



BEYOND LEGISLATION: THE ROLE OF JUDICIAL ACTIVISM IN SECURING THE RIGHT TO ENVIRONMENT

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Abstract

Environmental health is fundamental to the security of life. Therefore, a lack of strong environmental law can mean wilful erosion of the future. Articles 48-A and 51-A of the Indian Constitution mandate the State and every citizen to protect the environment. To enforce the same, the Union Parliament has ad nauseam enacted multiple laws such as the Environment Protection Act, Wildlife Protection Act and the Forest Conservation Act. These legislations provide for a framework of protection, but fall short of addressing the growing environmental challenges and have evidenced insufficient to address new concerns such as climate change, weak penalties, policy conflicts and economic pressure. In such scenarios, the role of the judiciary becomes pivotal to ensure the protection of natural resources and secure the future. Situations of judicial interruption have arisen time and again that shaped Indian environmental jurisprudence. The Supreme Court, in various landmark cases, has recognised that the right to a clean environment is a part of the right to life under Article 21 of the Constitution.

Keywords: Environment, judicial activism, climate change, Article 21, natural resources

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I Introduction

INDIA HAS deep historical roots in environmental protection. Beginning from the Indus Valley Civilization to Vedas and other ancient scriptures have repeatedly illustrated the need to preserve the environment. An interesting piece of advice to humans can be found in the Yajurveda³, which says, 'Do not destroy anything of the sky and do not pollute the sky. Do not destroy anything of Antariksha. This showcases India's deep sense of belonging with the environment; however, ironically, India is surveyed to be among the top polluters of the world. A recent amendment to the Forest Conservation Act in 2023 has opened doors to environmental erosion by allowing state governments to clear forests which were deemed illegal prior to the amendment.¹ The death of thousands raised a tragic alarm to set up an articulate environmental legislation in 1984. Yet until now, India has struggled to attain economic and environmental balance in order to strike off its "developing" status. Amidst legislative vacuum and political and economic pressure, the Judiciary remains the only ray of hope for India to address environmental degradation caused by Governments, Companies as well and private individuals.

Judicial Activism, though a contentious topic, has positively affected the Environmental law jurisprudence in India. The judiciary has taken steps to fill the gaps in the existing laws to prevent environmental degradation. Prior to the Supreme Court's ruling in the Union Carbide case, India dealt with environmental laws through tort law and public nuisance under

¹ Vaishali Rawat, "Greenlight for destruction: Controversial Forest Act opens door to unfettered deforestation", *The Hindu*, Jan. 10, 2024.

criminal law.² The development of the concept of strict liability, absolute liability and polluter pays principle have mitigated many environmental challenges caused by corporations and the government. However, the judiciary's powers as a judicial activist attract the question of unconstitutionality by various scholars. The authors also delve into the economic versus environmental stance adopted by the judiciary through analysis of judicial precedents and also highlight the role of Judicial activism through the lens of courts other than the Apex Court i.e. the High Court and lower judiciary.

In this paper, the authors seek to critically examine the following contemporary challenges to the environment and whether judicial activism can be a solution to them. Furthermore, the authors also analyse the possible effects of judicial activism in India

II Existing Legal Framework for Environmental Protection

Like in other jurisdictions, environmental law in India finds its origins in the concepts of 'nuisance' under the law of torts and 'public nuisance' under criminal law.³ Ever since the dawn of independence, the union parliament has enacted multiple legislations to protect the environment, despite its implementation being riddled with obstacles such as corruption at various levels, overpopulation and lack of awareness.⁴

² Ayesha Dias, "Judicial Activism in India in the Development and Enforcement of Environmental Law" 6 *Journal of Environmental Law* 245 (1994).

³ *Ibid.*

⁴ Shyam Sundar, "Challenges in Implementing Environmental Laws and Policies in India" 18 *Current World Environment* 1255 (2024).

Constitutional provisions safeguarding environmental protection

In the Indian context, the Constitution recognises the need for environmental protection. The 42nd Amendment Act saw the insertion of Article 48-A to the Indian Constitution.⁵ This provision places responsibility on the State to ensure that proactive measures are undertaken to protect wildlife and improve the environment. This points to the importance of preserving forests, wildlife and rivers, which are vital to India's natural heritage. However, the obligation to protect the environment rests not only on the state. Article 51-A levies a duty on every citizen to protect and improve the environment, including forests, lakes, rivers and wildlife.⁶ Thus, the constitution ensures that both the state and the citizens have a duty to protect the environment.

