

A COMPARATIVE ANALYSIS OF ENVIRONMENTAL JUDICIAL ACTIVISM IN INDIA AND THE U.S.

*Salmoli Choudhuri**

ABSTRACT

Till a few years back, the impact of neo-liberalism and indiscriminate harm to the environment as an adjunct to economic growth and progress was being largely ignored. With the proclamation of the precarious state of our ecology by the environmentalists and the scientists pronouncing the idea of 'sustainability' at the Stockholm Conference, there was no option but to chart out a blueprint for the future course of Sustainable Development. With the gradual decline of the concept of 'sovereignty', an international regime for protection of environment is being established. Judiciaries across the globe have played a critical role, with varying degrees of indulgence. This comparative study of judicial environmental activism in the United States of America and India is set in such background. Though existing in different constitutional set-ups, the attitude of the judiciary has shaped the law in a particular mould.

I. INTRODUCTION

From a historical perspective, the protection and preservation of the environment has been integral to the cultural and religious ethos of most communities. Comprehensive awareness and understanding of the prevailing environmental crisis across the globe is a prerequisite to facilitate framing of effective national policies to deal with domestic problems.¹ The rapidly increasing public acceptance of the ecological urgency and the resulting willingness of politicians across the political spectrum to put environmental protection high on their agenda do raise hopes.

Institutional settings and procedural arrangements are imperative for just decisions and distribution of burdens and benefits.² John Rawl's *Principle of Justice* provides an Archimedean point for appraising existing institutions as well as the aspirations

* B.A., LL.B. (Hons.), Vth Year, National Law University, Delhi

1 Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 Michigan Law Review 3 (1996), pp. 570-653.

2 Jonas Ebbesson & Phoebe Okowa, *Environmental Law And Justice In Context* (2009), Cambridge University Press, p. 12.

generated by them, giving an independent standard for guiding the course of social change.³ ‘Access to justice’ is essentially perceived as access to a fair review procedure, whereby decisions, acts and omissions by the public administration, and also by private persons should be challengeable in a court of law or other impartial tribunal.⁴ Access to the judiciary in environmental concerns links it to human rights law.⁵ The minimum standards on access to legal review procedures were set out in the *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)*, 1998⁶.

In 1996, the *United Nations Environment Programme* (UNEP) acknowledged the central role played by the judiciary in promoting environmental governance. Subsequently, it developed a program to engage the judiciaries of all countries in pursuit of rule of law in environmental and sustainable development.⁷ It has, in the past, partnered several other groups such as the *International Union for Conservation of Nature* (IUCN), to develop environmental resources for the judiciary. From 1996 to 2002, UNEP collaborated with the IUCN to convene six regional symposia on the judiciary’s role in promoting sustainable development.⁸ The judges who participated in the Global Judges’ Symposium on Sustainable Development and Rule of Law acknowledged that, “the deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law” at the national and local levels.⁹

3 John Rawls, *A Theory Of Justice* (1972), Oxford University Press, p. 520.

4 Jonas Ebbesson, *Introduction: Dimensions of Justice in Environmental Law*, in *Environmental Law And Justice In Context*, Cambridge University Press, (J. Ebbesson & Okowa, eds., 2009) p. 13.

5 Jonas Ebbesson, *The Notion Of Public Participation In International Environmental Law*, in 8 *Yearbook of International Environmental Law* 51; Right to access to courts or other independent or impartial tribunals mentioned in 1948 Universal Declaration of Human Rights, UNGA Res 217, UN Doc A/810(1948).

6 United Nations Declaration on Environment and Development, UN Doc. A/CONF.151/26/Rev.1 (1992), 31 ILM (1992) 1416.

7 United Nations Environment Programme, *UNEP Global Judges Programme*, vi (2004), <http://www.unep.org/delc/EnvironmentalLaw/tabid/54403/Default.aspx>

8 *Id* at p. 18.

9 *Id* at p. 14.

In 2009, Pace University School of Law along with other partnerships began the groundwork for creation of the *International Judicial Institute for Environmental Adjudication (IJIEA)* to support the judiciary in addressing contemporary environmental issues.¹⁰ IJIEA is an independent, non-profit research and advocacy organization with a mission to facilitate international collaboration for strengthening the environmental Rule of Law while addressing concerns raised by the Johannesburg principles.¹¹

Laws are ineffective unless they are implemented, and much environmental law exists only on paper.¹² Judicial activism has witnessed huge strides inter alia, due to lack of legislations or their ineffective implementation.¹³ Domestic courts worldwide are playing an increasingly important role in development of environmental law.¹⁴ India has been suffering from myopic policy-making and implementing in environmental matters and thus, court has posed to be *sentinel qui vive*.¹⁵ Although the legal systems of India and USA are dissimilar, yet their respective judiciaries share some similitude in their attitude.

II. ENVIRONMENTAL JUDICIAL ACTIVISM IN THE UNITED STATES

David Sive claims that in no other political and social movement has litigation played such a dominant role than in the environmental movement in the US.¹⁶ The notion of ‘environmental justice’ first appeared at the US Federal level in

10 <http://www.law.pace.edu/international-judicial-institute-environmental-adjudication-ijiea>

11 <http://www.law.pace.edu/lawschool/judicialinstitute/WRIPaceFinalreport.pdf>

12 The Chief Justice of South Africa, Arthur Chaskalson (Paul Brown, *Judges Pledge to Champion Environment*, The Guardian, August 28, 2002, <http://www.guardian.co.uk/environment/2002/aug/28/worldsummit2002.internationalnews1>

13 In its Law and Policy Reform, Brief No. 1, April, 2010, the Asian Development Bank mentions, Many DMCs have accepted international obligations under new or amended international environmental laws, yet these have not been sufficiently reflected in national legislation or translated into implementing rules and regulations at national, provincial, and local levels. Even where DMCs have appropriate policy, legal and regulatory frameworks, effective implementation, enforcement and compliance continue to pose challenges.

