CHAPTER - 7

SUSTAINABLE DEVELOPMENT

Sustainable development is opposed to the concept that development and ecological conservation can not go together. Sustainable development shows the way in which the planning pertaining to development should be approached. "The concept of sustainable development signifies a policy approach or goal rather that a substantive prescription. Its principal merit is that it modifies the previously unqualified development concept".[1]

7.1. Evolution of the Concept :

Though the concept of sustainable use of the natural resources is an ancient one, the principle of sustainable development received impetus for the first time in modern developmental era through the stockholm Declaration during the United Nations Conference on Human Environment in 1972. The World Conservation Strategy prepared by the World Conservation Union (IUCN) in 1980, after receiving advice and assistance from the United Nations Environment Programme and World Wild Fund, gave further strength to the concept of sustainable development. The concept was very well explained and defined in the Report of the World Commission on Environment and Development; 'Our Common Future' in 1987. The Commission was chaired by the then Prime Minister of Norway, Ms. G.H. Brundtland and as such the report is popularly known as 'Brundtland Report'. Thereafter, in 1991 the World Conservation Union, United Nations Environment Programme and World Wide Fund for Nature, jointly came out with a document titled as "Caring for the Earth" which is a strategy for sustainable living and defines "sustainability" as a characteristic or state that can be maintained indefinitely whereas "development" is defined as the increasing capacity to meet human needs and improve the quality of human life. Sustainable development would therefore, imply improving the quality of human life while living within the carrying capacity of supporting ecosystems. The Earth Summit held in June 1992 is the hallmark for the concept of sustainable development, as the summit saw the largest gathering of world leaders deliberating and chalking out a

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1. G.Singh, *Environmental law : International and National Perspectives*, 210 (1995).

blueprint for the survival of the planet. Among the tangible achievements of the Rio Conference is the signing of conventions by 153 nations on biological diversity and on climate change. The Summit also approved by consensus three non-binding documents namely, a Statement on Forestry Principles, a declaration of Principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution. "During the two decades, from stockholm to Rio, "Sustainable Development 'has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystem".[2]

This is an accepted fact that "the exercise of the right to development involves exploitation of the environment and its limited natural resources and this gives rise to the concept of sustainable development because the environment has to be shared by the individuals of a nation with the entire human community in relation to human survival. Thus, the two rights, viz., rights to environment and to development, go together as inseparable adjuncts and both have to be exercised subject to proper regulatory control".[3] There is a direct relation between economics and the sustainable development this may be explained as follows -

"We can think of economic and ecological sustainability as overlapping circles. Where they overlap is found the terrain of sustainable development and the starting point of a national strategy.

Economic susceptibility can be defined as the way that humans must manage an economy to preserve its productiveness".[4]

The main features of the concept of sustainable development may be summarized as follows -

"(1) Every human being is part of the community of life, made of all living creatures.

(2) Every human being has fundamental and equal rights, including the right to

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2. *Vellore Citizens Welfare Forum v. Union of India,* AIR 1996 SC 2715.
3. N. Singh, "Right to Environment and Sustainable Development as a Principle of International Law", 29 *JILI* 289, 292 (1987).
4. Boer, "Social Ecology and Environmental Law", *Environmental Law and Planning Journal,* 28 (1984).

access to the resources needed for a decent standard of living.

(3) Each person and each society is entitled to respect of these rights and is responsible for the protection of these rights for all others.

(4) Every life form warrants respects independently of its worth to people

(5) Everyone should take responsibility for his or her impacts on nature.

(6) Everyone should aim to share fairly the benefits and costs of resource use.

(7) The protection of human rights and the rights of nature is a worldwide responsibility that transcends all cultural, ideological and geographical boundaries".[5]

7.2. Recognition of the Concept by the Apex Court :

The Supreme Court of India has recognised and accepted the concept of sustainable development as an important principle in maintaining the right balance between the environment and development. In *Vellore Citizens Welfare Forum v. Union of India*[6] the Court observed -

"Sustainable Development as defined by the Brundtland Report means development that meets the needs of the present without compromising the ability of the future generations to meet their own needs. We have no hesitation in holding that sustainable development as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalized by the international law jurists".[7]

7.3. Elements of Sustainable Development :

The Court has listed in *Vellore* Case some of the salient principles of sustainable development as culled out from Brundtland Report and other international documents, as under -

- Inter-Generational Equity.
- Use and Conservation of Natural Resources.
- Environmental Protection.
- The Precautionary Principle.
- Polluter Pays Principle.

