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SUSTAINABLE DEVELOPMENT AND ENVIRONMENT

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INTRODUCTION

Sustainability in development has been a challenge to the human community. Protection of environment and its limited natural resources has been the confronting situation in the era of competitive industrial development. International and regional communities have time and again tabled their concern at various international forums so as to check and balance the degrading quality of the environment. The conventions, declarations and treaties have been a step forward towards sustainability in developmental approach. Post Stockholm development in 'environmental jurisprudence' brings into picture the Indian Constitutional, legislative and judicial commitment in tackling the distressing environmental state of affairs. Unrestricted and imbalanced growth has been leading the degrading and undignified human environment and thereby violating the constitutional right to live in the pollution free environment. The study of liability provisions point out the liability of a corporation and the state in cases of accidents which aims at restituto in integrum. The 'Public Trust Doctrine' holds in to check the authority of the government which holds the environmental resources as a trustee of the commons. The 'precautionary principle' and 'polluter pays principle' have been employed by the judicial system as component principles of sustainable development to rectify the developmental approach. The paper brings out the approach of Indian judicial system in balancing the economic centric approach and the environment centric approach in a harmonious manner so as to achieve sustainable development[1]

Industrialisation and urbanization on the one hand and population explosion andpoverty on the other ha s been witnessed formidable scale of the environmental problems.

[1] The Indian Forest Act, 1927, Act No. 16 of 1927 and World Birds and Animal Protection Act, 1912, Act No. IV of 1912

An increasing quantum of pollution *inter alia* results in declining environment both quantitatively and qualitatively that has severely been threatening the life support system of present and future generations. To resurrect environmental problems as a international commitment; a number of legislative and policy measures were adopted at all level. The multiplicity of environmental measures is further compounded to create various authorities to make effective implementation of all such measures. Although these regulatory agencies remarkably involved in planning and implementation of the measure; the various reports highlights the inadequacy in handling development and environmental issues. Thishas significantly raised a doubt that legal elements of the concept of Sustainable Development are a part of environmental governance in India. To verify the commitment; the present chapter an attempt is made to analyse the constitutional and legislative standards to conserve resources in achieving environmental sustainability both for present and future generations[2].

In India, depletion of resources and environmental crisis is not only because of povertyand population explosion but also industrial development. Since the establishment of East India Company, to respond to the tremendous challenges to the environment here are number of comprehensive legislative framework and institutional mechanisms were established in diversified subjects like forests and wildlife. However, no provision of the environmental legislation authorize the affected person in view of environmental pollution is entitled to claim remedy in any manner.

FOUNDATION OF THE CONCEPT OF SUSTAINABLE DEVELOPMENT[3]:

The concept of sustainable development is not a new concept. It came to be known as early as in 1972 in the Stockholm declaration. It had been stated in the declaration that:

"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being and he bears a solemn responsibility to protect and improve the environment for present and future generation."

But the concept was given a definite shape in a report by World Commission on Environment. The report was popularly known as *Our Common Future* which had been further discussed under agenda 21 of UN Conference on Environment and Development held in June 1992 at Rio de Janeiro, Brazil.[4]At the World Summit

[2] Factories Act, 1948, Act No. 63 of 1948.
[3]Patricia Birnie & Alan Boyle, *International Law & The Environment*, Oxford University Press, New York, 2001, 2nd Edition, p.331.
[4]*Ibid*.

on sustainable development in Johannesburg, the world community agreed that poverty eradication and access to clean energy have to go hand in hand. At the Summit, the European Union took the initiative to form a group of like-minded countries which are willing to agree on timetables and targets for increasing the use of renewable energies. India was also invited by some European countries to join this initiative.

By seeking patterns of resource use[5] that will be common for all countries, the new paradigm for sustainable development will re-balance the roles of the state, markets and citizens.[6] This approach suggests three key shifts in current environmental, economic and social perspectives.[7]

First, with the growing importance of the service sector, and consumer demand in economic growth worldwide, it points to the need to modify patterns of resource use and shift consumption, and not just production, patterns, particularly in developed countries. Second, for developing countries, it focuses on avoidance, rather than reduction, of adverse impacts on the environment through a shift in the growth path by recognising the importance of ecosystem services, and resulting convergence between management of the environment, economic growth and the alleviation of poverty. Third, new innovative market based employment opportunities need to be provided for the poor to shift current activities away from those causing harm to local ecosystems, as the best means for conservation of natural resources. The focus has to be on modifying longer term trends, rather than on-going activities.

