

DEVELOPING JURISPRUDENCE OF PRINCIPLES OF ENVIRONMENTAL PROTECTION AND ENVIRONMENTAL RIGHTS

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I. INTRODUCTION

The legal response to the imperative need of environmental protection has given rise to recognition of some “diffuse rights”¹ symbolizing socio-economic interests of a community which are known as environmental rights. This has been possible due to democratization of the legal system through infusing justice-orientation concerns into the legal process and improving accountability of the state to its citizens². Essentially, the expansive interpretation of rights compatible with people’s welfare, societal needs and interests is the byproduct of a legal sensitivity contributing to the evolution of modern jurisprudential trends. These trends, which form part of a wide spectrum of protection mechanism and community orientation of rights, promote, maintain and sustain rule of law. For, rule of law essentially means creating and maintaining conditions for protection of human dignity and development of one’s personality³. It is not enough that the government submits to the law, but it must also create conditions where people can develop capacities to exercise their rights properly and meaningfully⁴. Accordingly, protection of environment, which alone can ensure life consistent with dignity and development of potential, becomes an integral component of rule of law. Meaningful realisation of right is the touchstone upon which existence of right is legally sanctified. Environmental rights are the byproduct of this jurisprudential trend involving expansive interpretation

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¹ M. Cappelletti and B. Garth, (eds.), *ACCESS TO JUSTICE* (1979) at 445. Environmental rights have also been characterized as “third generation” and collective rights. See, John Lee, *Right to a Healthy Environment*, 25 *COLUMBIA JOURNAL OF ENVIRONMENTAL LAW*, 2000 at 293-94.

² Werner Menski, *Introduction: The Democratisation of Justice in India* in Gurjeet Singh, *THE LAW OF CONSUMER PROTECTION IN INDIA*, 1996 at xxxi.

³ I.P. Massey, *ADMINISTRATIVE LAW*, 2001 at 30.

⁴ *Id.* at 32.

of fundamental rights (in the traditional sense) which manifest in universalisation, democratization, human rights and community orientation.

Facets of constitutional governance, obligation and protection in India include environmental protection as adumbrated in Articles 21, 47, 48 A and 51 (g), and together they comprehend right to hygienic environment protection; it also casts an obligation on the state as well as individuals to maintain and protect environment, both man-made as well as natural⁵. Clean and wholesome environment is necessary for healthy living; hence, clean and wholesome environment is an essential ingredient of right to life⁶. The universality of right to life and the inextricable linkage of environment with it together make it the most basic human right⁷. Environment as a natural resource is meant for all, and should be used in equal measure by all; and should, therefore, be maintained preserved and protected as 'clean and wholesome' for the use of all⁸. Environment provides sustenance and bulwark to the entire life-support system on this earth, including the mankind. Hence, this integral and symbiotic relationship must be maintained as an immediate and long-term investment.

Massive deforestation, over-exploitation of natural resources, increasing pressures on energy resources and growing population have stimulated debate on the nature and quality of development and its impact on the environment as the latter has limited capacity. The concern for

⁵ *Virender Gaur v. State of Haryana*, (1995) 2 SCC 577.

⁶ The post-*Maneka* period witnessed an era of constitutional activism resulting into expanded interpretation of fundamental rights in consonance with the social milieu and desiderata. As a result of highly creative interpretations, right to healthy environment like so many other rights, has been included in the right to life guaranteed under Article 21 of the Constitution. *R. L. & E. Kendra v. State of U. P.*, AIR 1985 SC 652; *T. Damodar Rao v. Municipal Corpn; Hyderabad*, AIR 1987 A.P. 171; *Kinkri Devi v. State of H. P.*, AIR 1988 H.P. 4; *L. K. Koolwal v. State of Rajasthan*, AIR 1988 Raj. 2; *M.C. Mehta v. Union of India*, AIR 1988 SC 1037; *F. K. Hussain v. Union of India*, AIR 1990 Ker. 321; *Subhash Kumar v. State of Bihar*, JT 1991 (1) SC 77; *Virender Gaur v. State of Haryana*, (1995) 2 SCC 577 are only a few significant illustrations of this trend.

⁷ For a critical study of human rights perspective in environmental issues, see, Dominic McGoldrick, *Sustainable Development and Human Rights: An Integrated Conception*, 45 (4) ICLQ, 1996, 796 at 811.

⁸ 'Doctrine of Public Trust', which will be discussed later. This means that natural resources are the property of nation, and should be used by the state as a trustee for the benefit of all. *Infra* note 59.

enhanced quality of life and the resultant increased focus on industrial development caused a paradigm shift in environment-development symbiosis which provided an impetus and momentum to the growing activities of United Nations and its agencies, namely, IUCN, UNEP, WWF, etc in regard to progressive evolution of norms regulating over-exploitation of natural resources. The Stockholm Declaration, which was adopted by the UN General Assembly⁹, emphasized on the human dimensions of development in that while economic development is necessary for improving the quality of life of all peoples, environment must be safeguarded and improved for all people and posterity also. This harmonious link between environment and development carried on from Stockholm to Rio via the Brundtland Report and was moulded into an overarching principle of *Sustainable Development*, which essentially focussed on environmental base of development integrating physical, social and economic aspects of both¹⁰. Actually, the entire development of norms pertaining to resources-conservation commenced with the theory of renewable resource management in the early twentieth century and was later conceptualized as a fully integrated approach to conservation strategy¹¹. This development led to the growth of jurisprudential principles and concepts of environmental law. Socio-economic questions of livelihood, intergenerational equity, consumptive patterns of living and ecological stability can be traced to this development.

