Research Article

The Jour Multi Rese, 4(1), 2024, 8-18

The Journal of Multidisciplinary Research (TJMDR)

Content Available at www.saap.org.in ISSN: 2583-0317

ENVIRONMENTAL CLEARANCE AND SUSTAINABLE DEVELOPMENT: CHANGING PARADIGM OF ENVIRONMENTAL CONSTITUTIONALISM IN INDIAN

Saman Narayan Upadhyay[1], Dr. Milendra Singh[2]

[1] Assistant Professor and Ph.D. Scholar, Department of Legal Studies, UTD, Sant Gahira Guru Vishwavidyalaya, Sarguja, Ambikapur, CG, India

[2] Assistant Professor, Department of Law, R G Govt. PG College, Ambikapur, CG, India

Received: 03 Dec 2023 Revised: 15 Dec 2023 Accepted: 29 Jan 2024

Abstract

Environmental Clearance (EC) to operate in any industry or establishment is firmly accepted across the globe. It is issued after complying with four stages of Environmental Impact Assessment (EIA) namely screening, scoping, public hearing and appraisal. It stipulates the precautionary conditions to operate (CTO) an industry without causing environmental hazards deploying all necessary environmental protection measures. The MoEF & CC issues EC in India, directly or through its regional authorities. In recent decisions, the Supreme Court of India has allowed post-EC to some of the MSMEs that were operating without EC on account of ignorance of the law on the part of the owner as well as the State Pollution Control Board (SPCB). The post-EC has been permitted to remove procedural irregularity by applying the 'proportionality principle' on account of MSME's contribution to the national economy and livelihood to a significant size of the populace. This research paper finds post-EC anathema to the sustainable development principles.

***Keywords**:* Environmental Clearance, Environmental Impact Assessment, Conditions to Operate, sustainable development principles.

***Corresponding Author**

Saman Narayan Upadhyay

DOI: https://doi.org/10.37022/tjmdr.v4i1.560

Produced and Published by

South Asian Academic Publications

Introduction

An independent and effective judiciary is the hallmark of democracy. India is fortunate to be such a democracy. The Indian judiciary has been a consistent key player in the arena of environmental conservation that incorporates international environmental principles in Indian environmental jurisprudence [1]. It has promptly and effectively responded to the sustainable development (SD) policies set out in international environmental laws declaring them as a part and parcel of Indian environ-prudence since ancient times. The 'absolute liability principle' [2], 'precautionary principle' [3], 'polluter-pays principle' [4] and 'public trust doctrine' [5] are examples of such enviable commitments of the Indian judiciary to protect and improve the environment by encouraging legislatures and directing executives to develop democratized sustainable development policies. The judiciary went on to suggest the establishment of the 'Environmental Courts' at regional levels comprising one professional judge and two expert ecology scientists to adjudicate environmental conflicts involving the assessment and evaluation of scientific and technical data with the ability to appeal to the Supreme Court against the decisions of such courts (per P.N. Bhagwati, CJI in the M.C. Mehta case [6]. India's active participation in all international environmental conventions has been remarkably acknowledged, but simultaneously it carries a dogma of not translating its international environmental commitments into domestic environmental policies [7].

Recent verdict of the Indian Supreme Court in Pahwa Plastics [8] and Electrosteel Steels Limited [9] has turned its four decade enviable commitment to an ecological conservation clock back permitting and ruling post environmental clearance (EC) as a part of the Environment (Protection) Act-1986, the Environment (Protection) Rules-1986 and the Environment Impact Assessment Notification-2006. The court has applied the 'doctrine of proportionality', prioritizing the economic growth of the country over its ecological conservation, and has put sustainable development at stake legalizing the illegality. The court didn't set any accountability for the State authorities because of their ignorance of law. This fundamental shift in the environmental conservation approach of the Indian judiciary is likely to encourage the

recklessness of industrialists to ignore environmental conservation parameters in their economic activities. Furthermore, these verdicts also palliated the grace and significant expertise of the National Green Tribunal (NGT).

This research paper explores impact of the Indian judiciary in translating international sustainable development principles into domestic policies including its fundamental reversal. This research paper has six sections. The first is the introduction; the second is the methodology of the research, which includes a review of the literatures; the third is a brief description of international environmental governance; the fourth is the EIA procedure in India; the fifth is the Indian judiciary and environmental governance in India; and the sixth is the conclusion, suggestions and future research.