14 Louis J Kotzé, A. Paterson, *The Role Of Judiciary In Environmental Governance: Comparative Perspectives* (2009).

15 See, *Obayya Poojari v. Karnataka State Pollution Control Board*, AIR 1999 Kar 15 and *Gujarat Water Pollution Board v. Kohinoor Dyeing & Printing Works*, 1993(2) Guj. L.R. 1306.

16 In the *TVA v Hill* [437 US 153 (1978)], the Tennessee Valley Authority indulged in the construction of a dam on the Little Tennessee River which had the potential to cause considerable harm to a particular fish species called snail darter. The relevant provision of law, i.e. Section 7 of the Endangered

the Presidential Executive Order 12898 of 1994.¹⁷ Historically, the mainstream environmental movement in the United States has revolved around the causes of preservation of nature, resource management, and pollution abatement.¹⁸ In 1980s, the multiracial environmental justice movement emerged¹⁹ and demolished the earlier prevalent notion that communities of colour are not 'environmentalists'.

II. CONTRIBUTION OF THE US JUDICIARY

While seeking legal relief for violations of environmental laws the plaintiffs can, by filing a complaint, either approach the court or a particular administrative agency. However, the action of administrative agency is limited in scope.²⁰

2.1 Law of standing and class action:

Standing concerns the sufficiency of the plaintiff's stake in an otherwise justiciable dispute.²¹ It focuses primarily on the party seeking access to the courts while regarding the issues sought to be adjudicated as secondary.²² The doctrine of standing derives from Article III of the Constitution, which restricts courts to hearing only cases or controversies.²³

Standing has been subjected to widespread scholarly criticism²⁴ primarily directed at erratic application by the Supreme Court.²⁵ It has been difficult to justify

Species Act was quite explicit and the violation of the same occurred in this case. The US Supreme Court observed that the Congress intended that the endangered species be afforded the highest of priority and halted and reversed the trend toward species extinction because the value of endangered species was "incalculable." Thus, injunction was granted to the dam project. Unfortunately, after the case was decided, several amendments were made to the statute which introduced several exceptions to the law. The construction of the dam was accomplished and the fish died out. This case is the striking instance where judicial activism has failed because of legislative restraint on action.

17 Executive Order 12898 of 11 February, 1994.

18 Robert D. Bullard, *Environmental Justice for All*, 110(1) *The Crisis* 25 (2003).

19 D. Taylor, *Environmentalism and the Politics of Inclusion*, in *Confronting Environmental Racism*, p. 53, (Robert D. Bullard ed., 1993).

20 EPA Title VI Regulations, 40 CFR, Sec 7.120 (2005)

21 *Sierra Club v. Morton*, 405 U.S. 727, 731--32 (1972)

22 *Flast v. Cohen*, 392 U.S. 83, 99 (1968)

23 7 U.S. CONST. art. III, § 2. See G. Robinson, E. Gellhorn & H. Bruff, *The Administrative Process* 207 (3d ed. 1986) [*hereinafter* Robinson].

24 Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 *Yale Law Journal* 425 (1974); Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 *Yale Law Journal* 816 (1969); Currie, *Misunderstanding Standing*, 1981 *Supreme*

the reluctance of legislators to recognize the contribution of environmental groups to the protection of the environment by giving them legal standing. The obstacle seems to be a pretext used by the Crown to paralyze legal action by NGOs rather than a measure intended to repress the abuse of the judicial forum.²⁶ It is felt that at times the principal effect of the Law of standing is not to screen unmeritorious cases but to delay and increase the cost of proceedings brought up by litigants who are not the principal or traditional users of the courts.²⁷ Examination of the cases on standing reveals that the majority of the standing challenges are brought not by private parties but by government department and Crown agencies implicating that they are part of the corporate culture of the Crown litigation bureaucracy.²⁸

From 1966 to the early 1980s, the plaintiffs tended to prevail in class action certification²⁹ under Rule 23 of the Federal Rules of Civil Procedure in context of desegregation suits and various shareholder actions.³⁰ However, for toxic torts and environmental matters, the courts were less willing to accept that the plaintiffs had met the requirements for certification³¹, even under the less restrictive form provided by a Rule 23(b)(3) class action.³² Due to allegation by the plaintiffs of

Court Law Review 41; Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 University of Pennsylvania Law Review 635 (1985); Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 *The Kentucky Law Journal* 185 (1980-81); Nichol, *Rethinking Standing*, 72 *California Law Review* 68 (1984); Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 *Nat. Resources J.* 76 (1973); Scott, *Standing in the Supreme Court-A Functional Analysis*, 86 *Harvard Law Review* 645 (1973); Stewart, *The Reformation of American Administrative Law*, 88 *Harvard Law Review* 1669, 1723-47 (1975).

25 *E.g.*, Nichol, *Abusing Standing: A Comment on Allen v. Wright*, *supra* note 11, at 635.