II. BALANCING OF PRIORITIES : SOCIO-ECONOMIC NEEDS VERSUS ECOLOGICAL IMPERATIVES

Environment provides a broad spectrum for determining state's sensitivity towards people and their most basic problems. In that sense environment symbolizes "a metaphor for the foundations of a just political and legal order"¹² and "the struggle to protect the environment is a

⁹ U. N. General Assembly Res. 2994, December 1972.

¹⁰ Ben Boer, *Implementing Sustainability*, 14 DELHI LAW REVIEW, 1992, 1 at 9; See also, Ismail Serageldin, *Making Development Sustainable* in 30(4) FINANCE AND DEVELOPMENT, (IMF and the World Bank, 1993) at 7. Serageldin attaches economic, social and ecological aspects to sustainable development.

¹¹ William. E. Rees, *Understanding Sustainable Development* in Bernd Hamm and Pandurang K. Muttagi, (eds.), SUSTAINABLE DEVELOPMENT AND THE FUTURE OF CITIES, 1998, 19 at 20.

¹² Upendra Baxi, *Are Eco-Activists Eco-friends or Eco-enemies*, THE TIMES OF INDIA, November 18, 1993.

struggle to enhance democracy and the rule of law”¹³. Environment protection is not an end in itself; it has got an anthropocentric objective and value. Both as an entity to meet socio-economic needs, and as a value to maintain ecological stability, environment and environmental protection offer new challenges in a developing society, which represent a classic dilemma of removing poverty and promoting socio-economic justice, on the one hand, and maintaining long-term sustainability of environment and ecology on the other. The options are not limited to either and or of the two. There is no alternative to economic development, for non-development itself can be a curse and lead to abysmal poverty, the perpetuation of which will be antithetical to constitutional democracy and a negation of constitutional obligations. The need is to bridge the polarity between economic growth model and social justice and equity model of development. However, how to maintain balance between the competing claims of environmental protection and development may not provide Talisman-type solution. The criteria of larger benefit to the society have been accepted by courts as valid criteria to decide the preferred option¹⁴.

Economic growth is *sine qua non* of any development model because this enables the community equitable opportunity to fulfill its basic needs. But, as the economic model of growth has to be tempered with constitutional goal of socio-economic justice and ideals of an egalitarian society, any development capable of meeting the needs of present and future generations must be governed by the regulatory norm of conservation of natural resources. Achieving harmony between the two can be the only way to attain meaningful development. India presents a situation of classic dilemma in this regard. The governing norm, as proclaimed by Agenda-21, should be integration of environmental imperatives with developmental aspirations, which, in terms of natural resources, implies that country’s demand for its sustenance should not exceed its carrying capacity.

Thus, whereas, industrialization and technological advancement necessary for economic development is imperative for a developing country like India, the process of modernization is destroying nature in that it

¹³ *Ibid.*

¹⁴ *People United for Better Living in Calcutta – Public v. State of W.B.*, AIR 1993 Cal. 215 cited with approval by Apex Court in *Goa Foundation, Goa v. Diksha Holdings Pvt. Ltd.* (2001) 2 SCC 97; Also see *Indian Council for Enviro-Legal Action v. Union of India.* (1996) 5 SCC 281.

fosters search for cheap biomass-based raw material and cheap opportunities for waste disposal. Modernisation is also steadily transforming nature. Since commodification of nature gains priority in the planning process because of predominantly economic considerations, in physical terms, the tendency is to reduce the diversity in nature and transform it into a nature that is full of high yielding mono-cultures. The thrust on maximum profit and production overlooks long-term sustainability. Pressures of population on land for competing uses, such as agriculture, irrigation and power projects, industry, roads, etc., are contributory causes for the shrinking forest cover.

Such devastations are taking place in the forests, agricultural land and produce, grazing land, etc., due to construction of dams, mining activities, deforestation, urban expansion, etc. Reduction in biomass due to enormous increase in biomass-based industry also raises the spectre of scarcity, unemployment and inequity. For example, a planned hydroelectric dam for power production and irrigation may inundate and destroy too much forest cover, which in turn would add to the global carbon dioxide load by removing millions of trees and plants. Abandonment of such a project may become imperative to prevent greenhouse effect, preserve forests and thus avoid displacement of human settlements too.

Notwithstanding the above, there is no alternative to industrial development. What is needed is that national development proceeds along rational sustainable lines for environmental protection is the very basis of development. We have to ensure that development projects and programmes do not lead to depletions in our natural resources, which imply that industrial development and environmental concerns have to be harmonised by carrying out environmental impact assessment of development projects and programmes. The balancing process has to prioritize between competing claims of poverty alleviation, need for development, equity, both intra and inter-generational, conservation of biodiversity and rights of local tribal communities. Sustainable development becomes the norm and new paradigm of future developmental process.

One is tempted to quote here from some authoritative writings. Krishna Iyer J., writes:

If nature and human nature must be crippled for mass production, as against production by masses, if industrial chemistry and

agricultural pesticides are possible only by grave risk to common life we, in widest commonality, wish to live, not die as martyrs for the drunken cause of dazzling prosperity limited to a micro-minority¹⁵.

According to Paul Harrison:

The final principle is respect for nature. Growth that does not respect the natural world, limits itself. Resources are exhausted, ecosystems collapse, species disappear and our own physical and mental health and even our survival are threatened¹⁶.

The excerpts quoted above bring into sharp focus the conflict between “development and conservation” as was demonstrated in *Rural Litigation and Entitlement Kendra, Dehradun v. State of U.P.*¹⁷, and serve to “emphasize the need for reconciling the two in the larger interest of the country”. This case is significant from the point of judicial balancing of environmental and ecological integrity against industrial demands on forest resources.