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5. *Supra* note 1 at 211-212.
6. *Supra* note 2.
7. *Id.* at 2720.

- Obligation to Assist and Cooperate.
- Eradication of Poverty and Financial Assistance to the developing countries.

The Court however, expressed its opinion that out of aforesaid the 'Precautionary Principle' and the 'Polluter Pays Principle' were essential features of Sustainable Development. The Court referred Articles 21, 47, 48-A and 51-A(g) of the Constitution of India along with various statutory provisions of different enactments and held without hesitation that the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the country[8] and opined as follows -

"[O]nce these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost an accepted proposition of law that the rule of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of law. To support we may refer to Justice H.R. Khanna's opinion in *A.D.M. v. Shivakaut Shukla,*[9] Jolly George Varghese case[10] and Gramophone Co. case[11]".[12]

The aforesaid observation of the three Judges bench of the Supreme Court has been quoted by various judges of the Supreme Court in Subsequent judgments while deciding environmental issues.[13] None of the subsequent judgment has ever raised any doubt about the applicability of the principle of sustainable development in India and therefore, one may conclude that now it has been accepted as the law of the land.

7.3.1. Precautionary Principle :

The Precautionary Principle is one of the important principles under the concept

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8. *Id.* at 2721.
9. AIR 1976 SC 1207.
10. *Jolly George Varghese v. Bank of Cochin*, AIR 1980 SC 470.
11. *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey*, AIR 1984 SC 667.
12. *Supra* note 2 at 2722.
13. *M.C. Mehta v. Union of India*, AIR 1997 SC 734; *M.C. Mehta v. Union of India*, (1997) 3 SCC 715; *A.P. Pollution Control Board v. Prof. M.V. Nayudu*, AIR 1999 SC 812; *Consumer Education and Research Society v. Union of India*, (2000) 2 SCC 599; *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 3751; *Bittu Sehgal v. Union of India*, (2001) 9 SCC 181; *M.C. Mehta v. Union of India*, (2002) 4 SCC 356.

of sustainable development. Principle 15 of the Rio Declaration codified for the first time at the global level the precautionary approach. The Principle status as follows -

"In order to protect the environment, the Precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

Thus, the precautionary approach indicates that lack of scientific certainty is no reason to postpone action to avoid potentially serious or irreversible harm to the environment. At the core of the precautionary principle is the element of anticipation, reflecting a requirement of effective environmental measures based upon actions which take a long-term approach and which might anticipate changes on the basis of scientific knowledge.

Before the Stockholm Conference, 1972 the concept of 'assimilative capacity' was recognized at the international level. As per this concept the natural environment has capacity to absorb the ill effects of pollution, but beyond a certain limit the pollution may cause damage to the environment requiring efforts to repair it. Therefore, the role of environmental protection agencies will begin only when the upper limit of the pollution is crossed. Now it is very much clear to the world community that pollution cannot wait for effective measures to be postponed for investigation of its quality, concentration and boundaries. So there was a necessity to shift from the principle of 'assimilative capacity' to the 'precautionary principle'. The incorporation of the precautionary principle can be found in various international legal instruments. For example it is included in the Convention on Biological Diversity, 1992 and in the Convention on Climate Change, 1992 of the Rio Conference. The ninth preambular paragraph of the Convention on Biological Divessity,1992 provides, "where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat". Similarly, Article 3.3 of the convention on climate change, 1992 provides as follows -

"The parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there

are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socioeconomic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adoption, and comprise all economic sectors, Efforts to address climate change may be carried out cooperatively by interested parties".

According to the precautionary principle, when reasonable scientific evidence of any kind provides enough reason to believe that an activity, technology or substance may be harmful, action should be taken to prevent such harm. If one waits for scientific certainty, people may suffer and die, and damage to the natural world may be irreversible. Prof. Jariwala has differentiated the concept of 'assimilative capacity' from the precautionary principle, according to him -

"The difference in the principles is that, the former concentrates on pollution control and the latter an environment management. The first one is satisfied with the environmental self purifying and pollution recycling capacity, but in case of the other, it hits at the root of the process of pollution. Further, the former envisages treatment of pollution; whereas in the case of second, it confines its attention to preventive envirocare".[14]

It is clear, therefore, that the precautionary principle concentrates on prevention rather than cure. The principle embodies the idea of careful planning to avoid risks in the first place, rather than trying to determine how much risk is acceptable.