Statutory provisions

India's environmental protection legislation saw its inception with the enactment of the Water (Prevention and Control of Pollution) Act, 1974, which aims to prohibit the discharge of pollutants into water bodies beyond the specified standard and imposes penalties for not complying with such standards.⁷ Another legislation that has been at the forefront of ensuring environmental protection standards exist is the Environment (Protection) Act, 1986.⁸ This is an umbrella legislation conferring upon the central government a wide range of powers to take all necessary measures to protect and improve the quality of the environment by empowering it to implement standards for emissions and discharges and regulate the establishment of industries. The Act also empowers the

⁵ The Constitution of India, art. 48-A.

⁶ *Ibid*, art. 51-A(g).

⁷ Water (Prevention and Control of Pollution) Act, 1974 (Act 6 of 1974), s. 24.

⁸ Environment (Protection) Act, 1986 (Act 29 of 1986).

management of hazardous wastes and the protection of the general health and welfare of the public.

Other laws that seek to promote environmentalism include the Wildlife (Protection) Act, 1972,⁹ the Forest (Conservation) Act, 1980¹⁰ and the Air (Prevention and Control of Pollution) Act, 1981¹¹ amongst many others.

III Ineffective Implementation and Need for Judicial Activism

The implementation of environmental law in India parallels problems that are encountered even in the international arena. The foremost challenge in implementing environmental law internationally and domestically is that the problem is not identified unless it is too late. Even then, little heed is paid to the problems surrounding the environment. For instance, despite several UNEP and IPCC reports on climate change, the level of risk identified and the resource allocation towards the same has proven to be disproportionate.¹² This has been evidenced even locally with the temperatures in dealing crossing 50 degrees Celsius for the first time in recorded history.¹³ This has come as a consequence of a lack of care towards the environment and climate change, even though decades of warnings have warned that such a day will arise.

Lack of implementation of environmental law: general causes

⁹ Wildlife (Protection) Act, 1972 (Act 53 of 1972).

¹⁰ Forest (Conservation) Act, 1980 (Act 69 of 1980).

¹¹ The Air (Prevention and Control of Pollution) Act, 1981 (Act 14 of 1981).

¹² Wake up call for humanity: Q&A with climate expert on IPCC report, UNEP, *available at*: <https://www.unep.org/news-and-stories/story/wake-call-humanity-qa-climate-expert-ipcc-report> (last visited on Sept. 25, 2024).

¹³ Pallava Bagla, "Is It Really 52.9 Degrees in Delhi? Weather Chief Says Investigating Readings" *NDTV*, May. 29, 2024.

Several governmental agencies in India govern the implementation of environmental legislation, including the Ministry of Environment, Forest and Climate Change, the Central Pollution Control Board and multiple environmental tribunals, including the National Green Tribunal. However, it is often observed that multiple stakeholders increase the resources required for implementation and lead to incoordination between various governmental agencies.¹⁴ There is also ineffectiveness in the designated ministries in ensuring that the persons responsible for causing environmental degradation are punished.

The industrialists of today are not maintaining and adhering to standards that they signed up to stick to. Empirical data indicates that industrialists are not getting punished for violating environmental law.¹⁵ This is most notably observed in cases where industries involved in dyeing and tanning often release toxins into river bodies that millions depend on for survival. A notable example of this can be observed in the case of the river Yamuna, which does not even make up the tip of the iceberg.¹⁶

Shortcomings of the Regulatory Systems in India

The Regulatory Systems in India to ensure adequate implementation of environmental law is two-tiered. The Central Pollution Control Board (CPCB) is at the central level, and the State Pollution Control Board (SPCB) is at the state level.

¹⁴ Manda, M. I., & Ben Dhaou S, "Responding to the challenges and opportunities in the 4th Industrial revolution in developing countries" *In Proceedings of the 12th international conference on theory and practice of electronic governance* 248 (2019).