In the last two decades environmental law in India has experienced considerable changes and the maximum share of fundamental nature of the existing law has been developed through judicial thinking by Supreme Court and High Courts. The way in which judges understand and apply existing law serves as a powerful feedback loop to the drafters of statutes, regulations and permits.[8] In the particularization of injunctive relief, the judges may describe specific steps and elements of law compliance. Through all of these routes, judges are either making law or influencing the making of law.[9]

[5]G.J. Marshall, "Trends in the southern annular mode from observations and re analyses", *Journal of Climate*, Vol.16, p. 4134-4143.
[6]*Ibid*.
[7]Patricia Birnie & Alan Boyle, *International Law & The Environment*, Oxford University Press, New York, 2001, p.276.
[8] Marcia E. Mulkey, 'Judges and other law makers: Critical Contributions to Environmental Law Enforcement', *Sustainable Dev. Yearly*, VIII, 2004, p. 145.
[9] James L. Oaks, 'The Judicial Role in Environmental Law', *NYU L. Rev.*, 52nd edition, New York, 2004, p. 498, 512.

The Forty-second Amendment[10] to the Indian Constitution in 1976 gives an insight into the legislative action by introducing the basic principles of environmental protection in an explicit manner and led to the enactment of the Environment Protection Act, 1986. Although there have been initiatives by other two branches i.e. the legislature and the executive but judiciary's share has been more in terms of the actual immediate effect its actions have had on the environment and in evolving the concept of sustainable development. Courts in various jurisdictions have shown increased inclination to lean in favour of the right of the society as a whole against the adverse impact on environment when it comes in conflict with economic well-being of an individual or the State.[11] The court have played a pivotal role in interpreting those laws and has successfully isolated specific environmental law principles upon the interpretation of Indian statutes and the Constitution, combined with a liberal view towards ensuring social justice and the protection of human rights.[12] If the mere enactment of laws relating to the protection of environment were to ensure a clean and pollution free environment, then India would, perhaps, be the least polluted country in the world.[13]

So while analyzing the path of development of environmental law in India at the judiciary's instance, the concept of the 'judicial making of law' or "judge-driven implementation" of environmental administration in India has to be kept in mind.

The importance of the concept of sustainable development is increasing rapidly ever since the United Nations Conference on Environment and Development (the Earth Summit) held in Rio de Janeiro, Brazil in June of 1992. As per international agreements, four recurring ingredients seem to constitute the legal concept of sustainable development, being[14]:

1. The need to preserve natural resources for the benefit of the future generations.
2. Is 'sustainable' or 'prudent' or 'rational' or 'wise' or 'appropriate' use of natural resources?
3. The 'equitable' use of natural resources, which implies that one State must take account of the needs of other States.
4. The need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects

[10] Articles 48-A & Article 51-A of Directive Principles of State Policy, obligated the State to protect and improve the environment and citizens to undertake the same responsibilities respectively.
[11] *Lopez Ostra* v. *Spain*, (1994) 20 EHRR 277.
[12] S.C.Shastri, *Environmental Law in India*, , 2005,123.
[13] Shyam Divan and Armin Rozencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes*, Oxford University Press, New Delhi, 2001, p.13.
[14] Debra S. Knopman, 'Civic Environmentalism in Action: A Field Guide to Regional and Local Initiatives', *Progressive Policy InstituteReview*, Washington DC, 1999, p. 56.

EMERGING AND ACCEPTED PRINCIPLES OF ENVIRONMENTAL LAW

The consensus of ideas and the behavior between states lays the foundation for the international law. It is really extremely difficult to determine, at what stage an obligation or principles in a convention become binding on nations. There is an emergence of different principles in international environmental law and these principles are at the different stages of development. Similarly, on the national front the judiciary has used specific environmental law principles upon the interpretation of Indian statutes and the Constitution. This could be construed as a result of the judicial craftsmanship and this is due to with a liberal view towards ensuring social justice and the protection of human rights. The principles have often found reflection in the Constitution in some form, and are usually justified even when not explicitly mentioned in the statute concerned. An attempt to relate this acceptance and development of the environmental law principles to the concepts of 'judge-made law' and also the 'silent revolution'[15] which the Supreme Court tries to make through its judgments aiming at the social justice jurisprudence.