In India, there are lots of environmental regulations, but most environmental regulations, like the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 are aimed at cleaning up pollution and controlling the amount of it released into the environment. They regulate the harmful substances as they are emitted rather than limiting their use or production in

14. C.M.Jariwala, "Complex Enviro - Technosciences Issues : The Judicial Direction", 42(1) *JILI* 29, 32 (2000).

the first place. These laws are based on the assumption that humans and ecosystems can absorb a certain amount of contamination without being harmed. But the past experience shows that it is very difficult to know what levels of contamination, if any, are safe and therefore, it is better to err on the side of caution while dealing with the environment.

A comprehensive definition of the precautionary principle has been spelled out in a January 1998 meeting of scientists, lawyers, policy makers and environmentalists at Wingspread, headquarters of the Johvison Foundation in Racine, Wisconsin. The wingspread statement on the precautionary principle has summarised four components of the precautionary principle that should guide its implementation -

1. action to prevent harm despite uncertainty,
2. shifting the burden of proof to proponents of a potentially harmful activity,
3. examination of a full range of alternatives to potentially harmful activities, including no action, and
4. democratic decision making to ensure inclusion of those affected.

The Wingspread statement on the Precautionary principle summarizes the principle as follows -

"When an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically".

The Indian Supreme Court has accepted in *vellore* Case[15] that the Precautionary Principle is part of the environmental law of the country. The Court explained the 'Precautionary Principle' in the context of the municipal law as under -

"(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

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15. *Supra* note 2 at 2721.

environmental degradation.

(iii) The 'onus of proof' is on the actor or the developer/industrialist to show that his action is environmentally benign".[16]

In *Taj* Case[17] the Supreme Court was dealing with the problem of protecting the 'Taj Mahal' from the pollution of nearby industries. The Court applied the 'Precautionary Principle' as explained by it in *Vellore* Case and observed -

"[T]he environmental measures must anticipate, prevent and attack the causes of environmental degradation. The 'onus of proof' is on an industry to show that its operation with the aid of coke/coal is environmentally benign. It is rather, proved beyond doubt that the emissions generated by the use of coke/coal by the industries in TTZ are the main polluters of the ambient air".[18]

The Court ordered the industries to change-over to the natural gas as an industrial-fuel or stop functioning with the aid of coke/coal in the Taj trapezium and relocate themselves as per the directions of the Court.

The 'Precautionary Principle' has been invoked by the Supreme Court in various cases while deciding environmental issues. In *Calcutta tanneries* Case[19] the Court ordered the polluting tanneries operating in the city of Calcutta (about 550 in number) to relocate themselves from their present location and shift to the new leather complex set up by the West Bengal Government.

In *Badkhal & Surajkund Lakes* Case[20] the Supreme Court held that the 'Precautionary Principle' made it mandatory for the State Government to anticipate, prevent and attack the causes of environment degradation. The Court had no hesitation in holding that in order to protect the two lakes from environmental degradation it was necessary to limit the construction activity in the close vicinity of the lakes.

Even though the Vellore judgment was followed in the subsequent decisions of

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16. *Id.*
17. *M.C. Mehta v. Union of India*, AIR 1997 SC 734.
18. *Id.* at 762.
19. *M.C. Mehta v. Union of India*, (1997)2 SCC 411, 430.
20. *M.C. Mehta v. Union of India*, (1997)3 SCC 715, 720.

the Supreme Court, the Court felt the need to explain the meaning of the Precautionary Principle in more detail and lucid manner so that Courts and tribunals or environmental authorities can properly apply the said principle in the matters which might come before them. In *A.P. Pollution Control Board v. Prof. M.V. Nayudu,*[21] tracing the evolution of precautionary principle the Court observed -

"Earlier, the concept was based on the 'assimilative capacity' rule as revealed from Principle 6 of the Stockholm Declaration of the U.N. Conference on Human Environment, 1972. The said principle assumed that science could provide policy-makers with the information and means necessary to avoid encroaching upon the capacity of the environment to assimilate impacts and it presumed that relevant technical expertise would be available when environmental harm was predicted and there would be sufficient time to act in order to avoid such harm. But in the 11th Principle of the U.N. General Assembly Resolution on World Charter for Nature, 1982, the emphasis shifted to the 'Precautionary Principle', and this was reiterated in the Rio Conference of 1992 in its Principle 15."