In *Kinkri Devi v. State of H.P.*¹⁸, the Himachal Pradesh High Court, while emphasizing the need to strike a proper balance between industrial development and its adverse impact on the ecology, ordered review of all licenses granted for mining operations. The Court delineating the contours of Articles 48A and 51(g) of the Constitution proclaimed that industrial growth and exploitation of natural resources must proceed according to the norms mandated by the Constitution which is to preserve and improve the environment. The Court observed:

(T) here is both a constitutional pointer to the State and constitutional duty of the citizens not only to protect but also to improve the environment and to preserve and safeguard the forests, the flora and fauna, the rivers and lakes and all the other water resources of the

¹⁵ V. R. Krishna Iyer, A CONSTITUTIONAL MISCELLANY, 1986 at 233.

¹⁶ Paul Harrison, THIRD WORLD TOMORROW, 1991 at 345.

¹⁷ The Supreme Court issued numerous opinions and orders in this case, of which the principal orders are March 12, 1985, AIR 1985 SC 652; May 13, 1985, AIR 1985 SC 1259; September 30, 1985, 1985 (2) SCALE 906; December 18, 1986, AIR 1987 SC 359; October 19, 1987, AIR 1987 SC 2426; August 30, 1988, AIR 1988 SC 2187; December 16, 1988, JT 1988 (4) SC 710; and May 4, 1990, JT 1990 (2) SC 391.

¹⁸ AIR 1988 H.P. 4.

country. The neglect or failure to aide by the pointer or to perform the duty is nothing short of a betrayal of the fundamental law which the State and, indeed, every Indian, high or low, is bound to uphold and maintain¹⁹.

It is thus clear that industrial development and preservation of ecological balance have to be harmonised. More explicit enunciation of this harmonious balance can be found in *Indian Council for Enviro-Legal Action v. Union of India*²⁰, wherein the Apex Court observed thus:

Both development and environment must go hand in hand, in other words, there should not be development at the cost of environment and vice-versa, but there should be development while taking due care and ensuring the protection of environment²¹.

Thus, in order to achieve sustainable development, environmental protection must constitute an integral, an inalienable part of development process and cannot be considered in isolation of it.

Developmental planning cannot proceed on purely economic and technocratic conceptions; it has to proceed in conformity with sustainable use, intra and intergenerational equity and without causing adverse impact on ecological balance. The human dimensions of development and developmental planning must get precedence consistent with national and global priorities. The large scale multi-purpose river valley projects intended to meet the regional needs for irrigation, hydroelectric power and flood control are the cornerstones of India's economic progress. These projects are, however, creating serious human and environmental problems. The backwaters of a large dam generally displace many thousands of people, often tribals and forest-dwellers who are the poorest and most powerless people of the society. These dams are often ecologically unsound and economically unjustified if environmental costs are fully accounted for. These costs include the loss of forests and wildlife, waterlogging, siltation and loss of arable land. The Silent Valley Project, the Tehri Dam Project, the Narmada Valley Project, the Konkan Railway Project, the East Coast Road Project, the Cogentrix Power Project, and so on, have raised major environmental issues like loss of forest cover, wildlife habitats, soil

¹⁹ *Id.* at 8.

²⁰ JT 1996 (4) SC 263.

degradation, displacement of local population, and above all, ecological imbalance of catastrophic potential. It has been observed that most of these giant developmental projects are environmentally unsound because environmental considerations are not seriously taken into account at the planning stage. Environmental control lacks developmental perspective, i.e., there is little effort to modify the development process itself in a manner that will bring it into greater harmony with the needs of the people and the need to maintain ecological balance, while increasing the productivity of our land, water and forest resources²². In this regard, Lester Brown, while dwelling on the need to stabilize relationship between economic progress and ecological balance, talks of economy as “part of the earth’s ecosystem” and that it “can sustain progress only if it is restructured so that it is compatible with it²³” (earth’s ecosystem).

In order that development does not become unregulated and lead to massive environmental degradation, the Central Government has made Environmental Impact Assessment (EIA)²⁴ compulsory in certain specified

²¹ *Id.* at 277. See also, *Vellore Citizens Welfare Forum v. Union of India*, JT 1996 (7) SC 375; *A. P. Pollution Control Board v. M. V. Nayudu*, (2001) 2 SCC 62; *Live Oak Resort (P) Ltd. v. Panchgani Hill Station Municipal Council*, (2001) 8 SCC 329.

²² The National Conservation Strategy adopted in 1992 has stressed the need for integration and internalisation of environmental considerations in the policies and programmes of development in various sectors like industry, transportation, mining, tourism, etc. There is growing awareness among these sectors to ensure that their policies and programmes do not come in the way of sustainable management of forests. Some of these sectors have initiated action to complement and facilitate forest development initiatives: Ministry of Environment and Forests, Govt. of India, *INDIA’S INITIATIVES IN IMPLEMENTATION OF THE FOREST PRINCIPLES*, New Delhi (1994) at 47; Ministry of Environment and Forests, Govt. of India, *NATIONAL CONSERVATION STRATEGY AND POLICY STATEMENT ON ENVIRONMENT AND DEVELOPMENT*, New Delhi (1992) at 19 and 25.

²³ Lester R. Brown, *ECO-ECONOMY : BUILDING AN ECONOMY FOR THE EARTH*, 2002 at 21.