1. Research Methodology And Review of The Literature

2.1 Research Methodology

The normative (doctrinal) legal research method was followed in this research paper conceptualizing sustainable development goals as a norm to solve the legal issues arising from economic activities by applying conceptual as well as statutory approaches. Descriptive and qualitative techniques were used for both primary and secondary legal materials. The authoritative primary legal materials are international and Indian environmental laws and policies including constitutional court decisions; secondary legal materials are authentic publications in text books, journals, periodicals, newspapers, blogs, comments on court decisions, etc. In this study, the international environmental laws were limited only to the selective study of the Stockholm Declaration-1972, Rio Declaration-1992, Johannesburg Convention-2002, Rio+20 Declaration-2012 and Stockholm+50 Declaration 2022; and Indian environmental laws were studied in light of judicial decisions in separate sections. Secondary legal materials have been explored and examined to determine the scholarly findings and suggestions on the issue of pre- and post- environmental clearance (EC) and sustainable development (SD).

2.2 Review of the Literature

There is a glut of literature on the relationship between the EC and SD at the international and Indian levels. A brief review of the literature is provided in this research paper to determine post- EC trends worldwide.

Tathagat, D. and Dod, R. D. (2015) thoroughly studied the birth and growth of the Environmental Impact Assessment (EIA) in the world and in India. The authors described the EIA process carried out for a project and subsequent grant of EC. They concluded that the EIA and EC are the only guards of the environment from the gluttony of corporations across the globe. The authors suggested strict compliance with EIA and EC to maintain fine tuning between the national economy and natural ecology [10].

Thayyil, N. (2014) published his research on public participation in environmental clearance for democratic decision making in India. Identifying the EIA process central to the granting of EC, he found extremely limited space and scope of public participation and hearing in the existing EIA regime. He suggested that a broader EIA process provides a mechanism for effective public participation and hearing at multiple stages beginning from screening, scoping and appraisal during the EIA process to compliance with clearance conditions followed by post-clearance monitoring of economic activity [11].

Hedge et al (2022) studied environmental clearance conditions in impact assessments in India by analyzing environmental clearance conditions prescribed by the Ministry of Environment, Forest and Climate Change (MoEF&CC). Most of the EC conditions lack a scientific basis and specific information needed for effective pollution prevention, mangrove restoration and biodiversity conservation. They suggested relisting on EC conditions to make ecological conservation centric instead of engaging in greenwashing [12].

Dilay et al (2020) studied the impact of EIA on procedural environmental justice in India. They found that faulty EIA reports and meager opportunities for public participation trigger litigation and the persistence of crucial disconnects between EC conditions and local community issues. The authors suggested the inclusion of local knowledge, values and aspirations in the EIA system [13].

Boess et al (2021) explored the utilization of SDGs in the EIA process at the project level of high income. These authors referred to Danish cases of EIA reports to show the potential of SDG-propelled EIA for environmental protection rather than for dominating biospheric and environmental EIA parameters across the world. They concluded that the SDG-based EIA process has more potential to address the needs of people and human health [14].

Reynolds, A. (2023) described the EIA process as a ubiquitous mechanism for achieving SDGs across the globe. He carried out an empirical review of the impact of post EIA approval in Australia from 2011 to 2021. He found that more than 48% of developments were granted post-EIA approval condition settings under the Environmental Protection and Biodiversity Conservation Act-1999. Post-EIA approval was approved by the government to reduce the cost of EIA, which eventually threatened the integrity of the EIA process impairing its potential to dispense ecologically sustainable development outcomes and causing an information gap limiting stakeholder engagement during the EIA process [15].

Clarke and Vu (2021) did study of EIA effectiveness in Vietnam from the angle of stakeholders' perception. They found that the Vietnam's EIA process has undergone significant changes pursuant to the will of the Government to improve environmental performances. They found that procedural shortfalls in Vietnam's EIA process do not appreciate stakeholders' confidence and

underlying challenges potentially impair its capacity to protect environment. Persisting challenges in Vietnam's EIA process are repugnant dual Planning Law and Environmental Management Law, unstructured decision making, conflicting interests in the appointment of appraisal committee, information debar hindering civic engagement, etc. [16].

Canadian Supreme Court's Chief Justice Wagner (in Reference re Impact Assessment Act) [17] held the Federal Impact Assessment Act-2019 ultra wires and unconstitutional. This Act was providing for uniform EIA procedure spanning over the State maters, but the court turned it down with direction to make new environmental conservation laws by the Federal Parliament and provincial legislatures respective legislative domain of each other [18].