Explaining the cause for the emergence of 'Precautionary Principle' the Court referred Charmian Barton, who argued "it makes sense to err on the side of caution and prevent activities that may cause serious or irreversible harm".[22] The Court opined that the inadequacies of science was the real basis that had led to the Precautionary Principle of 1982. It was based on the theory that it is better to err on the side of caution and percent environmental harm which may indeed become irreversible. The principle of precaution involved the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. The Court adopted the view that "Environmental Protection should not only aim at protecting health, property and economic interest but also protect the environment for its own sake. Precautionary duties must not only be triggered by the suspicion of concrete danger but also by justified concern or risk potential".[23]

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21. AIR 1999 SC 812.
22. Charmian Barton, "The Status of the Precautionary Principle in Australia", 22 *Har v. Envtl. L. Rev.*, 509, 547 (1998).
23. *Supra* note 21.

The concept of burden of proof in environmental cases evolved in *Vellore* Case[24] that 'the owns of proof' is on the actor or the developer/ industrialist to show that his action is environmentally benign", was further elaborated by the Supreme Court in the *Nahudu* case. M. Jagannadha Rao, J. noticed, while the inadequacies of science had led to the 'Precautionary Principle', the said principle in its turn led to the special principle of burden of proof in environmental cases where burden as to the absence of injurious effect of the actions proposed, was placed on those who wanted to change the *status quo.* This is often termed as a reversal of burden of proof, because otherwise, those opposing the change would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, the Court observed, "it is necessary that the party attempting to preserve the *status quo* by maintaining a less polluted state should not carry the burden of proof and the party who wants to alter it, must bear this burden".[25]

The Supreme Court favoured the view that if the environmental risks being run by regulatory inaction are in some way 'uncertain but non-negligible', then regulatory action is justifies. According to the Court -

"In such a situation, the burden of proof is to be placed on those attempting to alter the *status quo.* They are to discharge this burden by showing the absence of a 'reasonable ecological or medical concern'. That is the required standard of proof. The result would be that if insufficient evidence is presented by them to alleviate concern about the level of uncertainty, then the presumption should operate in favour of environmental protection".[26]

Thus, the court by explaining the concept of precautionary principle and the new concept of the onus of proof in environmental cases paved the way for greater application of this principle in future.

In *Narmadda Bachao Andolan v. Union of India,*[27] the Supreme Court decided the issues relating to construction of dam on Narmada river which was a part of the Sardar Sarovar Project. Explaining the new concept of burden of proof the Court

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24. *Supra* note 2.
25. *Supra* note 21
26. *Id.*
27. AIR 2000 SC 3751.

held that the 'Precautionary Principle' and the corresponding burden of proof on the person who wants to change the *status quo* will ordinarily apply in a case of polluting or other project or industry where the extent of damage likely to be inflicted is unknown. Where the effect on ecology of environment of setting up of an industry is known, the Court held -

"What has to be seen is that if the environment is likely to suffer, then what mitigative steps can be taken to off set the same. Merely because these will be a change is no reason to presume that there will be ecological disaster. It is when the effect of the project is known then the principle of sustainable development would come into play which will ensure that mitigative steps are and can be taken to preserve the ecological balance".[28]

The Court concluded, what was the impact on environment with the construction of a dam was well known in India, the dam was neither a nuclear establishment nor a polluting industry, therefore, the decision in *A.P. Pollution Control Board's* Case[29] would have no application in this case.

Despite of the fact that the Court refused to apply 'Precautionary Principle' in this case as the impact on environment was known and could have been mitigated, in subsequent decisions of the Supreme Court one may find strict adherence to the Precautionary Principle and the new concept of onus of proof.[30]

7.3.2. Polluter Pays Principle :

There is no agreed definition of the term 'Polluter Pays Principle, scope of its application is also doubtful and there is lack of clear agreement on permissible exceptions, That is not surprising, because the Principle, though recognised internationally, has no global treaty on its application. Various regional organizations and the national authorities are applying the principle for their own purposes and therefore, interpreting the principle in different manner.