²⁴ EIA is an exercise to anticipate, measure and weigh the socio-economic and bio-physical changes that may result from a proposed project. It assists decision-makers in considering the proposed projects’ environmental costs and benefits. Where the benefits sufficiently outweigh the costs, the project can be viewed as environmentally justified. The need for EIA in India was recognised by the Planning Commission in the Seventh Five Year Plan. Initially it was introduced for River Valley Projects in 1978-79. Prior to the Statutory Notification in 1994, an administrative requirement for minimal environmental impact reports based on departmental guidelines was applied to certain developmental projects.

activities²⁵. This will ensure that environmental concerns of massive infrastructural projects will be taken into consideration at the project planning stage itself. By adopting a multi-disciplinary approach, intricate web of relationships between different parts of an ecosystem will be examined to establish the viability of mega development projects. The mandatory application of EIA will render the legal control more institutionalized, and thus more meaningful and resilient. However, the EIA notification still lacks guidelines incorporating biodiversity indices and measures. Against decision of the Central Government in this regard appeals can be filed before National Environment Appellate Authority, which has been set up under a Central Act of 1997²⁶. Thus, the procedure for environmental clearance has been made very fair and transparent, keeping in view the principles of accountability and public interest involved. The Act allows any person aggrieved by environmental clearance of a project to prefer an appeal before the Authority against such clearance²⁷. The conferment of power to challenge environmental clearance has been broad-based and is consistent with the approach to involve people in matters like damage to environment, which concerns them most.

III. HUMAN RIGHTS AND ENVIRONMENTAL RIGHTS

For the sake of understanding the nature and scope of Environmental Rights, it is necessary to understand the difference between human rights and environmental rights. To facilitate easy understanding, it may be said that human rights are individual rights in the sense that beneficiaries are individuals, and are concerned with the protection of equality, liberty and freedom or redressal of injustices and deprivations, and likewise environmental rights are collective rights. As such, human rights generally relate to access to equality, freedom, liberty and other attributes of 'being human'. Therefore, whenever there are deprivation of these specific rights, such instances are treated as violations or infractions of human rights. Environmental rights, on the other hand, relate to community entitlement or

²⁵ The Environmental Impact Assessment Notification, 1994.

²⁶ The National Environment Appellate Authority Act, 1997. Sections 11 and 12 delineates powers of and procedure to be followed by the Authority against grant of environmental clearance with respect to restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards.

²⁷ *Id.*, section 11 (1) and (2).

access to entitlement of community resources which are vital to survival of mankind. Essentially, therefore, it is more integral and germane to right to life. In the same manner, environmental rights are concerned with resources conservation and long-term sustainability. The considerations of socio-economic justice are more predominant here than in the case of human rights where 'individualistic' facets of socio-economic justice are relevant.

Another way to understand the distinction would be that human rights are more integral to 'liberty' component of 'right to life', environmental rights are more intimate to 'life' component of 'right to life'. It was thus observed by the Apex Court in *A. P. State Pollution Control Board v. M.V. Nayudu*²⁸ :

Environmental concerns... are, in our view, of equal importance as human rights. 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.

Of course, environmental rights are also part of human rights in the sense that they fulfill basic needs for the survival of human beings²⁹, and healthy environment enables people to enjoy a quality life which is the essence of the guarantee under Article 21 of the Constitution³⁰

More often than not, however, the inter linkages between the two are so pre-eminent that it becomes a futile exercise to look for any real distinction. Thus, water (a facet of environment) signifies an important basic need for the survival of human beings and is thus "part of the right to life and human rights as enshrined in Article 21 of the Constitution of India³¹. It was, therefore, observed by the Apex Court in *A. P. Pollution Control Board v. M.V. Nayudu*³² that "right to healthy environment and to sustainable development are fundamental human rights implicit in the right to life"³³. In fact access to right to healthy environment promotes

²⁸ AIR 1999 SC 812.

²⁹ *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664.

³⁰ *Hinch Lal Tiwari v. Kamla Devi*, (2001) 6 SCC 496.

³¹ *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664 at 767.

³² (2001) 2 SCC 62.

³³ *Id.* at 70.

access to human right of a quality and meaningful life. Right to healthy environment graduates to human right. In *Lopez ostra v. Spain*³⁴ the European Court at Strasburg has held that the result of environmental degradation might affect an individual's well being so as to deprive him of enjoyment of private and family life. Dwelling on this interrelationship, John Lee gives a wider perspective. While characterizing environmental rights as collective and "third generation" rights, he explains that environmental violation becomes significant enough to become a human rights violation when, as a result of a specific course of state action, a degraded environment occurs with either serious health consequences for a specific group of people or a disruption of a people's way to life³⁵. Progressive decline in the quality of environment due to pressures of population and developmental activities may become a human rights problem in due course of time. The emphasis on variability appears to be in respect of degree, magnitude and universality or commonality of the impact of environmental violation. The relationship between the two can be measured on a running scale in terms of the degree, magnitude and gravity of the impact. Hence, environmental rights, say, right to healthy environment, must be protected to ensure protection of human rights. Environmental protection leads to promotion of human rights; a system or regime of human rights would include environmental protection. Both are not mutually exclusive, but intimately related to each other, inter-dependent and inter-connected. Both the recognition of right to healthy environment and a corollary duty to defend the environment have found place in the constitutions of about sixty nations since 1990³⁶. In *Fundepublico v. Mayor of Bugalagraude* the Constitutional Court of Columbia held in favour of the right to healthy environment as a fundamental human right and treated the right as part of customary international law³⁷.

The above overlaps apart, there is a view that human-rights approach to environmental issues is very restrictive. Firstly, environmental law pursues objectives similar to but different from human rights law. Secondly, human rights-based approach is excessively individualistic and anthropocentric. It

³⁴ 303 – Eur ct HR (ser A) 1994.