26 Sven Deimann & Bernard Dyssli, *Environmental Rights: Law, Litigation And Access To Justice* (1995).

27 A.J. Roman, Pikkov, *Public Interest Litigation in Canada*, in *Into the Future* (1990), p.180 (A.J. Roman, Pikkov, eds.).

28 *Ibid.*

29 Class And Public Interest Litigation: The Raffles Town Club Saga, <http://www.aseanlawassociation.org/9GAdocs/Singapore.pdf>

30 *See generally*, *Cypress v. Newport News Gen. & Nonsectarian Hosp. Assoc.*, 375 F. 2d 648 (4th Cir. 1967) (certifying suit in the context of discrimination against an African physician and his patients); *Bragalini v. Biblowitz*, No. 67 Civ. 4988, 1969 U.S. Dist. LEXIS 12992 (SDNY Dec 16, 1969) (certifying a stockholder suit under Rule 23(b)(3))

31 In *Sierra Club v. Morton*, 405 US 727 (1972), it was laid down that a non-profit organization which worked for environmental causes did not have a standing in a court of law and for the purposes of litigation, a certain individual must prove injury. The dissenting Judgment by William O. Douglas, J., however, was remarkable. He expressed grief over the prevalent law: 'Perhaps the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land'.

32 Charles W. Schwartz and Lewis C. Sutherland, *Toxic Tort Symposium: Class Certification For Environmental And Toxic Tort Claims*, 10 *Tulane Environmental Law Journal*, pp. 187, 192-94, (1997).

differing types of exposure at different times as well as frequently changed products or productive procedures of the defendants, individual issues were seen as predominating while class actions were viewed as inappropriate.³³ Class action became predominant after 1980s.³⁴ However, the decision in *Students Challenging Regulatory Agency Procedures*³⁵ was a much welcome deviation of the existing trend.³⁶ *Scenic Hudson Preservation Conference*³⁷ reflects another story of success.

Justice Scalia's 'slash and burn' method' gave a severe blow to the reform measures.³⁸ The Supreme Court has observed that the law of standing is a complicated specialty of federal jurisdiction, the solution to the problems of which is, in any event, more or less determined by specific circumstances of individual situation.³⁹ In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc.*, the law on 'standing' again underwent a cataclysmic transformation as FOE was granted legitimate standing before the court of law.⁴⁰ With the recent Massachusetts decision⁴¹, the law related to 'standing' has become relatively flexible.

33 *Id.*

34 In Re: Agent Orange Product Liability Litigation, (818 F. 2d. 145-280) 2nd Circuit, 1987, exemplifies the large class action lawsuit. In this case, thousands of Vietnam veterans collectively sued the manufacturers of toxic chemical and as a defoliant in the Vietnam War. They claimed that the chemical, commonly named Agent Orange – a form of dioxin – caused them to suffer long term chronic physical injury and also emotional injury. The litigation was complicated by the fact that there was no incontrovertible evidence that Agent Orange actually caused any of the claimed disability. In this case, litigants formed factions, and fought among themselves. This factionalism did not, however, derail the judge-administered settlement; the judge was strong and decisive, and refused to let that happen. The settlement award was to be distributed in two ways, namely, cash awards to those who appear to have suffered the most severe injuries; and the delivery of rehabilitative services and health care to all other present and future claimants.

35 *United States v. Students Challenging Regulatory Agency Procedures*, 412 US 669 (1973).

36 In the instant case, few students of a law schools alleged collusion between state machinery and corporate bodies. The question of standing had again come up and the majority of the judges observed that each of the students were 'aggrieved' or 'adversely affected' and could prove 'specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected'. Thus, the suit was maintainable. However, the court maintained that standing is not confined to one who can show economic harm, but extends to safeguard 'environmental and aesthetic wellbeing'. The Court further opined that the judicial order of suspension of the administrative order of Interstate Commerce Commission (due to non-compliance of NEPA) by means of grant of injunction was not appropriate.

37 *SHPC v. Federal Power*, 407 US 926 (1972).

38 Discussed later.

39 *US ex rel. Chapman v. Federal Power Comm*, 345 US 153

40 (98-822) 528 U.S. 167 (2000).

41 549 U.S. 497 (2007); discussed later.

2.2 Causation

Prior to the decision in *Duke Power Co. v. Carolina Environmental Study Group Inc.*⁴², the court sought a stricter relation between cause and consequences.⁴³ However, subsequent to the judgment, the norm was relaxed.⁴⁴ The court granted an order of injunction against a nuclear power plant in the case, disregarding that none of the consequences had direct or proximate relation. This was done despite the harm caused being primarily aesthetic and environmental.

2.3 Recent trend:

The law has developed both on the *legislative* and *judicial* fronts.

The recent amendments introduced to Rule 23 in 2003 with respect to availability of opt-out opportunities for class members, appointment of attorneys, scrutiny of fee awards, judicial review of settlements, and mechanical details of class certification and notice, have indeed opened vast new opportunities for toxic tort litigation and provided a smorgasbord of new options for the federal judiciary.⁴⁵

The *Massachusetts* case⁴⁶ has, perhaps, revolutionized the entire arena of environmental jurisprudence in US.⁴⁷ Not only did the notion of ‘standing’ get liberalized, but the ‘precautionary principle’ was also adequately emphasized.⁴⁸

42 438 U.S. 59 (1978).