It was the Organisation for Economic Co-operation and Development (OECD)

28. *Id.* at 3804.
29. *Supra* note 21.
30. See. *A.P. Pollution Control Board II v. M.V. Nayudu,* (2001) 2 SCC 62; *Bitu Sehgal v. Union of India,* (2001) 9 SCC 180; *M.C. Mehta v. Union of India,* (2002) 4 SCC 356.

which first popularised the polluter pays principle in the early 1970's. "The principle basically means that the producer of goods or other items should be responsible for the costs of preventing or dealing with any pollution which the process causes. This includes environmental costs as well as direct costs to people or property. It also covers costs incurred in avoiding pollution, and not just those related to remedying any damage"[31] the principle may be explained as follows -

"The polluter pays principle is one which is aimed at ensuring that the costs of environmental damage caused by polluting activities are born in full by the person responsible for such pollution; the polluter. The principle means -

- The polluter should pay for the administration of the pollution control system; and
- The polluter should pay for the consequences of the pollution - for example, compensation and clean-up".[32]

Under the Principle it is not the role of Government to meet the costs involved in either prevention of damage caused by pollution or in carrying out remedial measures, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer. It may be noted here that despite the difficulties inherent in defining the principle, the European Community accepted it as a fundamental part of its strategy on environmental matters, and it has been one of the underlying principles of the Community Action Programmes on the environment. The Fourth Action Programme makes it clear that 'the cost of preventing and eliminating nuisances must in principle be borne by the polluter'.

"[T]he polluter Pays Principle has now been incorporated into the European Community Treaty as part of the new Articles on the environment which were introduced by the single European Act of 1986. Article 130-R(2) of the Treaty States that environmental considerations are to play a part in all the policies of the community, and that action is to be based on three Principles : the need for preventive action; the

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31. S.Ball and S.Bell, *Environmental Law*, 97 (1994,2nd Ed.).
32. S.Wolf and A.White, *Environmental Law*, 15 (1995).

need for environmental damage to be rectified at source; and the polluter should pay".[33]

It seems that the Rio-Declaration adopted in 1992 also recognises the polluter pays principles. According to principle 16 of the Declaration -

"National authorities should endeavour to promote the internalization of environmental costs and use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment".

It is clear therefore, that without referring to the "Polluter Pays" principle the Rio Declaration has put emphasis on the principle of internalization of environmental costs i.e. an economic concept which consists in charging a polluter for all the costs that his activity created for other persons.

It may be submitted that the shift in environmental liability principle from criminal sanction to economic and financial deterrence is the driving force which has paved the way for incorporation of polluter pays principle in most of the countries in the world.

Supreme Court of India for the first time applied expressly the polluter pays principle in the case of *Indian Council for Enviro-Legal Action v. Union of India*[34] and held that the responsibility for repairing the environmental damage was that of the offending industry. The Court further held that sections 3 and 5 of the Environment (Protection) Act, 1986 empowered the Central Government to give directions and take measures for giving effect to polluter pays principle.[35]

In *Vellore Citizens Welfare Forum v. Union of India*[36] the Supreme Court declared in unequivocal terms that the polluter pays principle is part of the environmental jurisprudence of India Explaining the meaning and scope of the polluter pays principle the Court observed -

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33. Carolyss shelbourn, "Historic Pollution-Does the Polluter Pay?" *Journal of Planning and Environmental Law*, Aug. 1974 quoted in *Indian Council for Enviro-Legal Action v. Union of India*, AIR 1996 SC 1446, 1466.
34. AIR 1996 SC 1446.
35. *Id.* at 1466.
36. AIR 1996 SC 2715.

"The Polluter Pays principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of sustainable development and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology".[37]

Further, the Court directed the Central Government to constitute an authority under section 3(3) of the Environment (Protection) Act, 1986 for implementation of the polluter pays principle. The Court opined that the authority should, with the help of expert opinion, assess the loss to the environment and also identify the victims of the pollution and assess the compensation to be paid to the said victim. The authority should further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment.

The Court further held in this matter that the polluting tanneries were liable to pay for the past pollution generated by them, which resulted in the environmental degradation and suffering to the residents of the area. In addition to this pollutions fine of Rs. 10,000/- each on all the polluting tanneries was also imposed, this money along with the compensation amount recovered from the pollutes were directed to be deposited under a separate head called "Environment Protection Fund". The fund was to be used for the purpose of giving compensation to affected persons and for restoring the damaged environment.

In *M.C. Mehta v. Kamal Nath*[38] the Court after referring the *Vellore* case reiterated, "one who pollutes the environment must pay to reverse the damage caused by his acts". It was proved in the case that Sapan Motels Private Limited used earth-movers and bulldozers to turn the course of the river in order to save the Motel from future floods. On the basis of Polluter Pays Principle the Court held -

"The Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The pollution caused by various constructions

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37. *Id.* at 2721.
38. (1997) 1 SCC 388.

made by the Motel in the riverbed and the banks of River Beas has to be removed and reversed".[39]

Further, the Court asked the National Environmental Engineering Research Institute, Nagpur (NEERI) to submit an assessment of the cost which was likely to be incurred for reversing the damage caused by the Motel to the environment and ecology of the area.