³⁵ John Lee, *Right to a Healthy Environment*, 25 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW, 2000 at 283.

³⁶ *Id.* at 318-19.

³⁷ *Ibid.*

does not properly reflect the intrinsic value of environment. In fact, it is better and much more effective to concentrate on duties, standards and enforcement rather than a rights-based perspective. Thirdly, in many respects “environmental rights” would be indeterminable – mostly in terms of qualitative level of environment guaranteed, whether safe, decent, healthy or satisfactory; and corollary obligations. Fourthly, it is not clear as to whether “human right to environment” is procedural, substantive, or both³⁸.

As such, it is more appropriate to conceptualise environmental rights as composite and collective rights in the nature of “diffuse rights” than as human rights. Issues of environmental protection can be tackled much more effectively from the perspective of duties, standards and enforcement rather than in the frame of rights-perspective. For example, the state undoubtedly has a duty to protect and preserve the environment, but so have all citizens³⁹. Only this approach can promote better environmental protection rather than a right-centric approach.

IV. PRINCIPLES OF ENVIRONMENTAL PROTECTION AND ENVIRONMENTAL RIGHTS

Generally speaking, environmental protection encompasses laying down and maintenance of standards regarding preservation, improvement and conservation of environment for meeting physical (biological) and socio-economic needs, duty of the state and individuals thereto, and enforcement thereof. The need for such imperative action has arisen in the wake of awareness generated by international endeavour to tackle problems like environmental degradation, pollution, deforestation, climate change, etc. In India, particularly, the legal response to these problems has received fillip and also gained momentum due to the constitutional mega-vision witnessed in the post-*Maneka* period in the form of expansive interpretation of various fundamental rights and integrated approach towards its relationship with Directive Principles of State Policy. This trend also got further bolstered by PIL movement, which reflects a shift from *laissez-faire* system engendered and sustained by Anglo-saxon system of jurisprudence, in which civic

³⁸ *Supra* note 7.

³⁹ Arts. 48-A and 51-A (g), Constitution of India.

⁴⁰ I. P. Massey, *ADMINISTRATIVE LAW* (1990) at 259. This theme has been described differently in the later editions.

litigation reflected essentially an individualistic philosophy of the right of man to a collectivistic system in which social, collective and diffuse rights of groups, classes and communities are recognized⁴⁰. PIL is an effective strategy for environmental protection for people's aspirations and assertiveness spurred by judicial activism have moulded the environmental policy into a dynamic and vibrant-system of jurisprudence of socio-economic interests transformed into legal rights. The concern for environmental protection essentially arise from the realisation that potential to exploit the environment for meeting socio-economic interests of present and future generations being limited, a regulatory framework of preservation and conservation principles are necessary. Environmental degradation in any form can cause multifarious health and other socio-economic problems. Both social and economic development is inextricably linked to the capacity to derive benefits from uses of natural resources. Hence, sustained economic and social development depends on how the renewable resources are managed. The World Commission on Environment and Development has rightly highlighted that only growth can eliminate poverty and create the capacity to solve environmental problems⁴¹. Echoing the intergenerational perspective of environmental protection, Venkataramiah, J, expressed the view in *M. C. Mehta v. Union of India (Kanpur Tanneries Case)*⁴² that human environment must be defended for 'the present and future generation(s)'. The efforts of the international community from Stockholm (1972) to Rio (1992) as well as U.N. General Assembly have contributed to the evolution of many environmental rights, namely, right to development, right to environment and right to sustainable development⁴³, etc. Drawing heavily from these developments in the global arena, the intensive judicial approach have reinforced the emergence of these collective and diffuse rights. Some of these rights and principles have been discussed here.

⁴¹ G. H. Brundtland, *OUR COMMON FUTURE* (Report of the World Commission on Environment and Development, 1987) at 89.

⁴² AIR 1988 SC 1037 at 1039.

⁴³ *Declaration on the Right to Development* annexed to UNGA Res. A/Res/41/128, dated December 4, 1986; see also, Resolution entitled *The Right to Development*, A/Res/41/133 dated December 4, 1986. See, Nagendra Singh, *Right to Environment and Sustainable Development as a Principle of International Law*, JOURNAL OF INDIAN LAW INSTITUTE, 1987 at 289 wherein the author argues that right to environment and sustainable development have emerged as general principles of International Law. See also, *supra* note 35-37.

A. Sustainable Development

The concept of sustainable development or the sustainability principle denotes a balance between the physical (ecological) aspects of environment and its socio-economic dimensions. The concept of sustainable development was contained in the Stockholm Declaration of 1972, entered the environmental debate more intensely in the 1970's, was popularized by the Brundtland Report and further developed in the document *Caring for the Earth*⁴⁴. The competing human rights to healthy environment and sustainable development must be balanced as there is a need to take into the right to a healthy environment along with the right to sustainable development and balance them⁴⁵. Infact the concept of sustainable development itself signifies balance between environment and development, and presupposes that the two are not antithetical. Both can co-exist with interplay of mutually supportive parameters which will determine the development of public policy in India.

The principle has been variously defined to emphasize specific aspects of a relevant approach. However, broadly there are two core principles—firstly, the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given, and, secondly, the idea of limitations imposed on the environment's ability to meet present and future needs⁴⁶. Philippe Sands describes it as a composite principle comprising components of the principle of sustainable use, the principle of integration between environment and development, the principle of intergenerational equity and the principle of equitable use or intragenerational equity⁴⁷. Essentially, the concept of sustainable development integrate the socio-economic objectives of development with environmental orientation.