Telesphore and Mutavu (2022) empirically evaluated the effectiveness of EIA in Rwanda by analyzing EIA clearances granted between 2006 and 2019. After they appreciated the EIA process of Rwanda, they recommended strengthening documentation, digitalization of services and incorporation of EIA results into decision-making. These authors identified potential hindrances to the effectiveness of Rwanda's EIA procedure such as insufficient monitoring and environmental management programmes, weak follow-up, implementation and auditing by inexperienced professionals and inadequate public participation [19].

Ehtasham et al (2022) reviewed the status of EIA in Pakistan compared with that in other countries. They found pre-EIA approval and Initial Environmental Examination (IEE) provisions in the Islamic State of Pakistan, China, UK and India, with variable contents, before the commencement of development projects. China additionally undertakes further analysis to determine EIA, India analyzes impacts of proposed project on environment by five committees vesting final authority in the Ministry of Environment, Forest and Climate Change (MoEF&CC) to finally approve or disprove the proposed project, and UK makes mandatory EIA for projects listed in first schedule and potential EIA for projects of second schedule with a liberty to challenge the screening opinions in the court [20].

Enríquez-de-Salamanca, Á. and Díaz-Sierra, R. (2023) found that the temporary activities and events have significant negative impact on the environment nevertheless they are not covered within the scope of EIA process unless there are certain major activities in eco-sensitive areas. They noted technical and material differences in EIA mechanism across the world and proposed suggestions to analyze impact of proposed activities on the environment at the Strategic Environmental Assessment (SEA) level, during screening process or through EIA process for authorizing activities [21].

Roos et al (2020) found a positive perception among the South African regulators about the potential of EIA and actual realization of benefits from the EIA that it benefits more to the SD than the cost involved in its process. The intangible benefits are spreading over conservation of biodiversity, civic engagement in the EIA process, informed EIA mechanism, ecological impact mitigation and legal implementations [22].

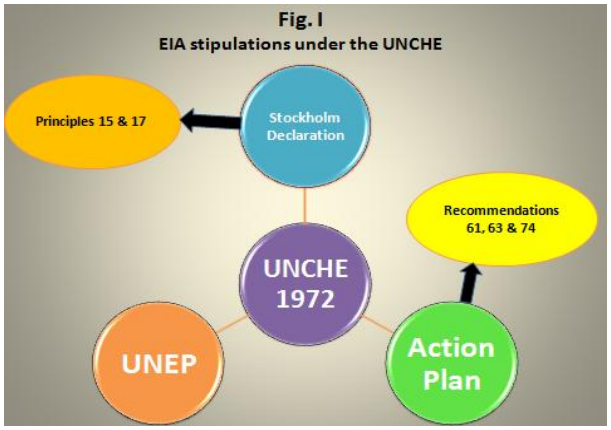
Keken et el (2022) note that the EIA has completed its more than five decade journey and it is still evolving across the world as a most potent tool for successfully regulating and managing the dynamic developmental programmes. They suggest regulators to identify the economic activities fit for EIA process as well as post project auditing [23].

All environmental-legal scholars have unanimously agreed on the issue of strengthening of the EIA mechanism through the granting of EC before the commencement of economic activities and, on the issue of post project environmental auditing. None of them advised for post-EIA procedures and grants of EC i.e. bringing the EIA procedure into operating or granting the EC after the project started functioning. Even Indian legislators had not thought of post-EIA and post-EC legislation. Nevertheless, the Indian judiciary has ruled for post-EIA and post-EC to an industry in name of its economic contribution to the country, damaging its own four-decade enviable track record of environmental conservation.

2. International Environmental Governance: Brief Description

International environmental governance began with the United Nations Conference on the Human Environment (UNCHE) with the Stockholm Declaration 1972, which involved compiling 26 moral norms overwhelmingly endorsed by all participating countries to be followed as common inspiring and guiding principles in their developmental schemes [24]. In addition to the Stockholm Declaration, the UNCHE yielded (1) a global action plan for an environmental assessment programme, environmental management activities and international measures to support assessment and management activities carried out at the national and international levels and created (2) the United Nations Environment Programme (UNEP) [25]. The 'SD' text doesn't appear in it; nevertheless, it recognizes socio-economic development for a dignified life (principle 8) putting responsibility on individuals to conserve the environment in a sustainable manner (principle 1) obliging States to make rational plans to reconcile conflicts between economy and ecology (principle 14) and socio-economic-environ centric urban planning (principle 15) to improve environmental quality by creating national environmental resources planning-managing-controlling agencies (principle 17). It spells for no trans-boundary pollution obligation of States (principle 21) and compensation for trans-boundary pollution (principle 22). The concept of EIA emerged in this UNCHE at the international level for the first time; this study simply recommended to the Secretary General of the United Nations General Assembly (UNGA) to initiate a pilot