In *S. Jagannath v. Union of India,*[40] the Court once again applied the Polluter Pays Principle and passed orders against the shrimp farming culture industry found guilty of Polluting Coastal areas. The Central Government was directed by the Court to constitute an Authority under section 3(3) of the Environment (Protection) Act, 1986 to deal with the situation created by the shrimp culture industry in the Coastal Stated and Union Territories. The Court held that shrimp culture industry was liable to compensate the affected persons on the basis of the 'Polluter Pays' Principle. The Court further held that the aforesaid Authority should assess the loss to the environment in the affected areas and identify the individuals or families who had suffered because of the pollution, and assess the compensation to be paid to them. In addition to this, the Court held that, the Authority should further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment.

The *Calcutta Tanneries* case[41] is yet another illustration where the Court applied the 'Polluter Pays' principle as explained by it in *Vellore* Case. The matter before the Court involved issues relating to pollution caused by about 550 tanneries located in the adjoining areas in the eastern fringe of the city of Kolkata. The Court in its order directed the State Government to appoint an Authority/Commissioner to assess the loss to the environment in the areas affected by the pollution caused by the tanneries. It was held by the Court that the said authority should determine the compensation to be recovered from the polluter-tanneries as cost of reversing the damaged environment.

It appears that the Court has maintained the consistency in the application of

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39. *Id.* at 415.
40. (1997) 2 SCC 87.
41. *M.C.Mehta v. Union of India,* (1997) 2 SCC 411.

polluter pays principle in subsequent cases and invariably followed the *Vellore* case.[42] It may be submitted, however, that the explanation regarding nature, scope and definition of the 'Polluter Pays' principle in a more lucid manner by the Court is need of the hour, as there is no direct statutory provision regarding application of this principle in India.

7.3.3. Intergenerational Equity :

One of the important components of sustainable development is the principle of Intergenerational equity. This principle gives emphasis to the need of preservation of the environment for the benefit of present as well as future generations. "The Principle of inter-generation equity envisages that each generation has to use the natural resources in a sustainable way so that the coming generations get their due share and the existing civilization further continues happily its onward journey".[43] The Principle has got recognition and acceptance at various international forums.

The Stockholm Declaration has recognised this principle and has given due importance to it. Proclaim 6 of the declaration stressing the principle of Inter generational equity states as follows -

" ... To defend and improve the human environment for present and future generations has become an imperative goal for mankind, a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of world-wide economic and social development".

The Stockholm Declaration, in very clear terms, has recognised the right to environment for future generation principle 1 and principle 2 of the declaration state as follows -

Principle 1 - "Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for the present and future generations."

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42. See, *Consumer Education and Research Society v. Union of India,* (2000) 2 SCC 599; *M.C. Mehta v. Kamal Nath,* (2000) 6 SCC 213; *Bittu Sehgal v. Union of India,* (2001) 9 SCC 181; *M.C.Mehta v. Union of India,* (2002) 4 SCC 356; *M.C. Mehta v. Kamal Nath,* AIR 2002 SC 1515;(2002) 3 SCC 653.
43. *Supra* note 14 at 37.

Principle 2 - "The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate".

Various documents which emerged from the "earth summit" at Rio de Janeiro in 1992 also underline the concept of Intergenerational equity. Principle 3 of the Rio Declaration Proclaims- "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations". The Convention on Biological Diversity, 1992 also touches the concept of Intergenerational equity, while explaining the meaning of 'Sustainable use' Article 2 of the convention states -

"Sustainable use means the use of components of biological diversity in a way and at a rate that does not lead to the long term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations".

Similarly, Article 3 of the UN framework Convention on Climate Change, 1992 reads -

"... The parties should protect the climate system for the benefit of present and future generations of human kind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities ..."

Agenda 21, the monumental centrepiece agreement adopted by participating Nations at Earth Summit in Rio de Janeiro, sets an agenda for the 21st century to make the world habitable. "It, *inter alia,* enumerates a set of priority actions to be taken by states during the ensuing century to ensure a sound eco-management and to achieve sustainable development.[44]

The Indian Supreme Court has also used the Principle of Intergenerational equity while delivering environmental justice. In *Rural Litigation and Entitlement Kendra v.*

44. K.I.Vibhute, "Environment, Present and Future Generations : Intergenerational Equity, Justice and Responsibility", 39 *JILI* 281, 283 (1997).

