussion regarding this will be imminent and this is Narmada Bachao Andolan v. Union of India<sup>11</sup> and for that matter all of the infrastructural projects and the related policy issues. In this case it was opined by the Supreme Court that “ In present case, we are not concerned with polluting industry..... what is being constructed is a large dam. The dam is neither a nuclear establishment nor polluting industry. The construction of a dam undoubtedly would result in the change of environment but it will not be correct to presume that the construction of a large dam like Sardar Sarovar will result in ecological disaster. The experience does not show that construction of a dam.....leads to ecological or environmental degradation.” This signifies that the precautionary principle can be used only in the case of pollution and with reference to the Sustainable development Supreme Court observed that “ Sustainable development means what type or extent of development can take place, which can be sustained by nature/ecology with or without mitigation”.

The courts have attempted to provide a balanced view of priorities while deciding environmental matters. As India is developing country, certain ecological sacrifices are deemed necessary, while keeping in mind the nature of the environmental in that area, and its criticality to the community. This is in order that future generations may benefit from policies and laws that further environment as well as developmental goals.



## **Doctrine of Public trust:**

The application of the Professor Joseph Sax's doctrine of public trust is another important contribution by the Supreme Court of India. The doctrine of public trust calls for affirmative state action for effective management of resources and empowers the citizens to question ineffective management of natural resources. Chief Justice Y. K. Sabharwal points out that when the Supreme Court has applied the public trust doctrine, it has considered it not only as an international law concept, but also as one which is well established in our domestic legal system.

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### **(2000) 10 SCC 664**

In *M. C. Mehta vs. Kamal Nath*<sup>12</sup> the Court held that the State, as a trustee of all natural resources, was under a legal duty to protect them, and that the resources were meant for public use and could not be transferred to private ownership. In the case of *M. I. Builders Pvt. Ltd. vs Radhey Shyam Sahu*<sup>13</sup> it was observed by the Supreme Court that public trust doctrine has developed from the Article 21 of Constitution and is very much a part of the Indian legal jurisprudence.

This again points towards the inevitability of the judicial legislation and as S. P. Sathe says that the Indian parliament has stopped legislating in the last two decades, naturally as an alternative people also started to look at the Supreme Court as an institutional set up for the enforcement of their rights or rather as a sensible agency which could hear their problems. As Upendra

Baxi says that the public interest (social action) litigation and the judicial  
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activism had given the Supreme Court legitimacy to step into the shoes of the legislator and to make the law. The doctrine of public trust though borrowed from professor Joseph Sax is a real epitome of the creation of the new principle by the Supreme Court.

The principles of sustainable development and its ancillary principles, like precautionary principle, polluter pay principle and the principle of inter-generational equity are further adopted in the latest judgment of the Supreme Court., namely, Karnataka Industrial Area Development Board-Vs- C. Kenchappa<sup>14</sup> where the Apex Court clarified that there are two conditions which emanate from the principle of sustainable development :-

The consequence and adverse impact of development on environment must be comprehended properly . It must be seen that the development activities does not cause irreparable loss to ecology of the area;

The clearance of the project from the concerned pollution control boards and the Department of Forest and Environment must be made a ‘ mandatory condition’ for any developmental projects.

In another recent case Intellectual Forum, Tirupathi-Vs- State of A. P. <sup>15</sup> the doctrine of Public Trust has been adopted your Apex Court as the integral part of the Indian Law.

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**(1997) 1 SCC 388**

**AIR 1999 SC 2468**

**AIR 2006 SC 2038**

**(2006) 3 SCC 552**

**Conclusion:**

From the above discussions it can be inferred that if we consider the era of globalization as a water shed then the role of Indian Judiciary in developing the environmental jurisprudence through its plethora of judgments may be divided in to two phases:-

In the first phase - in the pre-globalization stage i. e. just after the Bhopal Gas Disaster Case, 1984, our Apex Court has played a pro-active role in enforcing the environmental norms strictly in the light of the Stockholm Conference, 1972, without compromising with the interest of the industrialization and other socio economic problems of our country.

Obviously such role of the Supreme Court created a conflict between the environment and development of the country.

But in the second phase i. e. the post globalization stage, under the Brundtland Report, 1987 and Rio Declaration, 1992 the Indian Judiciary has made an adjustment with its earlier views and adopted different principles of sustainable development and attempted to resolve the conflict between interest of the corporate world environment. It is needless to say that such

changing role of the Indian Courts paves the way of the multinational companies to come to our country due to the effect of the globalization. Actually, in the developing countries the industrialization is not the only cause of the environmental pollution.

In the Stockholm Conference, 1972, the then Prime Minister of India, Mrs. Indira Gandhi in her speech stated, that “ the environmental problems of the developing countries are not the side effects of the excessive industrialization but reflect the inadequacy of development. The rich countries may look upon the development as the cause of environmental destruction but to us it is not all the primary means of improving the environment for living, of providing food, water, sanitation and shelter. The ecological ground should not add to the burdens of the weaker nations by introducing new consideration in the political and trade policies of rich nations. It would be ironical if the fights against pollution were to be completed into another business, out of which a few companies, corporations or nations would make profit at the cost of many.”

In my view the apprehension of Mrs. Gandhi in her aforesaid statements is still relevant after passing 39 years of the Stockholm Conference. It is true that in order to eradicate the poverty an advance economic growth of the country, industrialization is necessary and for the said purpose the balance is to be created between the effect of industrialization and the environmental protection. We should welcome the said seminal work of the Indian Judiciary as long as it is beneficial for the common people. But side by side it is to be kept in mind that whether the role of our Apex Court in the era of

globalization will ultimately benefits a large number of common people of <https://assignbuster.com/judicial-activism-in-developing-environmental-jurisprudence-in-india-politics-essay/>

our country or it will turn into an instrument in the hands of a few multinational companies for making their profit at the cost of the interest of the people of India.