¹⁵ Health Systems & Reform, 5(3), 224-235, available at: <https://www.tandfonline.com/doi/pdf/10.1080/23288604.2019.1625251> (last visited on August 15, 2023).

¹⁶ Rajnee Naithani and I.P Pande, "Comparative analysis of the trends in river water quality parameters: A Case study of the Yamuna River" 4(12) *IJSRET* 1220 (2015).

The CPCB, as the nodal agency, has a mountainous task, among many others, of promoting the cleanliness of surface and groundwater, controlling air pollution, coordinating the implementation of laws and policies with the state government and settling any disputes that might arise. However, there is a lack of environmental expertise in the stakeholders involved in the running of these boards. This dilemma knocked on the doors of the Supreme Court and in the case of *A.P. Pollution Control Board v. M.V. Naidu*.¹⁷ In this case, the SPCB denied the granting of a certificate to an industry for its operation for reasons including that the industry operates in the red category of polluting industries notified by the union ministry as well as that the by-products have the potential to cause pollution. The Supreme Court highlighted the various problems encountered in the implementation of law in India as follows:

- Lack of expertise in environmental law in appellate authorities and courts, weakening the judicial review process;
- Lack of a precautionary approach but rather a punishing approach to environmental law in India;
- Scientific uncertainty in relation to the consequences of Environmental;
- Need for expert inputs and opinions in environmental adjudicatory bodies, including tribunals and courts;
- Need for environmental legislation to evolve and keep up with industrial and changing global standards.

¹⁷ A.I.R. 1999 S.C. 812.

Thus, it is imperative that the judiciary ought to interfere to ensure that these laws even though might be outdated, are implemented in spirit.

IV EASING OF LOCUS STANDI STANDARD IN ENVIRONMENTAL LAW MATTERS:

Locus Standi is normally understood to mean one's legal right to appear in a court of law. Earlier, the position in civil litigation was that only persons who have suffered injuries could sue for damages.¹⁸ This resulted in affected persons seeking relief under sections 91¹⁹ and 133 of the CPC, 1908, as necessary.²⁰ Consequently, relief was not sought on behalf of the public but on an individual basis. However, this approach of the judiciary changed gradually for the first time in the *Ratlam Municipality Case*,²¹ where the trial court found that the municipality was responsible for the nuisance caused to the public and dismissed the non-availability of funds argument of the municipality.

Evolution of Public Interest Litigation in India

In the first three decades of Indian independence, only the sufferer of harm could issue proceedings in a court, including the higher judiciary. However, a shift in this approach was observed in 1982 in *PUDR v. UOI*.²² This case recognised that any third party could directly petition, including through just a letter and seek the judiciary's intervention in a matter that involved the violation of fundamental rights violation. This shift in the Indian judiciary highlighted that it had jurisdiction to advance

¹⁸ Law of Damages in India, NDA available at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Law_of_Damages_in_India.pdf (last visited on August 15, 2024).

¹⁹ Code of Civil Procedure, 1908 (Act 5 of 1908), s. 91.

²⁰ *Ibid*, s. 133.

²¹ *Municipal Council, Ratlam v. Shri Vardhichand*, 1980 AIR 1622.

²² *People's Union for Democratic Rights v. Union of India*, 1982 (2) S.C.C. 253.

the rights of the disadvantaged and poor, and such a claim need not be brought about by the disadvantaged themselves. This saw the emergence of Public Interest Litigation (PIL) in India. PILs can be used to enforce the rights of a group of people who are directly harmed by an act or omission but are unable to approach the court due to a particular disadvantage, even though there may not be any direct specific injury to any individual or member of the public. The Supreme Court of India allowed PILs to be filed in an effort to restore its reputation, which had been damaged by some decisions made during the Emergency that resulted in flagrant violations of human rights. This undermined the public's confidence in the judiciary's independence and the foundation of the doctrine of separation of powers.

PILs in Environmental Law Matters

This opened the floodgates for petitions to be filed, most prominently in the forms of mandamus under Articles 32²³ and 226 of the Constitution²⁴ before the Supreme Court and High Court of the States, respectively. In Environmental law matters, the first notable case was the *Rural Litigation and Entitlement Kendra case*,²⁵ where the Apex Court ordered the closure of limestone quarries in Mussoorie, where mining activities created environmental hazards and caused ecological imbalance. This position gained momentum and global recognition in the *M. C Mehta* series of environment related PIL cases.