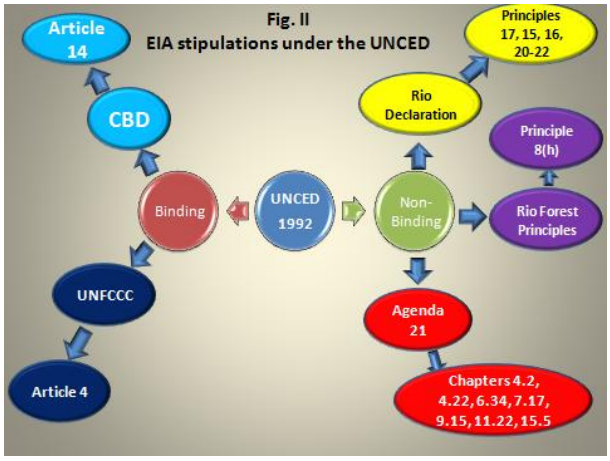
study to assess the environmental impact of resource development projects on ecosystem of international significance in cooperation with concerned national governments and international expert agencies (Recommendation 61) [26]. This Action Plan recommends to the Secretary General of the UNGA to ensure the inclusion of environmental impact considerations in the national development projects with the help of international assistance (Recommendation 63) [27]. In the last mention of the EIA, the Action Plan recommends the Secretary General of the UNGA to develop international test schedules for evaluating the EIA strengthening international acceptance of the EIA procedure for both short term and long term economic activities, keeping it up to date and including new knowledge and techniques from time to time (Recommendation 74) [28]. Fig. I shows



the EIA stipulations under the UNCHE.

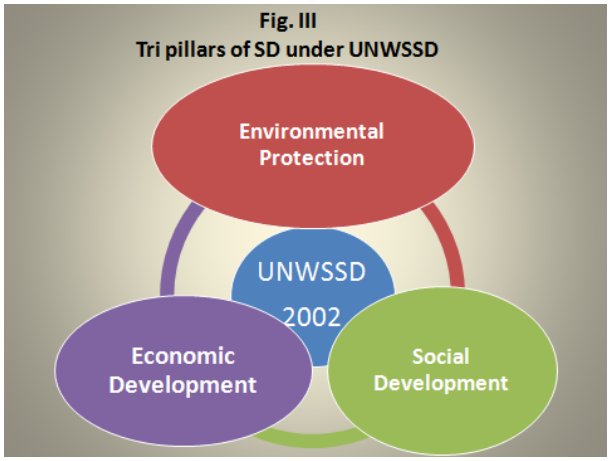
Gro Harlem Brundtland, chairperson of the World Commission on Environment and Development (WCED), said in its report 'Our Common Future' that there is no military solution to 'environmental insecurity' and suggested the expansion of traditional threats to national sovereignty to include the growing impact of environmental stress [29]. Pre-EIA of new development technologies before use is recommended to ensure that production, use and disposal are not overstressed. The proposed projects should be mandatorily subjected to public scrutiny and approval under the EIA procedure [30]. The commission found the pre-EIA procedure to be the most potent tool for ensuring the sustainable development of a conserving environment and natural resources to ensure intergenerational equity.