43 *Flast*, 392 U.S. at 102.

44 John D. Echeverria, Standing Up For The Environment: Justices Should Welcome Green Groups To Court, http://www.gelpi.org/gelpi/research_archive/standing/StandingUpWelcomeGreen.pdf

45 Kenneth S. Rivlin and Jamaica D. Potts, *Proposed Rule Changes To Federal Civil Procedure May Introduce New Challenges In Environmental Class Action Litigation*, 27 *Harvard Environmental Law Review*, pp. 523-29.

46 549 U.S. 497 (2007)

47 Read Michael Sugar, *Massachusetts V. Environmental Protection Agency*, 31 *Harvard Environmental Law Review*, pp. 531-44 (2007).

48 The court mentioned that it is not appropriate for a court to indulge in rule-making when the power has already been vested with a separate body; however, the statute under consideration provided the court with such a power and moreover, ‘While regulating motor-vehicle emissions may not by itself *reverse* global warming, it does not follow that the Court lacks jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. See *Larson v. Valente*, 456 U. S. 228 , n. 15. Because of the enormous potential consequences, the fact that a remedy’s effectiveness might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant’; see, the text of the judgment.

Massachusetts along with eleven other states and three cities, sued the Environmental Protection Agency (EPA) for an injunction requiring the agency to regulate carbon dioxide emissions from new motor vehicles using its authority under § 202(a)(1) of the Clean Air Act, found in 42 U.S.C. § 7521(a)(1). Massachusetts had petitioned the EPA to regulate greenhouse gases because of global warming concerns, while the EPA denied having the statutory authority to regulate greenhouse gases.⁴⁹ The Supreme Court held that such citizens' groups had standing, hence no evidence of personal injuries was required, and that the EPA was duty bound to regulate tailpipe emissions of greenhouse gases. The court paying reverence to the opinion of Justice Holmes in the case of *Georgia v. Tennessee Copper Co*⁵⁰ said that 'the State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, is small. This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain'.

Justice Stevens had penned the majority decision, with Justice Scalia dissenting. The latter's decision ultimately had a great negative influence on environmental litigations on the question of 'standing'⁵¹ as they mainly relate to review of administrative orders. However, it did not come as a surprise since his ideology was that of neo-conservatism and judicial restraint⁵². Justice Stevens, on the other hand, rejected that environmentalism was some sort of a transcendental force which gave authority to the judges to overrule statutory agencies.⁵³

49 <http://law.duke.edu/publiclaw/supremecourtonline/certgrants/2006/masvenv>

50 206 U.S. 230, 237 (1907)

51 See, Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk University Law Review* 881 (1983); he appreciates the fact that 'standing' must be interpreted strictly to adhere to the principle of 'separation of powers'.

52 See *Chief Justice Burger to Retire From Supreme Court; Reagan Nominates Rehnquist as Successor, Scalia to Fill Vacancy*, 17 *Environment Reporter (BNA)* at 217 (June 6, 1986). See also, Boyd, *Bork Picked for High Court; Reagan Cites his 'Restraint'; Confirmation Fight Looms*, *New York Times*, July 2, 1987, at 1, col. 6; See R. Posner, *THE FEDERAL COURTS* 208 (1985); See *Two Nominees, One Philosophy*, *National Law Journal*, June 6, 1986, at 15, col. 1.

53 *Chevron v. NRDC* (1984), he wrote a majority opinion for the Court that sternly rebuked the D.C. Circuit for substituting its judgment for that of the Reagan EPA, which had sought to give industry more flexibility in meeting their Clean Air Act obligations. Though a bitter defeat for environmentalists, *Chevron*, which holds that judges must defer to agencies when they make a reasonable judgment about an ambiguous law, is rightly hailed today as a landmark of both administrative law and judicial restraint; see, <http://grist.org/article/2010-04-14-justice-stevens-pro-environmental-legacy-embodies-a-simple-appro/>

III. ENVIRONMENTAL JUDICIAL ACTIVISM IN INDIA

Public Interest Litigation or Social Action Litigation has vigorously flourished since 1979.⁵⁴ Post-emergency judicial activism has been inspired by a philosophy of constitutional interpretation that looked at the Constitution not as a mere catalogue of rules, but as statements of principles of constitutional governance. The basic structure of the Constitution being an inarticulate premise of the Indian Supreme Court, its articulation requires reference to the Preamble and the principles that emanate from it.⁵⁵

Ramchandra Guha claims that the environmental movement in India is a child of the sixties that has stayed its course.⁵⁶ The judiciaries in South Asian countries are said to lead the world as a guarantor of sustainable development and the environment.⁵⁷ PIL presented the green activists with an opportunity to knock at the doors of judiciary, seeking its intervention in acts of commission and omission on the part of the Executive in environmental matters. With the adoption of the Rio Principles in June 1992, particularly the Precautionary Principle, the scales weighed heavily against development. This was liberally interpreted to mean that the possibility of an adverse outcome, however remote, was enough to stall or put on hold a project. Any possibility of trade-off between ecology and economic welfare, even when possible, were shunned.⁵⁸ At the climate change conference in Cancun, India not only played a leading role in the negotiations but also ensured that most of its concerns were addressed.⁵⁹

International legal experts have been unequivocal in terming the Indian courts of law as trailblazers, both in terms of laying down new principles of law and