²³ The Constitution of India, art. 32.

²⁴ *Ibid.*, art. 226.

²⁵ *Rural Litigation and Entitlement Kendra v. State of U.P.*, 1985 AIR 652.

One of the most notable cases in the M.C. Mehta series of cases is the *Oleum gas leak case*,²⁶ where locus standi was granted to the petitioner. This case also marked a shift from the 'common law' principle of *strict liability* and laid down the concept of *absolute liability* in India. Under the strict liability doctrine, the defendants could escape from liability pleading defences such as natural use of land, act of God, unforeseen consequence, et cetera. However, under the absolute liability doctrine any industry involved in inherently hazardous or dangerous activities could not plead any of the defences available under the *strict liability* doctrine. This enriched the citizen's lives to live in a healthy and pollution free environment.

The Supreme Court made it quite evident in the *Ganga River case*²⁷ and the *Taj Mahal Trapezium case*²⁸ that companies that did not adhere to environmental norms need to be shut down right away. Mehta's argument that he lacked riparian ownership (living by the river) and therefore lacked standing to file a motion to prevent pollution in the Ganges River was refuted by the court, which decided that it was appropriate to permit anyone to file a petition on behalf of the entire community.

V Role of Judicial Activism in the Development of India's Environmental Law

In the beginning of the constitutionalism of India, the supreme court played a positivist outlook towards law. This view of the Supreme Court changed with the landmark judgment of AK Gopalan where courts were

²⁶ *M.C. Mehta v. Union of India*, AIR 1987 SC 965.

²⁷ *M.C. Mehta v. Union of India*, AIR 1988 4 SCC 471.

²⁸ *M.C. Mehta v. Union of India*, AIR 1997 SC 734.

given a power of judicial review.²⁹ The Supreme Court refused to stay a silent spectator of the legislative actions. Article 13 of the constitution of India gave the higher courts to declare a legislation invalid if the courts find it unconstitutional.³⁰ In other words, the constitutional courts have the power to interpret the constitutionality of a legislation. Therefore, judiciary, being the watchdog of the nation is responsible for ensuring a check of legislative and executive inaction. Judicial activism has framed most of Environmental law principles due to the obvious lack of legislations, social awareness and education in the field. In the case of *Bombay Dyeing v. Bombay Environmental Action Group and others*,³¹ the Supreme Court upheld creative interpretation of law to secure environmental protection. Thus, through judicial activism, the judiciary fills the legislative and enforcement vacuums by democratisation. The Indian judiciary has significantly evolved the existing environmental principles and has addressed various forms of pollution.

Air Pollution

Air Pollution is regulated in India by the Air (Prevention and Control of Pollution) Act, 1981. However, judicial activism has led to establish various guidelines which aid proper implementation of the said act. In the case of *MC Mehta v. Union of India (2001)*³², a Public Interest Litigation was filed for Delhi's excessive vehicular transmissions creating health hazards to the environment as well as the people led to the Supreme Court take steps to act beyond existing legislations. The Supreme Court held that right to clean environment is the fundamental

²⁹ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 34.

³⁰ The Constitution of India, art. 13 cl. 1.

³¹ *Bombay Dyeing v. Bombay Environmental Action Group*, 2006 3 SCC 434.

³² (2001) 3 SCC 756.

right of people under article 21 of the constitution³³ which override the provisions of the Motor Vehicles Act³⁴ as well as other statutory provisions. Furthermore, it also laid down guidelines to be followed by vehicles in order to comply with the environment protection act, 1986³⁵ and made the rules binding on public as well as private bus operators. 2 years later, another case, *Orrisa state prevention and control of pollution board v. orient paper mills and another*³⁶ dealing with air pollution was decided by Justice Brijesh Kumar in the Supreme Court of India where it held that the state government has the power to declare any area as the air pollution control area by means of notification in the official gazette. In another case of 2010, *State Pollution Control Board Orissa v. Jagannath Stone Crusher and others*, an appeal from the Orissa High Court lay before the supreme court that prescribed guidelines for operation of the stone crushers in the state. Hereby, the judiciary has steps towards creative norm making to fill the gaps in the aforementioned Environmental legislations.