Following the WCED report-1987, the UNGA held the first earth summit 'UN Conference on the Environment and Development' (UNCED)-1992 at Rio de Janeiro from 3 to 14 June 1992, on the occasion of the 20th anniversary of the first global conference on the human environment. This conference gave birth to two binding treaties (1) the Convention on Biological Diversity (CBD) and (2) the UN Framework Convention on Climate Change (UNFCCC); as well as three non-binding treaties (1) the Rio Declaration on Environment and Development (Rio Declaration), (2) the Programme of Action for SD (the Agenda 21) and (3) the Principles for a Global Consensus on the Management, Conservation and SD of all types of Forests (the Rio Forest Principles) [31]. The UNCED-1992 has meticulously addressed the EIA and SD in all of its documents. The Rio Declaration clearly mentions the EIA as a necessary national instrument for every proposed economic activity that has an adverse impact on the environment under the final decisional authority of the national agency (Principle 17) [32]. It has set global standard for integration of environmental concerns in the developmental policies (principle 4) for sustainable use of natural resources to maintain intergenerational equity (principle 3) strengthening global partnership spirit for conservation of earth's ecosystem (principle 7) reducing unsustainable production and consumption (principle 8) enhancing endogenous capacity building through transfer of technology (principle 9) affording public participation in the developmental decision making process with effective judicial and administrative access (principle 10). It entails effective national environmental legislation with permissible development guidelines (principle 11) for compensating pollution victims (principle 13) by applying precautionary principles without excusing cost-effective measures (principle 15) and the polluter pays principle (principle 16). The full participation of women (principle 20), youth (principle 21) and indigenous people (principle 22) who are essential for achieving SD based on their expertise and courage has been encouraged. The Agenda 21 does require the EIA process in trade, business and industries for the achievement of SD [33]. The Rio Forest Principles demand the establishment of an EIA with international cooperation to mitigate health and environmental stresses arising from economic activities [34]. The EIA processes that emerged in the Rio declaration, Agenda 21 and the Rio Forest Principles are nonbinding in nature. The binding nature of the EIA occurred between the CBD and UNFCC. The CBD mandates that nations introduce the EIA process for proposed projects likely to cause significant damage to biological diversity to mitigate such adverse effects, along with public participation in the EIA process (article 14) [35]. The UNFCC makes it necessary for nations to formulate EIA procedures at their own level and apply it to minimize the adverse impacts of economic development projects on public health and quality of the environment to mitigate climate change (article 4) [36]. Fig. II shows the EIA stipulations under the UNCED.



The Kyoto Protocol (KP) is another international environmental conservation effort to characterize the 20th century as a top-down climate change governance era [37]. The KP has prescribed a timeline for stabilizing greenhouse gases (GHGs), reducing emissions by developed countries between 2008 and 2012 by five percent below the baseline in 1991 (Kyoto Protocol, article 3(1)) [38]. The KP demands that developed countries implement their commitment to reducing GHG emission within the estimated timeline to minimize adverse socio-environ-economic impacts on developing countries (article 3), as they comply with their common but differentiated responsibilities and offer access to environmentally sound technology (article 10) and scientific information (article 13) to developing countries. The KP is not a legally binding instrument. This approach does not impose penalties for noncompliance or withdrawal or incentives for compliance [39]. KP has contributed substantially to the development of common consensus among nations to formulate legally binding international laws for the protection of the environment from exceeding carbon emissions, which is essential for the socio-economic development of present and future generations.

Celebrating the tenth anniversary of UNCED, the United Nations World Summit on Sustainable Development (UNWSSD) took place at Johannesburg in September 2002. This summit couldn't carry the legacy of UNCED nor successfully persuaded nations on any concrete methodology of sustainable development. However, this summit drew the attention of the nations to the assimilation of tri indispensable pillars of the SD, i.e. socio-economic-environ security across the world [40]. Fig. III shows tri pillars of SD under UNWSSD.



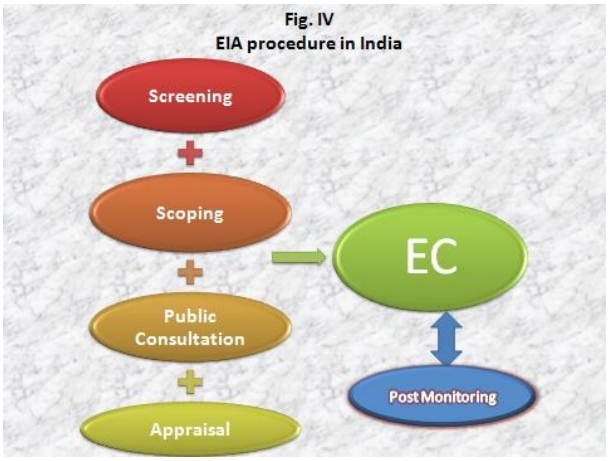
In 2012, the world leaders met again at the Rio de Janeiro in the UN Conference on Sustainable Development (UNCSD / Rio+20) after four decades of UNCHE, two decades of UNCED and one decade of UNWSSD. Participants debated on three major objectives viz. to secure global commitments for SD, assessment of global measures taken for the SD and to find out solutions for the emerging challenges to SD in future [41]. The Rio+20 cover almost all the areas of SD along with means of implementation; nonetheless, this could unanimityize the participants merely on the issue of renewed world commitment to a socio-economic-environmentally sustainable future for all [42] in its nonbinding document '*The Future We Want*' [43].