54 Upendra Baxi, *Who bothers about the Supreme Court: The Problem of Impact of Judicial Decisions*, <http://www.conectas.org/IBSA/whobothersabouttheSupremeCourt.pdf>,

55 S.P. Sathé, *Judicial Activism in India: Transgressing Borders And Enforcing Limits*, Oxford Publication.

56 Ramachandra Guha, *Environmentalism: A Global History*, Oxford University Press, 2000.

57 Nicholas A. Robinson, *A Common Responsibility: Sustainable Development and Economic, Social and Environmental Norms*, 4 *Asia Pacific Journal of Environmental Law* 195, 195 (2000); *See also* Parvez Hassan, *In Pakistan, the Judiciary Leads the Way*, 15 *The Environmental Forum* 48 (1998). All cited in Parvez Hassan and Azim Azfar, *Securing Environmental Rights through Public Interest Litigation in South Asia*, 22 *The Virginia Environmental Law Journal* 215.

58 Jairam Ramesh, *Stress On Community Forest Rights*, *Pioneer*, 4th January, 2011.

59 This relates to the shift of the 'peak year' and escape from voluntary pledges to 'legally binding' commitment on reduction of level of green-house gases emission; *India escapes heat at Climate meet*, *Indian Express*, 12th December, 2010.

in the introduction of innovations in the justice delivery system.⁶⁰ The increasing interest and a sense of inevitability in approaching the corridors of justice for every conceivable environmental problem, by public interest groups and individuals, bear witness to this unprecedented trend.⁶¹ 3

3.1 Contribution of the Indian Judiciary

'No one can tell what the law is until the Courts decide it.' (C. J. Hamson)

3.1.1 Relaxing the requirements of locus standi and promoting access to justice:

A combination of variables, both internal (domestic environmental and social variables) and external (international trade factors) has brought about a positive change in the attitude towards environmental protection in India. The cue of PIL was taken by the Indian judiciary from the US Supreme Court⁶². In the Judges' Assets case⁶³, the court held that a letter written by public spirited person to it would be treated as a petition. PIL is aptly called the brain child of Krishna Iyer, J. and Bhagwati, J. The Apex Court opined in *Bandhua Mukti Morcha*⁶⁴ that Article 32 of the Constitution alongside empowering it to issue writs and direction, also authorized it to forge new remedies and strategies. After 1990s the environmental movement in India was virtually led under the aegis of Kuldip Singh, J., who liberally imported the PIL jurisprudence into the environmental sphere.

3.1.2 Forging remedies and planning strategies, thus, creating rights:

Citizens have a choice of three civil remedies to obtain redress:

- (1) a common law tort action against the polluter⁶⁵;

60 See Michael R. Anderson, *Individual Rights to Environmental Protection in India*, in Human Rights approaches to Environmental Protection, Alan E. Boyle and Michael R. Anderson (eds.) (1st ed., 1998).

61 M.K. Ramesh, *Environmental Justice Delivery in India: In Context*, 2 Indian Journal of Environmental Law No. 2, (2001).

62 Refer to, *Gideon v. Wainwright* (1963) 372 US 335, where a postcard from the prisoner was treated as a petition.

63 *S.P. Gupta v. Union of India*, 1981 Supp SCC 87 at 210

64 AIR 1992 SC 38

65 In *Vellore Citizen's Welfare Forum v. Union of India*, AIR 1996 SC 2715, the Supreme Court traced the constitutional and statutory provisions that protect environment to the 'inalienable common law right'.

- (2) a writ petition to compel the agency to enforce the law and to recover the clean up or remedial cost from violator; or
- (3) in the event of damage from a hazardous industry accident, an application for compensation under the Public Liability Insurance Act, 1991 or the National Environment Tribunal Act, 1995.⁶⁶

Additionally, criminal remedies are provided under, Sec 133 to 144 of the Code of Criminal Procedure, Sec 268 of the Indian Penal Code, Sec 19 of the Environmental Protection Act, 1986, while Sec 91 of the Code of Civil Procedure provides for civil remedy. The Indian courts have built an entire environmental law jurisprudence based on fundamental rights of the citizens under the writ jurisdiction.⁶⁷

The tort actions are of little practical utility due to the abysmally low rate of compensation. However, in cases where injunction had been granted, the relief provided had met the needs of the aggrieved.⁶⁸ The evolution of principles like ‘polluter pays’, ‘strict liability’⁶⁹, ‘absolute liability’⁷⁰, ‘precautionary principles’ in environmental law can be traced to intermingling of common law doctrines and reports framed and treaties signed in International conventions.

Judicial recognition of environmental jurisprudence, in the backdrop of industrialization, reached its peak with the pronouncement of the Supreme Court that the right to wholesome environment is a part of Article 21 of the Constitution.⁷¹ *Rural Litigation and Entitlement Kendra vs. State of UP*⁷² was the

66 Armin Rosencranz, Shyam Divan & Martha Noble, *Environmental Law And Policy In India*, (1991), pp.87-111

67 Dr B.R. Ambedkar had called Art 32 as the ‘heart and sole of the Indian Constitution’; Mahendra Singh (ed.), V.N. Shukla’s *Constitution of India* (2010), p.936.