The judiciary has also led to the evolution of environmental protection in tort law by establishing the principle of absolute liability and the polluter pays principle. In the tragic case of *Union Carbide Corporation v. Union of India*, 1984³⁷, the Supreme Court laid down the principle of absolute liability and polluter pays principle wherein it won a victory over mega corporation's development projects. Through *MC Mehta v. Union of India* (1986), the Supreme Court imposed strict liability on industries causing deaths and injuries working with hazardous substances.³⁸ Along with the

³³ *Supra* note 30, art. 21.

³⁴ The Motor Vehicles (Amendment) Act, 2019 (Act 32 of 2019).

³⁵ *Supra* note 8.

³⁶ (2003) 10 SCC 421.

³⁷ (1989) 2 SCC 540.

³⁸ *Supra* note 26.

rule of strict liability, right to clean environment was recognised as a fundamental right under article 21 of the Constitution. Justice PN Bhagwati words "*it is through creative interpretation and bold innovation that the human rights jurisprudence has evolved in our country to a remarkable extent and this forward march of the human rights movement cannot be halted by unfounded apprehensions of status quoists*"³⁹ denote the importance of judicial activism in the environmental law. Therefore, through judicial activism, environmental law evolved into a matter of much stricter penalties.

Water Pollution

In the Indian Jurisprudence, water pollution is controlled by the Water (Prevention and Control of Pollution) Act, 1974⁴⁰ which is on its way towards amendment in 2024. However, time and again it has been seen that the enforcement gaps, substandard monitoring and inefficient role of the pollution control boards have given rise to environmental water pollution rather than mitigating it. Through the 2024 amendment to the recent act, the legislature is trying to decriminalise certain environmental violations and releases the violators with payment of fines.⁴¹ This act of the legislature showcases how the "principle of pay to pollute" is being advanced. In such instances, it becomes essential for the judiciary to step up and take necessary steps into safeguarding environmental law by examining the constitutionality of the amendments introduced by the legislature.

³⁹ *Supra* note 38.

⁴⁰ *Supra* note 7.

⁴¹ Jacob Koshy, "What are the changes in the New Water Act?" *The Hindu*, Feb. 24, 2024.

Grave pollution of the Ganga was recorded by discharge of harmful substances and chemicals into the river through tanneries causing health hazards in the case of *MC Mehta v. Union of India*, (1992).⁴² A 2015 case study on Yamuna showcases the deteriorating quality of the river through industrial and domestic pollution.⁴³ Similarly, unchecked discharge of industrial pollutants have reported to have affecting groundwater and making them unsuitable of drinking in Haryana's Kundli area.⁴⁴ All these instances showcase the inability of the Governmental bodies to provide clean water to the citizens which remains their fundamental right. Therefore, the role of the judiciary becomes necessary in taking steps to upgrade environmental law in India.

Industrialisation

Rapid industrialization has taken a toll on the environment and are regarded as one of the major factors for its degradation. Urbanization and Mega developmental projects are often contrary to environmental health. As rightly stated by Justice O Chinnappa Reddy, "they would rather sell the city than dwell on its future".⁴⁵ Therefore, unchecked development without environmental protection might spark irreversible climate change. The legislations guiding urbanisation give the Government immense power that makes room for abuse of the same and

⁴² (1992) 2 SCC 637.

⁴³ *Supra* note 16.

⁴⁴ Sat Singh, Industrial water pollution threatens residents in Haryana's Kundli area, Mongabay, available at: <https://india.mongabay.com/2022/06/industrial-water-pollution-threatens-residents-in-haryanas-kundli-area/> (last visited on October 10, 2024).