The fore mentioned and more principles relating to this subject can be discussed under the following heads[16]:

The "no harm" rule

The most fundamental principle law of international environmental law is contained in the Principle 21 of the Stockholm Declaration and the Principle 2 of the, Rio Declaration:

"states have…the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of the limits of the national jurisdiction."

This principle has therefore created a balance between the states territorial sovereignty and the collective responsibility of the international community.

In the 1949 *Corfu Channel Case*[17], though this is not an environmental case, this has contributed a lot for the development of this principle. The ICJ held that Albania was responsible in international law failing to inform the UK about the presence of mines laid in its territorial waters. It was held that every state has a duty not to knowingly allow its territory to be used for the activities which are contrary to the rights of the other states.

[15] T.K. Tope, 'Supreme Court of India and Social Jurisprudence', *SCC Journal*, New Delhi, 1988, p. 8.
[16] Patricia Binnie and Alan Boyle, *International Law & The Environment*, Oxford University Press, New York, 2001, p. 456-513.
[17] *UK* v. *Albania*, 1949, ICJ Reports, 4.

Following its appearance in the Stockholm Declaration this principle appeared many times in the international arena between 1972 to 1992.

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 cases of and has also been recognized by the Supreme Court of India in the *M.C. Mehta* v. *Union of India* (Taj Trapezium case).[18] In *State of Himachal Pradesh* v. *Ganesh Wood Products*[19], 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)[20] that the principle would be violated if there were a substantial adverse ecological effect caused by industry.

The Principle of State Cooperation

The principle that the states shall co-operate in the protection of environment is affirmed in virtually all international agreements. The preamble to the Rio convention stresses on necessity and the importance of promoting international, regional and global co-operation among states. Principle 27 of the Rio Declaration states that state and people shall co-operate in good faith and in spirit of partnership in the fulfilment of the principles embodied in this declaration and in the further development of the international law in the field of sustainable development. The necessity for co-operation is mentioned six times in the Rio Declaration. But the practical requirements of the principle still remain unclear.

[18] AIR 1997 SC 734.
[19] AIR 1996 SC 149.
[20] (1996) 5 SCC 281.

The Precautionary Principle

This principle has widely been recognized as the most important principle of 'Sustainable Development'. Principle 15 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."

In other words it means:

1) Environmental measures by the state government and the local authority must anticipate, prevent and attack the causes of environmental degradation.
2) Where there are threats of serious and irreversible damage, lack of scientific certainty should not used as a reason for postponing measures to prevent environmental degradation.
3) The 'onus of proof' is on the actor or the developer to proof that his action is environmentally benign.[21]

Internationally, the precautionary principle has been directly or impliedly applied or referred to in judicial decisions in several countries. Justice Stein[22] refers to cases decided in Britain,[23] India, Pakistan and New Zealandand also refers to judgments of the International Court of Justice[24] and the European Court of Justice[25].

In *AP Pollution Control Board* v. *Nayudu*[26] the Indian Supreme Court applied the precautionary principle in considering a petition against the development of certain hazardous industries. The Court held that ". . . it is necessary that the party attempting to preserve the status quo by maintaining a less-polluted state should not carry the burden of proof and the party who wants to alter it, must bear this burden".

In *Vellore Citizens' Welfare Forum* v. *Union of India*[27], The Court explained that the concept of "Precautionary Principle" in the context of the municipal law obliged the State to "anticipate, prevent and attack the causes of environmental degradation" and where there are threats of serious and irreversible damage, "lack of scientific

[21] *Vellore Citizen Welfare Forum* v. *Union of India*, AIR 1996 SC 2715.
[22] P.L. Stein, 'Are Decision-makers too Cautious with the Precautionary Principal?', *Environment and Planning Law Journal*, Volume 17, 2000, p. 3.
[23] *R* v. *Secretary of State for Trade and Industry Ex parte Duddridge and Others* (Queens Bench Division, 4 October, 1994 (unreported)).
[24] The *Danish Bees Case*, Judgement of 3.12.1998 in case no. 67/97.
[25] The *Danube Dam Case*, *Hungary v. Slovakia* (1998) 37 ILM 162, 204, 212.
[26] (2001) 2 SCC 62.
[27] (1996) 5 SCC 647.

certainty should not be used as a reason for postponing measures to prevent environmental degradation", the "onus of proof" always being "on the actor or the developer/industrialist to show that his action is environmentally benign".