The judicial approach in India has always been to reconcile the conflict between environmental protection and development as witnessed

⁴⁴ *Caring for the Earth: A Strategy for Sustainable Living*, IUCN, UNEP and WWF, Gland 1991 was developed by the Second World Conservation Project. See also, *supra* notes 8, 11 and 14.

⁴⁵ *A. P. Pollution Control Board v. M. V Nayudu*, (2001) 2 SCC 62 at 69.

⁴⁶ Philippe Sands, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW*, 1995 at 198.

⁴⁷ *Id.* at 199 and 208.

⁴⁸ *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, AIR 1985 SC 652.

in the famous *Doon Valley*⁴⁸ case. It is now accepted by Courts that there is a need to have sustainable development⁴⁹. In the *Indian Council for Enviro-Legal Action*⁵⁰, the Supreme Court observed thus:

While economic development should not be allowed to take place at the cost of ecology or by causing widespread environment destruction and violation; at the same time, the necessity to preserve ecology and environment should not hamper economic and other developments. Both development and environment must go in hand, in other words, there should not be development at the cost of environment and vice-versa, but there should be development while taking due care and ensuring the protection of environment.... In other words, in order to prevent ecological imbalance and degradation that developmental activity is sought to be regulated.

In *Vellore Citizens Welfare Forum*⁵¹ case, the Court held that the “traditional concept that development and ecology are opposed to each other, is no longer acceptable⁵². Sustainable development as a balancing concept between ecology and development is the answer”⁵³. In *State of Himachal Pradesh v. Ganesh Wood Products*⁵⁴, the court while stressing on the significance of sustainable development and intergenerational equity⁵⁵, further emphasized that the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations⁵⁶. The Apex Court has further, amplified in *Vellore Citizens Case* that intergenerational equity, use and conservation of natural resources, environmental protection, precautionary principle, eradication of poverty, etc., are the salient principles of sustainable

⁴⁹ *Indian Council for Enviro-Legal Action v. Union of India*, JT 1996 (4) SC 263 at 277; See also, *supra* notes 14 and 45.

⁵⁰ *Ibid.*

⁵¹ *Vellore Citizens Welfare Forum v. Union of India*, JT 1996 (7) SC 375. See also, *Consumer Education and Research Society v. Union of India*, (2000) 2 SCC 599.

⁵² *Id. (Vellore)* at 384.

⁵³ *Id.* at 385.

⁵⁴ JT 1995 (6) SC 485.

⁵⁵ *Id.* at 505.

⁵⁶ *Id.* at 510.

development⁵⁷. The precautionary principle has been held to mean:

- (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.
- (iii) The "onus of proof" is on the actor or the developer/industrialist to show that his action is environmentally benign.⁵⁸

B. Doctrine of Public Trust

The doctrine of public trust⁵⁹ signifies, though indirectly, environmental protection in that it permits use of natural resources only for valid, legitimate and public purposes. It is a limiting doctrine, and, as such, it sanctifies rational prudent and sustainable uses of nature and its wealth. Although developed in a different context, the doctrine has been adopted in the lexicon of our environmental law to emphasize protection of natural resources, like forests, rivers, lakes, parks, etc. In *M. C. Mehta v. Kamal Nath*⁶⁰, the Apex Court held that the State as a trustee of all natural resources is under a legal duty to protect them and that the resources are meant for public use and cannot be converted into private ownership. The doctrine was applied in the context of protection of forests and

⁵⁷ *Supra* note 51 (*Vellore*) at 385. See also *S. Jagannath v. Union of India*, JT 1997 (1) SC 160 at 212-14; and *M. C. Mehta v. Kamal Nath*, JT 1996 (11) SC 467.

⁵⁸ *Ibid.*

⁵⁹ The Public Trust Doctrine is based on the legal principles of Roman and English Law, and has been developed in modern law by Prof Joseph L. Sax in an article *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV., 1970 at 473. The doctrine imposes three types of restrictions on the government about the property subject to trust: first, such property must not only be used for a public purpose, but must be held available for such a use; second, the property may not be sold; and third, the property must be maintained for particular types of uses. The author ends his exposition of the doctrine by saying that it can be used by courts in helping to promote rational management of our natural resources.

⁶⁰ JT 1996 (11) SC 467 at 485 and 491. This is an epochmaking case in the sense that the doctrine has been used here for the first time, and has also been expanded to include all ecosystems operating in our natural resources.

preservation of natural resources. In *M. I. Builders Pvt. Ltd. v. Radhey Shyam Sahu*⁶¹, the Apex Court observed that this doctrine has grown from Article 21 of the Constitution, and applied the doctrine for ordering demolition of building structures on a public park land. Likewise, it can be said that constitutional obligation under Article 48-A of the Constitution to protect and improve the environment bears close resemblance with the doctrine.

The entry of this doctrine in environmental jurisprudence is of seminal importance and creative potential. It can be used both to stress a legal obligation to protect environment and to also check, restrict and prevent illegal and unlawful uses. The community orientation of environmental principles and rights can be best promoted through this doctrine, for unless sustainable uses of environment are promoted as 'an environmental ethics', environmental protection and conservation will remain a far cry.

C. Jurisprudence of Environmental Rights

The post-*Maneka* period witnessed a trend signifying creative interpretation of fundamental rights which manifested itself in flowering of new and positive rights as part of right to life under Article 21. Since environmental protection is essential for healthy living, environmental dimension to right to life was judicially recognized. A survey of cases⁶² from the *Dehradun Quarrying* case clearly brings out the integral relationship between environmental protection and right to life as "Article 21 of the Constitution embraces protection and preservation of nature's gifts without [which] life cannot be enjoyed",⁶³ and that environmental degradation violates the fundamental right to life⁶⁴.