68 Injunctions are regulated by Sections 94 and 95 and Order 39 of the Code of Civil Procedure, 1908; they have been granted in very few situations; *refer to*, Ram Baj Singh v. Babulal, AIR 1982 All 285 and Manohar Lal Chopra v. Rai Baja Seth Hiralal, AIR 1962 SC 527

69 *Rylands v. Fletcher*, (1868) LR 3 HL 330

70 *MC Mehta v Union of India*, AIR 1987 SC 1086; the absolute liability principle so adopted was first applied by the Madhya Pradesh High Court to support its award of interim compensation to the Bhopal victims; *Union Carbide Corporation v Union of India* (Civil revision No. 26 of 1988, 4th April, 1988). In light of *Shriram*, Justice Seth of the High Court described the liability of the enterprise to be ‘unquestionable’.

71 Indrajit Dube, ENVIRONMENTAL JURISPRUDENCE: POLLUTER’S LIABILITY (2007), Lexis Nexis, Butterworths, New Delhi.

72 AIR 1985 SC 652.

first case where Supreme Court made an attempt to look into the dilemma between environment and development. The case concerned limestone quarrying in the Doon Valley which was causing ecological imbalance and health hazards. The court ordered its closure while acknowledging that though it would undoubtedly cause hardships, it was a price which had to be paid for protecting and safeguarding the right of people to live in healthy environment.

The M.C. Mehta's cases decided subsequently by the Supreme Court, indirectly approves the right to a healthy environment. In *Subhash Kumar v. State of Bihar*⁷³, the Supreme Court stated that the right to life includes the right of enjoyment of pollution free water and air for full enjoyment of life. Various High Courts across in India declared that the right to a clean environment was included in the right to life under Article 21. *Damodhar Rao v. S.O Municipal Corporation Hyderabad*⁷⁴ is a land mark case in this regard. Courts in India have slowly but steadily enlarged the scope of the right to environment.

In *Vellore Citizens Welfare Forum v. Union of India*⁷⁵, Kuldeep Singh, J., stated that in view of the constitutional and statutory provision, the 'Precautionary Principle' and 'Polluter Pays Principle' are part of the environmental law of our country. In *M.C. Mehta v. Kamal Nath*⁷⁶, the Supreme Court made 'Public Trust Doctrine' a part of the law of the land. This doctrine enjoins upon the government to protect the resources for the enjoyment of the general public. The apex court in *Indian Council for Enviro-Legal Action v. Union of India*⁷⁷ stated that even though it is not the function of the court to see the day to day enforcement of the law, the failure of enforcement agencies to implement the law to protect the fundamental rights necessitated judicial activism.

The Court has also weighed the right to wholesome environment against other fundamental rights, like, right to practice religion⁷⁸, right to speech and

73 AIR 1987 SC 985, AIR 1987 SC 982, AIR 1987 SC 1086.

74 AIR 1987 AP 170

75 (1996) 5 SCC 647

76 (1997) 1 SCC 388

77 1996) 5 SCC 281

78 *Church of God (Full Gospel) v. KKR Majestic Colony Welfare Association* Air 2000 SC 2773; *Om Birangana Religious Society v. State*, (1996) 1000 CWN 617; *Maulana Mufti Syed Mohd. v. West Bengal*, AIR 1999 Cal 15.

expression⁷⁹, right to trade and commerce⁸⁰ and articulated the supremacy of the former. The jurisprudence behind Articles 48A⁸¹ and 51A (g)⁸² have also been injected in framing environmental justice.

3.1.3 Creating newer institutions of justice:

The concept of 'Green bench' has been the brain child of the Supreme Court of India. In *Vellore Citizens' Welfare Forum v. Union of India*⁸³, the Apex Court noted that such institutions must be set up with powers similar to those of the higher judicial bodies to tackle all the environmental issues. As a result of this, the National Green Tribunals Act...

3.2 Impediments challenging judicial activism in India today

India, like most developing countries, is faced with the daunting task of rapid development, while at the same time preserving and protecting its environment.⁸⁴ The Bhopal gas tragedy remains a dark blot on the environmental jurisprudence in this country.⁸⁵ With the retirement of Justice Kuldeep Singh, the dynamism has also substantially reduced. Though the Supreme Court with its all good intentions has tried to strike a balance between the development and protection of environment, in several decisions it has failed to deliver the ideals it

79 P.A. Jacob v. Superintendent of Police, AIR 1993 Ker 1; Rajnikanth v. Study, AIR 1958 All 360.

80 Abhilash Textiles v. Rajkot Municipality, AIR 1988 SC 57; Wing Commander Utpal Barbara v. State of Assam, AIR 1998 Gau 78; S. Jagannathan v. Union of India, (1997) 2SCC 87; M C Mehta v. Union of India, AIR 1988 SC 1037.

81 Article 48A states, 'Protection and improvement of environment and safeguarding of forests and wild life The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country'; Virender Gaur v. State of Haryana, 1995 (2) SCC 577; Indian Council for Environmental Action v. Union of India, AIR 1996 SC 1446; RLEK, Dehradun v. State of UP, AIR 1985 SC 652.

82 Article 51A(g) states, 'It shall be the duty of 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; MC Mehta v. Union of India, AIR 1992 SC 382, L K Koolwal v. State of Rajasthan, AIR 1988 Raj 2.

83 AIR1996SC2715; the Supreme Court had passed similar orders for states other than that of Tamil Nadu in view of increasing number of petitions relating to disputes over environment and forest issues.