State of Uttar Pradesh,[45] the Court, while dealing with indiscriminate tapping of natural resources observed- "It has always to be remembered that these are permanent assets of mankind and are not intended to be exhausted in one generation". The Court recognised the significance of the concept of sustainable Development and Intergenerational equity once again in *State of H.P. v. Ganesh Wood Products.*[46] Here the matter was relating to the significance of forest wealth and its impact an environment and ecology.

In *S. Jagannath v. Union of India,*[47] the Court dealt with the problem of pollution caused by shrimp farming culture industries in coastal areas. The Court was of the view that there must be an environmental impact assessment before grant of permission to install commercial shrimp farms, and such assessment must take into consideration the inter-generational equity.

In *A.P. Pollution Control Board v. Prof. M.V. Nayudu,*[48] the Court for the first time discussed the principle of inter-generational equity in some detail and opined that the principle is of recent origin. Referring to the Stockholm Declaration, 1972, Jagannadha Rao, J. noted that several international conventions and treaties had recognised the principle of inter-generational equity and that several imaginative proposals such as the *locus standi* of individuals or groups to take out actions as representatives of future generations, appointment of ombudsman to take care of the rights of the future against the present, had come up.

Prof. Jariwala, however, differs from the view of the Court that the principle of intergenerational equity is of recent again. He rightly points out that the history of ancient Indian texts and texts of different religions "provide satisfactory evidences to support the conclusion that the basic theme of the principle was in operation even in the ancient time. The *Shrishti,* God of nature did not belong to any particular person or generation. The existing generation was ordained not to plunder but use nature according to one's is capacity to repay".[49]

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45. AIR 1987 SC 359, 364.
46. (1995)6 SCC 363, 382.
47. (1997)2 SCC 87, 146.
48. (1999)2 SCC 718.
49. *Supra* note 14 at 36.

It may be submitted that the Court though recognised the principle of intergenerational equity in few cases decided by it, never tried to explain the nature, scope and meaning of the principle and, therefore, ambiguity regarding the principle is still prevailing. One is not sure whether the principle is part of the law of the land and if it is, to what extent and under what circumstances. A clear pronouncement in this connection by the Supreme Court would be highly appreciable specially, in absence of any express statutory provision recognizing intergenerational equity in India.

7.3.4. Doctrine of Public Trust :

The origin of the 'Doctrine of Public Trust' may be traced to the ancient Roman Empire. The Doctrine was founded on the idea that certain common properties such as rivers, seashore, forests and air were held by Government in trusteeship for the free and unimpeded use of the general public. Under the Roman Law these natural resources were either owned by no one (*res nullious*) or by every one in common (*res communious*). Similar concept of 'Public Trust' may also be traced under the English Common Law. "Under the English common law, however, the sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interest in navigation or fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public".[50]

According to Prof. Joseph L. Sax, proponent of the Modern Public Trust Doctrine, the source of modern public trust law is found in the nature of property right in rivers, the sea, and the seashore. In this connection he has emphasized following two points -

"First, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties - such as the seashore, highways, and running water- 'Pespetual use was dedicated to the public', it has never been clear whether the public had an enforceable

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50. *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388, 407.

right to prevent infringement of those interests. Although the State apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government".[51]

Professor Sax is of the view that the Public Trust Doctrine often imposes three kinds of restrictions on governmental authority. Firstly, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; Secondly, the property may not be sold, even for a fair cash equivalent; and thirdly, the property must be maintained for particular types of uses.

The doctrine of Public Trust has also got recognition in the American legal system, the decision of the United State Supreme Court in *Illinois Central Railroad Co. v. People of the State of Illinois*[52] may be considered trend setter. In this case the Illinois legislature made a substantial grant of submerged lands to the Illionois Central railroad in 1869. Just after four years the legislature changed its decision and repealed the grant. The state of Illinois sued to quite title. The Court held that the title of the State in the land in dispute was a title different from the title which the United States held in public lands which were open to preemption and sale. It was a title held in trust for the people of the state so that they may enjoy the navigation of the water, carry on commerce over them and have liberty of fishing therein free from obstruction or interference of private parties. The court while accepting the stand of the state of Illinois held that the abdication of the general control of the state over lands in dispute was not consistent with the exercise of the trust which required the government of the state to procure such waters for the use of the public.