This trend has received sustenance from court's reliance on directive principles as complementary to fundamental rights⁶⁵, and also a recognition of obligation to protect and improve the environment on the part of the State and citizen⁶⁶. The evolution of "precautionary principle"⁶⁷ which

⁶¹ AIR 1999 SC 2468.

⁶² *Supra* notes 5 and 6.

⁶³ *T. Damodar Rao, id.* at 181.

⁶⁴ *Kinkri Devi, supra* note 6 at 9.

⁶⁵ *M. C. Mehta v. Union of India*, AIR 1985 SC 1037 at 1038.

⁶⁶ Consequent to the Stockholm Conference, Articles 48 A and 51 A (g) were added to the Constitution of India by 42nd Amendment Act of 1976. See also section 3 of Environment (Protection) Act 1986.

⁶⁷ *Supra* note 57 (*Vellore*).

enjoins on the state and the statutory authorities duty to anticipate, prevent and attack causes of environmental degradation, only strengthens this obligation. It is noteworthy that the Apex Court has succinctly summed up the evolution of indigenous environmental jurisprudence in *Virender Gaur v. State of Haryana*⁶⁸:

Article 48-A in Part IV (Directive Principles) brought by the Constitution 42nd Amendment Act, 1976, enjoins that “the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country”. Article 47 further imposes the duty on the State to improve public health as its primary duty. Article 51-A (g) imposes “a fundamental duty” on every citizen of India to “protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures”. The word ‘environment’ is of broad spectrum which brings within its ambit “hygienic atmosphere and ecological balance”. It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment. The State, in particular has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. Environmental protection, therefore, has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore, there is a constitutional imperative on

⁶⁸ *Supra* note 5 at 580-81.

the State Government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment.

It follows from the above that maintenance of ecological balance is an essential ingredient of right to healthy environment as the latter encompasses the former as well. An important aspect of maintenance of ecological balance is protection and improvement of natural environment including forests, lakes, rivers, wildlife and other living creatures. The obligation to protect and improve the natural environment comprehends affirmative action as well. Hence, protection and improvement of natural environment is an investment in future and promotes maintenance of ecological balance and stability. Tapping of natural environment for socio-economic development is desirable, but it must be done "with requisite attention and care so that ecology and environment may not be affected in a serious way"⁶⁹. Because, uncontrolled and unregulated exploitation of natural environment causing massive despoliation of flora and fauna affects ecological balance, and might, therefore, be disastrous to human life in the long run. Preservation of flora and fauna, forests and wildlife is constitutionally sanctified⁷⁰, and the court cannot allow any further shrinkage in the national forest cover⁷¹. Thus, socio-economic development, which necessarily warrants exploitation of natural environment, must run in harmony with ecological balance and long-term sustainability. In other words, in order to prevent ecological imbalance and degradation developmental activity needs to be regulated⁷², and has to proceed on in accordance with parameters of sustainable development⁷³.

Environmental protection and conservation, which emphasize controlled, restricted or regulated use of natural resources, posits a conflict with the livelihood patterns of local people, whose survival depends on various

⁶⁹ *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, AIR 1987 SC 359 at 363.

⁷⁰ *Animal and Environment Legal Defence Fund v. Union of India*, JT 1997 (3) SC 298 at 302.

⁷¹ *Id.* at 306.

⁷² *Supra* note 50.

⁷³ *Supra* note 57.

uses of forest produce and wildlife. The survival needs need to be protected, of course in close harmony with imperatives of environmental protection. A delicate balance has to be struck between the two. While in the *Doon Valley*⁷⁴ case the Apex court though acknowledging the hardships to the people engaged in the limestone quarrying business, accorded precedence to environment and ecological balance, in *Animal and Environment Legal Defence Fund*⁷⁵ case the court observed that “the right of the tribals formerly living in the area to keep body and soul together must also receive proper consideration⁷⁶”. This observation of the court suggests that compulsions of developmental priorities are bound to pose serious questions of balancing of competing rights necessitating a substantive debate about the nature and extent of socio-economic development. The questions of human rights⁷⁷, magnitude of environmental impact, larger benefit to the society⁷⁸ and equity considerations will most likely determine the future course of development. The Narmada Valley Movement (Narmada Bachao Andolan) has already highlighted many such dedicate people-centric issues. The movement is not dying down despite the fact that the Apex Court has already decided the issue of height of the dam, and rehabilitation of the oustees. Essentially, these trends are thrust areas of people’s empowerment having potential dimensions of law representing a shift from legal centralism to legal pluralism, and institutionalization of informal justice⁷⁹.

D Future Trends

As mentioned in the preceding sub-section, the imperatives of environmental protection will generate issues concerning socio-economic policies which will also be required to be delicately balanced. Environment and environmental protection will thus symbolize a paradigm to determine just governance and promote social justice⁸⁰.

⁷⁴ *Supra* note 69.

⁷⁵ *Supra* note 35.

⁷⁶ *Id.* at 305.

⁷⁷ *Supra* note 35.

⁷⁸ *Supra* note 14.

⁷⁹ Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 JOURNAL OF LEGAL PLURALISM, 1981 at 17.

⁸⁰ *Supra* notes 12 and 13.