⁴⁵ *B.K. Srinivasan. v. State of Karnataka*, (1987) 1 SCC 658.

arbitrariness. Recently, Bangalore's water shortage raised eyebrows caused by unchecked industrialization in the city.⁴⁶

Indian courts have been historically supporting the plea for clean environment by against rapid urbanisation. In the case of *Indian council for enviro-legal action v. Union of India and others.*, uncontrolled urbanisation without pollution control systems led to disappearance of the fertile agricultural lands, clean waters and took away the protection from cyclonic damages.⁴⁷ In this case, the Supreme Court issued guidelines for urban planning and industrialization. In another case of *Bombay Environmental Action Group and others v. State of Maharashtra*, a number of petitioners stood before the Bombay High Court against the unchecked town planning of Mumbai, drastically deteriorating its environment. The Uttarakhand High Court has prevented unchecked road widening through deforestation.⁴⁸

Time and again people have shown their frustration towards government's mega developmental projects threatening the life of the surroundings. Millions of people joined hands against the Omkareshwar dam project on the river Narmada attracting the world's attention towards strict environmental laws against industrialization. Hereby, the people of various states such as Maharashtra and Gujarat participated in the protest against displacement and degradation of the river.⁴⁹ This judgement showcased a harmonious construction of judicial activism in environmental law and development infrastructure.

⁴⁶ *Bengaluru facing shortage of 500 MLD water daily, admits Chief Minister Siddaramaiah*, The Hindu, Mar. 18, 2024 available at: <https://www.thehindu.com/news/cities/bangalore/bengaluru-facing-shortage-of-500-mld-water-daily-admits-chief-minister-siddaramaiah/article67964439.ece> (last visited on Sept. 29, 2024).

⁴⁷ (1996) 5 SCC 281.

⁴⁸ *Ashish Kumar Garg v. State of Uttarakhand*, (2022) SCC Online Utt 1074.

⁴⁹ *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 3751.

The judiciary's step towards securing the right to environment can secure better implementation of the laws, prevent procedural backlogs and prevent arbitrary abuse of power. However, there still remains a failure of state cooperation, environmental and technical skills lag the growth of Industry without harming the environment. Environmental law in India, mostly statute driven, fails to address various inadequacies of the same as most of the action by judiciary relies on the effects of an action rather than a precautionary approach.

VI Accessing the Effectiveness of Judicial Activism in Environmental Law

With the evolution of a proactive judiciary, multiple principles from international law, such as the Stockholm⁵⁰ and Rio Declarations,⁵¹ have made it into Indian law. The Supreme Court has time and again interpreted principles of International environmental law and has found their place etched in Indian Environmental jurisprudence even though Indian legislation is silent on the same. The Constitution of India itself forms the basis for the Supreme Court's interpretation of international law.⁵² Some of the principles that have found their way into Indian jurisprudence are discussed in this section of the paper.

Precautionary Principle

Traditionally, international environmental law focused on remedying actual damage (reactive) rather than preventing identified hazards

⁵⁰ United Nations Conference on the Human Environment, United Nations Environment Programme, *Stockholm Declaration and Action Plan for Human Development*, UN Doc A/RES/2994(XXVII) (Jun. 16, 1972).

⁵¹ *Ibid.*

⁵² V.G Hedge, "International Law in the Courts of India" 19 *Asian Yearbook of International Law* 70 (2013).

(preventive).⁵³ This practice is evidenced by the approach adopted in international law from the very beginning, including in the *Trail Smelter Arbitration case*,⁵⁴ where the arbitral award favoured 'clear and convincing evidence' of environmental harm was required, instead of a proactive approach to a potential future harm. The realisation that this evidence-first approach caused a number of issues arose from the growing awareness of the fragile nature and vulnerability of ecosystems. It first disregarded the ecological complexity that exists by nature. As such, any forecast regarding the impact of human activity on them is inherently unclear, which makes it challenging, if not impossible, to present "clear and convincing evidence". Secondly, it failed to consider the temporal lag that occurs before several detrimental consequences manifest in the natural world. Precautionary thinking follows a more proactive logic. In general, the ecosystem will gain from any such scepticism.

Thus, this principle requires environmental policy to ban and restrict industries from engaging in practices that can have adverse consequences on the environment.

In India, the Supreme Court has given effect to the 'Precautionary Principle' in the *shrimp culture case*;⁵⁵ the SC was tasked with the task of deciding on the situations caused by the shrimp industry and issued directions consistent with the precautionary principle by prohibiting further action until it is proven that shrimping does not affect the fragile

⁵³ Jacqueline Peel, "The Precautionary Principle in Practice: Environmental Decision-Making and Scientific Uncertainty" 22 *Australian Journal of Environmental Education* 130 (2006).