The judgment of the Supreme Court of California in the *Mono Lake* Case[53] is another illustration which shows that the public trust doctrine has gained firm ground in United States of America. Mono Lake, which is the second largest lake in California consists of saline water and no fish but supports a large number of Brine Ships and bird

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51. Joseph L.Sax, "Public Trust Doctrine in Natural Resource Law : Effective Judicial Intervention", 68 *Mich L. Rev.* 473 (1970) quoted in *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388, 407.
52. 146 US 387 (1892).
53. *National Audubon Society v. Superior Court of Alpine Country*, 33 Cal 3d 419.

life besides being a tourist attraction. The Plaintiffs filed a suit against the city of Los Angles which was drawing water from stream that fed Mono Lake, alleging that as a result of the diversion, the lake level was falling marring the scenic beauty and imperilling the birds. Upholding the plaintiffs claim that the Public Trust Doctrine could be used to supersede Los Angels' water diversion, the California Supreme Court explained the concept of Public Trust Doctrine in the following words -

"The public trust is more than an affirmation of state power to use public property for public purpose. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes marshlands and tidelands, surrendering that sight of protection only in rare cases when the abandonment of that right is consistent with the purpose of the trust ..."

Thus, it is clear that the Public Trust Doctrine which is confined under the English Common Law only to certain traditional uses such as navigation, commerce and fishing has got an expanded meaning in United States of America. The observations of the Supreme Court of California in *Mono Lake* Case show beyond doubt the judicial concern in protecting all ecologically important lands, for e.g. fresh water, wet lands, riparian forests etc.

The Indian Supreme Court has also adopted the Public Trust Doctrine and declared that it is part of the law of the land. In *M.C. Mehta v. Kamal Nath,*[54] the Court for the first time explained the nature and scope of Public Trust Doctrine. Here the court was dealing with the potential threat to ecology caused by the diversion of the course of river Beas by a private company, Sapan Motels pvt. Ltd., to save the Motel from future floods. The Court, after discussing various views expressed by noted jurists and foreign Courts, regarding Public Trust Doctrine observed as under -

"Our legal system-based on English common law-includes the Public Trust Doctrine as part of its jurisprudence. The state is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The state as trustee is under a legal duty to protect the natural resources. These resources

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54. (1997) 1 SCC 388.

meant for public use cannot be converted into private ownership".[55]

The Court noted that large area of the bank of river Beas which was part of protected forest had been given on a lease purely for commercial purposes to the Motel and therefore, the Himachal Pradesh government committed patent breach of public trust by leasing the ecologically fragile land to the Motel management. Further, the Court termed the issue in the case as "the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and these charged with administrative responsibilities, who, under the pressure of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change". The conflict can be resolved, according to the court, by the legislature by making suitable laws. The court was however, of the opinion that in the absence of any such legislation, "the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert then into private ownership, or for commercial use".

Assigning the role of custodian to the judiciary, the Court head - "The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources".[56] The Court made it very clear that the Public Trust doctrine, as discussed by it in the *Kamal Nath* case was a part of the law of the land".[57]

In *M.I. Builders v. Radhey Shyam Sahu,*[58] the Court held that allowing an underground shopping complex to come up below a public park violated the doctrine of Public Trust and ordered the demolition of the structures and restoration of the park. The Court was of the view that by allowing underground construction the Mahapalika had deprived itself of its obligatory duties to maintain the park. The Court held. "The Mahapalika is the trustee for the proper management of the park. When the

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55. *Id.* at 413.
56. *Id.*
57. *Id.* at 415.
58. AIR 1999 SC 2468.

true nature of the park, as it existed, is destroyed it would be violative of the doctrine of public trust".[59] The Court reiterated the view expressed by Kuldip Singh, J. in *Kamal Nath* case and remarked, "This public trust doctrine in our country, it would appear, has grown from Article 21 of the Constitution".[60] No suitable reasoning or argument was placed by the Court to support the remark, however, this may me treated as an indication by the Court that scope of the Doctrine may be expanded in near future.

It is evident therefore, that the Court has recognised and adopted the concept of sustainable development, various components of the concept have been resorted to by the Court in matters relating to environmental protection. It may be submitted that the concept has been used by the Court as a supplement to the right to wholesome environment.

59. *Id.* at 2498.
60. *Id.*