India is a developing economy which undoubtedly needs a vast industrial infrastructure. This is the only way to alleviate poverty and usher in social justice. Whether the environmental considerations will outweigh these concerns? Whether the concern for future survival of mankind will halt or foreclose our developmental options at the risk of perpetuating appalling poverty? These questions will need to be dovetailed in overall environmental and developmental policy, and might defy judicial resolution. In a purely legal and constitutional perspective, a conflict may arise between various fundamental rights - Articles 14 (right to equality) and 21 (right to clean and healthy environment); Articles 21 and Article 39 (commitment for social justice); or within Article 21 itself (right to livelihood versus right to clean and healthy environment). How to balance conflicts and dilemmas may be of vital legal and social concern in future.

One approach may be to provide environmental orientation to various related provisions of the Constitution - Articles 21, 48A, 51A(g) and also Article 14 and Article 39 - by constructing an "environmental dharma" out of it, and also to establish its ascendancy. This may be a welcome trend and will continue in the future as well.

However, resolution of such conflicts in future may not offer such simple solutions, i.e., balancing of conflict of interests may not be that easy. The prioritisation of competing claims and values at the social and political levels, the complex nature of the problems itself, and the proclivity of politicians to resort to populist measures in the hope of short-term gains often ignoring long-term interests will render solutions intractably difficult. Environmental law may then acquire another dimension of a study of state power versus people's rights. To cite another dimension of futuristic concern - in the case of workers losing their employment on account of government ordering closure of their employment operations, should the government weigh the costs to these workers in lost jobs against the benefits to society? The glaring contradictions in regard to the enforcement of CNG as a safe fuel for the public transport system of Delhi constitute another instance defying cut and dry solution from a purely legal perspective. Thus, the vital question may be asked as to whether a developing country can afford ecological imbalance, and to what extent? No doubt, the global consensus reached regarding conservation of biodiversity, the overarching principle of state's sovereignty over their natural resources, right of access to genetic resources and equitable sharing of benefits, the

concepts of sustainable use and inter-generational equity contained in the Convention on Biological Diversity, will provide some clues - obviously pointing towards the pre-dominant concern for survival of humanity. But, these broad principles and considerations have to be operationalised in national laws for effective implementation.

The globalisation approach may no doubt solve some problems, but may also create a few. It may facilitate the exchange and development of technologies for conserving and using biodiversity sustainably. Developing countries need to define technological needs, seek and manage information on technology, adapt existing technologies and develop their own. The international community must assist in these respects. There is a vital area of future concern in regard to technology transfer and intellectual property rights (IPRs).

Environmental degradation, including threat thereto, acquires myriad and subtle forms. As such, its detection, determination of regulatory standards, monitoring and enforcement must be based on esoteric and in-built mechanism rather than external control mechanism. The extent of governmental control must be minimal, limited only to broad policy framework; the operationalisation and implementation thereof must involve people to become effective. That is why new regulatory and enforcement techniques like citizen's suit, right to information, public participation, public comment and public hearing have acquired great significance. Since the complexities of environmental problems have been growing, and control mechanisms lagging behind, the judiciary took upon itself the task of controlling such problems on case to case basis by devising new methods. Thus, in the *Rural Litigation and Entitlement Kendra* case⁸¹ the Apex Court appointed several expert committees and through periodic directions based on the committees' reports, supervised the regeneration of the Dehradun Valley, which had been devastated by limestone quarrying.

There is, however, a pressing need to institutionalise such control measures for the sake of uniform application, minimising disputes and expeditious solutions. To some extent provisions for citizens suit and public participation have been made statutory. There is a further requirement to make it standardised, i.e., it must be in line with a consistent policy. The

⁸¹ *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, AIR 1985 SC 1259.

Environmental Impact Assessment (EIA) should be carried out by expert organisations rather than private agencies. The adherence to strict norms by EIA mechanism will ensure that environmental concerns of a massive development project will be taken into consideration at the project planning stage itself. By adopting a multi-disciplinary approach, intricate web of relationships between different parts of an ecosystem will be examined to establish the viability of large development projects. Necessary safeguards will be provided either in the project-plan itself or else the project will be scrapped. Our country is committed to industrial development, which alone can revitalise the economy and herald all-round national progress. The mandatory application of environmental impact assessment (EIA) will reduce the conflict between development and environmental viability, and will obviate the type of problems witnessed in the context of Silent Valley Project, Narmada Valley Project, Tehri Dam Project, and so on. This alone will lead to sustainable development which essentially amounts to interlocking of ecosystems with social and economic systems.

A word about PIL before discussion on this topic comes to an end. The growth of environmental law has largely been influenced by PIL, a manifestation of judicial activism, which has also been characterized as 'strategic arm of law'. This has worked both as a propelling force and an innovative mechanism for environmental protection. The inadequacies of the adversarial system of litigation would have posed serious handicaps in environmental protection. The collaborative and participative mechanism of PIL has greatly advanced protection, preservation and improvement of environment, a community resource, and has thus helped in safeguarding most common and universal public interest. It will continue doing so in future as well.

V. CONCLUSION

The development of principles of environmental protection and environmental rights has been the most remarkable phenomenon of legal development, both in India and other countries. The efforts of the international community, primarily through the United Nations and its agencies and the specialised programmes, have always provided initial spur and momentum and offered opportunities for directing and channelising the sporadic movements into organized endeavours. As a result, the conclusion of various multilateral conventions signifying humanity's response to tackle

problems of environmental degradation has been epochmaking and pathbreaking. At the national level, judicial activism has made great strides, traversed miles and miles in protecting the natural environment. Its singular contribution has been to accord judicial recognition to new principles and doctrines, and facilitating creation of new environmental rights. Establishing linkage between environment and development and evolving an integrated concept of sustainable development as part of the national law has been a yeoman contribution of the judiciary. Undoubtedly, the principle of sustainable development will be an anchor principle of legal policy for the future.