84 Ayesha Das, *Judicial Activism in The Development And Enforcement Of Environmental Law: Some Comparative Insights From The Indian Experience*, 6, Journal of Environmental Law, Issue 2, p. 243-262 (1994).

85 Even after 25 years justice has not been meted out to the victims. Not only the criminal liabilities have been deflected, but the civil penalties have also not been seriously harped on.

conceived. Cases like *N.D. Jayal v. Union of India*⁸⁶ and *Narmada Bachao Andolon v. Union of India*⁸⁷ are the best examples of this failure.

The administrative and legislative barriers pose obvious hurdles to judicial remedies. There is no direct co-relation between the State Pollution Control Board's⁸⁸ mandate and staff strength; the ratio of technical to non-technical staff is also asymmetrical; chairman and member-secretary are not adequately qualified; human resource planning is not strategic; the laboratories and regional offices are not planned; the staff do not undergo sufficient training; the environmental standards are not met with in most of the cases as the penalties imposed by the law are too high to be imposed on environmental matters.⁸⁹ Shyam Divan has stated that if the Supreme Court's activism is to have a lasting impact, a new political will in the form of budgetary allocations at the municipal level and greater community pressure on board officials is necessary. Left to themselves, the PCBs will revert to a culture of slipshod enforcement.⁹⁰

VI. COMPARISON

The confluence of Indian and American environmental jurisprudence, perhaps reached a dramatic tenor at the UCC trial at Justice Keenan's court when the 'ambulance chasing lawyers'⁹¹ from India, in order to retain the American forum for trial, dug up the filth of Indian judiciary and exposed its tarnished image, whereas UCC highlighted the magnificence of 'Indian legal system, its development and innovations'⁹².

4.1 Class action:

Though the Indian judiciary had taken this as a cue from the American legal system, yet its efficacy has outdone the latter. The factum of 'standing' has

86 2003 (7) SCALE 54.

87 Writ Petition (civil) 328 of 2002.

88 The governing authority constituted by the Government to look into the environmental matters

89 Armin Rosencranz and Videh Upadhyay, *Some Suggestions and Recommendations towards a Model State Pollution Control Board (SPCB) In India*, 1, Environmental Law and Practice Review (2011).

90 Shyam Divan, *Cleaning the Ganga*, Economic and Political Weekly, p. 1557, 1st July, 1995,.

91 C.M. Abraham and Sushila Abraham, *The Bhopal Case And The Development Of Environmental Law in India*, 2 The International and Comparative Law Quarterly (1991), p. 340.

92 *Id.*

often come in the way of pro-active judicial reforms. Order I rule 8⁹³ of the Code of Civil Procedure and Rule 23 of the Federal Rules of Civil Procedure and 28 USCA Section 1332 (d) lay down the law for class action. Unlike India, there are strict standing rules which are to be followed before courts in US.⁹⁴ While filing a suit, it is important to determine whether the same is to be filed in the state or the federal court.⁹⁵ Prudential standing requirements⁹⁶ are also to be met in the US as a necessary outcome of strict compliance of ‘separation of power’. The mechanism is put in place to check that the courts do not usurp the jurisdiction of legislature and executive.

4.2 Procedure for framing rules for court administration and management:

Judicial Conference constitutes the rule-making body in the US⁹⁷. The rules formulated by it are scrutinized by the Supreme Court and later amended by the Congress if any changes are required. These rules are mainly with regard to the management of the working or administration of the federal courts. This is due to the federal structure in the US.

4.3 Rule making procedure:

In the US, the Congress delegates the rule making power to an expert agency which publishes its proposal of rule making in the Federal Register which is accessible to the public.⁹⁸ Any interested person can propose amendments to it.⁹⁹ After taking all the comments the agency brings out the final rule, after which the people can again approach the court and challenge the constitutionality of the same. The rules are given similar force and effect as that of legislations.

93 *Kodika Gounder v. Velandi Goundar*, AIR 1955 Mad 281, 286.

94 The requirements of ‘standing’ have been discussed previously.

95 28 USC Sec 1331 (2005), conferring jurisdiction to federal courts for federal question cases and controversies, and 28 USC Sec 1332 (2005), conferring jurisdiction to federal courts for cases or controversies between citizens of different states.

96 This is not found in the Constitution, but comprises of judicially self-imposed limits on the exercise of federal jurisdiction; *Lujan v defenders of Wildlife*, 504 US 550, 560 (1992).

97 *Refer to*, <http://www.uscourts.gov/FederalCourts/JudicialConference.aspx>

98 *See*, <http://www.lectlaw.com/files/env02.htm>

99 <http://www.lectlaw.com/files/env02.htm>

In India, the Parliament does not vest any specialized institution with the power to frame rules. There have been agencies which have been set up by statutes like the Pollution Control Board, the regulation of which stays in the hands of the Central and State Government. No such parallel rule-making body has been established. Moreover, the extant committees and sub-committees are not functional.¹⁰⁰ There prevails lack of adequate staff, asymmetry between number of technical and non-technical staff; centres of monitoring bodies and laboratories are also not sufficiently diffused in their functioning. In this condition the courts find it difficult to address matters requiring scientific and technical evaluation.¹⁰¹

4.4 Judicial review:

In US, there are specific statutes laying down standards of judicial review in different matters.¹⁰² However, the process of judicial review¹⁰³ in India is absolutely judicial discretion. Section 151 of the Code of Civil Procedure and Article 142 of the Constitution give ample power to the civil courts and Supreme Court to do 'complete justice' respectively.