⁵⁴ *Arbitral Trib.*, 3 U.N. Rep. Int'l Arb. Awards 1905 (1941).

⁵⁵ *S. Jagannath v Union of India*, AIR 1997 SC 811.

ecosystem. In *Narmada Bachao Andolan*,⁵⁶ the Apex Court held that the industry or the unit that is likely to cause pollution must necessarily bear the burden of proof that the ecological balance will be maintained in cases where there is uncertainty about the amount of damage or pollution that is likely to be caused due to a lack of data or material. This forms one instance where a principle of international environmental law has been etched into domestic law.

Polluter Pays Principle

The Polluter Pays principle is a widely recognised principle of International Environmental Law.⁵⁷ This principle has gained the limelight in the past decade with the adoption of the National Green Tribunal Act, 2010.⁵⁸ However, this principle had made its way into Indian Environmental jurisprudence long before. In the *M.C. Mehta Case*, which introduced the concept of absolute liability, the Supreme Court held that the damages to be paid would not be determined by a claim brought about by either party but rather through an examination undertaken by the Court itself.

With the establishment of the NGT, this principle has seen a plethora of cases where the Polluter Pays Principle has been strictly enforced. In the case of *Gurpreet Singh*,⁵⁹ the NGT directed the companies engaged in mining activities to pay a hefty fee for operating without the necessary Environmental Clearance and consent from the appropriate State Pollution Control Board. In *The Proprietor M/s. Varuna Bio Products v.*

⁵⁶ *Supra* note 49.

⁵⁷ P. Sands and J Peel, *Principles of International Environmental Law* 228 (Cambridge University Press, United Kingdom 2012).

⁵⁸ National Green Tribunal Act, 2010 (Act 19 of 2010), s. 20.

⁵⁹ *Gurpreet Singh Bagga v. Ministry of Environment and Forests*, 2016 SCC OnLine NGT 92.

The Chairman Tamil Nadu Pollution Control Board,⁶⁰ it was alleged that a chemical factory was functioning without the necessary permission. The NGT noted that the unit was running without the necessary consent, notwithstanding the fact that it was not discharging any effluents. Consequently, the NGT ordered the guilty industry to make a PPP payment of Rs. 25,000. It seems that merely breaking the law was enough to apply PPP, regardless of the harm done to people, their property, or the environment.⁶¹

The Polluter Pays principle is another instance where the judiciary has played a crucial role in shaping Indian Environmental policy and ensuring that it is one of the few instances where the legislature also has taken a step in the right direction to implement the same.

VII ECONOMIC VS. ENVIRONMENTAL PRIORITIES IN JUDICIAL DECISIONS

The judicial systems in democracies across the world often face cases where industrial growth and environmental protection conflict. The judicial organs play a crucial role in setting precedents that either prioritize ecological integrity or consider economic imperatives.⁶² The Indian Judiciary time and again has faced the dilemma of choosing either between economic or environment interests. This section analyses various judicial precedents from the Indian judiciary to see how the Apex court has ruled when tasked with prioritising either environmental or economic activities.

⁶⁰ *The Proprietor M/s. Varuna Bio Products v. The Chairman Tamil Nadu Pollution Control Board*, 2015 SCC OnLine NGT 138.

⁶¹ Harshita Singhal and Sujith Koonan, "Polluter Pays Principle in India: Assessing Conceptual Boundaries and Implementation Issues" 7(2) *RGNUL Student Research Review* 40 (2021).

⁶² Arindam Basu, "Adjudicating Sustainable Development: A theoretical insight" 6 *Environment Law and Practice* 29 (2018).