Polluter-pays principle

The Polluter-Pays Principle (PPP), also known as Extended Polluter Responsibility (EPR), is a principle in international environmental law where the polluting parties are made liable to pay for the damages they cause to the natural environment. The objective of this principle is to shift the responsibility of dealing with waste from governments to the entities producing it. As the polluters receive no subsidies to help in this process, over time much of that cost is passed along to consumers in the price of the goods involved.

Under the same principle the World Wildlife Fund for Nature demanded that industrialized countries should compensate the developing countries which were struck by climate-related disasters, the way they compensate their own countrymen. Developing countries account for one-third of energy-related carbon dioxide emissions but bear the brunt of pollution and climate change consequences. The PPP is normally implemented through two different policy approaches:

Command-and-control approach

This approach focuses on preventing environmental problems by specifying how a company should manage a pollution-generating process. The approach lays down detailed regulations and an ongoing inspection program follows. In the United States, the Resource Conservation and Recovery Act (RCRA) is a prime example of this kind of regulation.

The alternative to "command and control" regulation is "performance oriented" regulation which specifies the environmental performance goals. This tends to be much more difficult to enforce because it requires an intimate understanding of the process and alternatives to the process.

Market-based approach

Manufacturers pollute the environment because it is available to them without cost. A market-based approach would charge a valid price to the producer for using the environment, rather than the zero prices which firms have been accustomed to. Under this method the Government can establish a discharge fee or tax which every polluter has to pay.

However, calculating the cost of pollution damages is extremely difficult. Therefore, choosing the correct tax level is fraught with difficulty. It is therefore felt that a quantity-based approach is much easier. At the international level the Kyoto Protocol, which requires the offending parties to bear the cost of reducing their greenhouse gas emissions, is an example of application of the PPP.

In *Indian Council for Enviro-Legal Action* v. *Union of India*[28], Supreme Court found "Polluter Pays Principle" to be a sound rule, since it was "simple, practical and suited to the conditions obtaining in this country". It was 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 rule is premised upon the very nature of the activity carried on".

In *Vellore Citizens' Welfare Forum* v. *Union of India*[29], the Supreme Court referred to the Brundtland Report and other international documents in addition to Articles 21, 47, 48-A and 51-A (g) of the Constitution of India besides the legislative mandate "to protect and improve the environment" as found in enactments like the Water (Prevention and Control of Pollution) Act, 1974 (the Water Act), the Air (Prevention and Control of Pollution) Act, 1981 (the Air Act) and the Environment (Protection) Act, 1986 (the Environment Act) and held that the "Precautionary Principle" and "Polluter Pays Principle" form "part of the law of the land" and are the essential features of "Sustainable Development". The Court explained that the concept of "Precautionary Principle" in the context of the municipal law obliged the State to "anticipate, prevent and attack the causes of environmental degradation" and 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" always being "on the actor or the developer/industrialist to show that his action is environmentally benign". The "Polluter Pays Principle" was interpreted to mean 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". Remediation of the damaged environment was held to be part of the process of "Sustainable Development" and as such the polluter was found liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

[28] *Supra* 29.
[29] *Supra* 36.

CONCLUSION

The issue of sustainable development is a matter of serious concern for both he developed and developing countries including India. However, there is a marked difference in the character of the issues involved in two differing situations. Therefore, the conservation of natural resources, prevention of pollution and the restoration of the degraded environment cannot be effected universally by one and the same measures. Broadly speaking, two factors influence the attainment of sustainable development (i) industrialisation and (ii) excessive population. India is not an industrialized country hence the major cause for achieving sustainable development could not be industrialization.

The concept of sustainable development, though does not find express mention in environment statutes of India, but it can be read in various provisions of the Environment (Protection) Act; Water (Prevention and Control of Pollution) Act; Air (Prevention and Control of Pollution Act) and other environment related laws. The Indian Judiciary, particularly the Supreme Court of India in various judgments[30] has accepted the principle of sustainable development as part of law of the land. However in all these judgments Indian Judiciary has applied 'sustainable development' as balancing concept between ecology and development *i.e.* industrial development.

The nation is looking forward to the pro-active Indian Judiciary to help state secure constitutional guarantee of socio-economic justice to the people of India by evoking the principles of sustainable development.

[30] *Supra*note 17.