4.5 Penalties:

In the US, the violators are required to pay compensation as per the National Environment Policy Act, 1969. However, there are no provisions for imprisonment. Thus, there are hardly any arrests for environmental violation.¹⁰⁴ In

100 Armin Rosencranz and Videh Upadhyay, op. cit.

101 M.C. Mehta v. Union of India, Supreme Court of India, Judgment of 17 February 1986, (1986) 2 SCC 176, 201-202, Indian Council for Enviro Legal Action v. Union of India, Supreme Court of India, Judgment of 13 February 1996, (1996) 3 SCC 212, 252, A.P. Pollution Control Board v. Prof. M.V. Nayadu (Retd.) & Ors, Supreme Court of India, Judgment of 27 January 1999, (1999) 2 SCC 718,730-731[hereafter A.P. Pollution Control Board I case] and A.P. Pollution Control Board v Prof. M.V. Nayudu (Retd.) & Ors., Supreme Court of India, Judgment of 1 December 2000, (2001) 2 SCC 62, 84-85 [hereafter A.P. Pollution Control Board II case].; the lack of appropriate scientific outlook and technical inputs to solutions to environmental problems had been pointed out by the Supreme Court in Oleum Gas Leak Case (Air 1987 SC 965).

102 See, e.g., CAA, 42 U.S.C. sec. 7607; RCRA, 42 U.S.C. sec. 6976; TSCA, 15 U.S.C. sec. 2618

103 'Judicial review' forms a part of the Basic Structure of the Constitution; see, Keshavananda Bharati v. State of Kerala, AIR 1973 SC 1461; Indira Gandhi v. Raj Narain, AIR 1975 SC 2299, Minerva mills v. Union of India, AIR 1980 SC 1789, Waman Rao v. Union of India, AIR 1881 SC 271, IR Coelho v. State of Tamil Nadu, MANU/SC/1031/1999, etc.

104 Virginia Waste Water Treatment Operators were imprisoned under the Clean Water Act in 2003; see <http://www.ehso.com/ehso3.php?URL=http%3A%2F%2Fyosemite.epa.gov/r3/press.nsf/>

India, the statutes impose high penalties which are not realizable. This trend should be curtailed and effective amendments should be brought in which would follow the ‘deep pocket’ principle and extract cost from the polluters for restoring the lost balance in ecology and human lives.¹⁰⁵ The sentencing policies under different environmental laws swing from one extreme to another – from being too liberal to the other extreme of being too exacting. Both have had negative impacts in terms of effectiveness of enforcement.¹⁰⁶

4.6 Environmental justice – circumferential aspects:

J. Mijin Cha observes,¹⁰⁷

Environmental justice in the US looks at cases of environmental harm not just as a purely environmental concern, but also as a civil rights concern. This is in direct contrast to access to justice movements that do not discuss the social and economic concerns behind environmental justice. To an American audience, the term ‘environmental justice’ goes beyond just access to courts. The term carries significance and weight of its own. It addresses the combination of social inequity and harmful environmental effects that creates this idea of ‘environmental justice’.

V. CONCLUSION

Gus Speth and Peter Haas, in their book *Environmental Governance*, formulated three important conclusions that are beyond controversy:

- (1) The conditions related to global environment are worsening;
- (2) Current responses to address these conditions are grossly insufficient; and
- (3) Major new initiatives are needed to address the root causes.¹⁰⁸

7f3f954af9cce39b882563fd0063a09c/41af08476ea984b485256dc900672598 ; the extant provisions for imprisonment are also moderate in their scope as in most cases the maximum amount of imprisonment is 1 year.

105 Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, (2002), Oxford University Press; www.bizjournals.com/sanjose/stories/1997/09/22/editorial4.html

106 M.K. Ramesh, op.cit.; Sec 15 of the Environmental Protection Act lays down that for every violation there could be a prison term of five to seven years and a fine up to Rs. 1,00,000. Further, there could be an additional fine upto Rs. 5000, for every day continuing violation.

107 J. Mijin Cha, *Access to Environmental Justice in the United States*, in *Access To Environmental Justice: A Comparative Study* (2007), p. 319 (Andrew Harding, ed.)

108 Speth & Haas, *GLOBAL ENVIRONMENTAL GOVERNANCE* (2007), Island Press, Washington DC, p. 139.

The requirement has been partially met through the activism of the judiciary, both in the US and India. Judge Jerome Frank has rejected the suggestion that 'in a democracy it can ever be unwise to acquaint the public with the truth about the...shortcomings of our judiciary...the judiciary is not the least dangerous branch of the government'.¹⁰⁹ 'Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions'.¹¹⁰ Thus, inspite of the progressive trend of judicial activism, the lapses are also required to be widely discussed, preferably through public participation at a wide scale. The United Nations Conference on Environment and Development was of the view that that one of the fundamental prerequisites for the achievement of sustainable development was extensive public participation in decision-making. The Conference further emphasized, in the specific context of environment, "the need for new forms of participation" and "the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in (pertinent) decisions."¹¹¹

109 Justice VR Krishna Iyer, *Off The Bench* (2001), Universal Law Publishing Co. Ltd., New Delhi, p 13.

110 *Id.*

111 A/CONF.151/4 (Part III), chap. 23, paras. 23.1 and 23.2; http://www.un.org/esa/dsd/agenda21/res_agenda21_23.shtml