In the case of *Vellore Citizens' Welfare Forum*,⁶³ the petitioners filed a PIL against tanneries in Tamil Nadu, which were discharging untreated effluents into agricultural lands and water bodies. The economic importance of the tanneries as a source of livelihood for thousands clashed with the adverse environmental impacts on public health and water quality. The Supreme Court ruled in favour of the petitioners emphasizing on the Polluter Pays Principle and the Precautionary Principles. The Court ordered the polluting industries to install effluent treatment plants and directed the closure of non-compliant units. This case serves as a landmark for the strict enforcement of environmental laws against polluting industries and promoting environmental protection over economic gain. Further in *Indian Council for Enviro-Legal Action*,⁶⁴ industries in Rajasthan released toxic chemicals and industrial effluents that polluted nearby water sources, severely impacting the local ecosystem and the health of villagers. In this case, the Hon'ble Supreme Court ordered the industries responsible for the pollution to pay for environmental restoration and compensate affected villagers. Here, the Polluter Pays Principle was reinforced, requiring polluters to bear the financial costs of their actions. The Supreme Court in this case noted that economic activities contributing to GDP should not come at the expense of public health and environmental degradation, setting a critical benchmark for future decisions.

The above two precedents illustrate how the Supreme Court has underlined the importance of protecting the environment without letting economic growth causing permanent damage. However, the Apex court's decisions have come under scrutiny for hindering economic growth as

⁶³ *Vellore Citizens' Welfare Forum v. Union of India*, 1996 (5) SCC 647.

⁶⁴ *Indian Council for Enviro-Legal Action v. Union of India*, 1996 SCC (3) 212.

well as welfare of citizens in some cases. The best example of this is the case of *Narmada Bachao Andolan*,⁶⁵ which involved the construction of the Sardar Sarovar Dam project. The SC decided that the Sardar Sarovar Dam project should have a maximum reservoir height of 455 feet. The petition was filed in 1994, but a decision was not arrived at by the Court until 2000. There has been considerable criticism that the lengthy litigation delayed the completion of the Sardar Sarovar Dam, which, if operational earlier, could have provided a significant boost to regional economies. The delay postponed the realization of irrigation, drinking water supply, and hydroelectric power, affecting millions who could have benefitted from the project. The infrastructure of the dam was essential for economic growth in Gujarat, Madhya Pradesh, and Maharashtra. The delay affected not only industrial and agricultural growth in these areas but also postponed the broader economic benefits that large-scale infrastructure brings, including job creation and improved living standards. The authors recommend that the judiciary must bear in mind, the costs of litigation on development and welfare of the beneficiaries of such projects while deciding upon such cases over a prolonged time.

The delay in realizing the project benefits meant that India lagged in global competitiveness, as infrastructure improvements in agriculture, energy, and water resources could have positioned these regions as centres for economic growth and reduced dependency on rainfall.

VIII Conclusion

Judicial Activism has profoundly transformed the shape of environmental law in India. The judiciary has successfully recognized the

⁶⁵ *Supra* note 49.

inadequacies of the Government and rightfully mitigated various problems. The Supreme Court, by interpreting the right to a clean environment as a fundamental right, has raised immense awareness about climate change. However, enforcement of judicial orders still remains in the grey.

Judicial activism could be continuous if the High Courts as well as the lower courts take to a more vigilant role. Environmental concerns can be dealt with at every regional and local level by High Courts, so precedents set there eventually enforce stricter implementations across different states. Lower courts would ensure speedier adjudication of violations regarding the environment, which would discourage polluters and promote environmental accountability at the grassroots level. High Courts and the lower judiciary should leverage the benefits of relaxed *locus standi* and PILs to democratize environmental justice, empowering citizens to hold local governments and industries accountable. Additionally, integrating expert opinion on environmental science and policy in judicial processes would equip judges to handle the complex technicalities involved in environmental matters.

While it is commendable that the judiciary has achieved substantial progress in securing the right to a clean and pollution free environment as a fundamental right, it has been met with its share of criticism.

The authors also recommend that the judiciary while dealing with cases of environmental protection lack of focus on cost-benefit analysis. The authors suggest that India could have drawn on global examples of large dam projects such as the Three Gorges Dam in China over the Yangtze River where rapid infrastructure expansion contributed to poverty

alleviation, food security, and regional development without extensive delays.

While, the judiciary has always been criticised for indulging in judicial activism, and environmental related activism is no different. However, the authors support the stance taken by the judiciary. After all, the doctrine of separation of powers in India is known for its rigidity and flexibility. Where one organ of the government fails in securing its objective, it's imperative for the other organ to step in.