Recently the UN convened another international meeting titled 'Stockholm+50: a healthy planet for the prosperity of all- our responsibility, our opportunity' in Stockholm on the 2nd and 3rd June 2022 commemorating five decade promises of UNCHE. Tree planetary crises i.e. climate, nature and pollution were the focal points in three leadership dialogs of this meeting. Reforms in governance, cooperation and collaboration, equality and inclusiveness, finance, the private sector, digital transformation, data, research and technology, capacity building, education and awareness programmes were recommended [44]. This meeting resolved the prioritization of climate solutions promoting gender equality with women's rights in the management of public affairs and equitable access and control over natural resources and recognized the indispensable role of indigenous and local communities in the conservation and sustainable consumption of natural resources. The leaders agreed to guarantee the free, prior and informed consent of the stakeholders in all kinds of economic developmental activities and promised to guarantee fair and equitable sharing of profits arising from such activities [45].

The epicenters of all of the above-discussed international policies for sustainable development had been free, prior and informed consent of stakeholders. This in turn makes the EIA process necessary prior to the establishment and execution of any economic activity.

3. EIA Procedure In India

In 1976-77, with the probing of EIA in valley river projects by the Department of Science and Technology at the desire of the Planning Commission, India started the EIA procedure. Thereafter the Central Government issued administrative decisions to follow the EIA of the projects requiring the approval of the Public Investment Board. Legislative support was received in 1994 with the promulgation of the EIA Notification by the Union Ministry of Environment and Forest under the EP Act-1986, which mandates the EC to start new projects or expand or modernize existing projects [46]. The term 'environmental impact' does find mention under Rule 5 (1) (vii) of the Environmental (Protection) Rules-1986 prohibiting and restricting the operation of industry or any other activity that is likely to cause net adverse environmental impacts. Expanding the EIA to various projects, the EIA Notification 2006 was issued. This approach made pre- EC to all kinds of projects in categories A and B respectively from the Central and State regulatory authorities [47] valid for certain periods [48] with the right to transfer EC to other projects [49]. The EC process consisted of four stages: Screening, Scoping, Public Consultation and Appraisal [50]. It makes mandatory for project management to submit a half yearly report pertaining to compliance with EC grant terms [51]. Fig. IV



shows the EIA procedure in India.

5. Indian Judiciary and Environmental Governance In India

The Indian judiciary has been a very keen protector of the environment on Indian soil. The Indian court has diluted the common law principle of 'Locus Standi' allowing Public Interest Litigation (PIL) in matters relating to environmental protection. It has extensively explored international environmental policies in four ways- first, holding clean and healthy environment as one of the fundamental rights within the meaning of the right to life guaranteed under article 21 of the Indian constitution; second, providing direction to state authorities to take appropriate measures to prevent environmental pollution by industries, factories, municipal corporations, hospitals and colonies; third, directing closure of environmental polluting activities; and fourth, developing significant principles and rules for the prevention of pollution and restoration of environmental damage.

The judicial environmental protection journey in India began with the Rural Litigation Entitlement Kendra, Dehradun v. State of U.P. (Dehradun Quarrying case) [52] involving maintenance of the ecological balance with development. On the recommendation of the Bhargava Committee, the court ordered the closure of illegal limestone mining in the ecologically sensitive Doon Valley area under the EP Act-1986. The court further held that the preservation of ecology is not only the task of the State under article 48A of the Indian constitution but also the responsibility of the citizen under article 51A(g) of the Indian constitution. Chief Justice P.N. Bhagwati directed for the reclamation, a-forestation and ecological conservation programmes in this area employing the relieved workers of the closed mining industry.

The Indian judiciary wrote a new chapter in the Factory Act-1948 and compelled Parliament to enact the Public Liability Insurance Act-1991 in M.C. Mehta v. Union of India [53] (Oleum Gas Leak/ Shriram Food and Fertilizer case). Chief Justice P.N. Bhagwati held that the court has dual powers to address environmental issues, one is injunctive and the other is remedial. The court coined the absolute liability principle rejecting the application of strict liability in India for the tortuous liability of the person who has brought dangerous substances to his or her land and it has escaped to cause injury to others without his or her fault. The court imposed absolute and non delegable liability on the industry owner to ensure that no damage would result from the hazardous nature of the activity undertaken by him. If he fails to do so and harm is caused even without negligence from his part, the industry owner shall be liable to compensate sufferers without any exception.

Upholding the Bhopal Gas Leak Disaster (Processing of Claims) Act-1985 in Charan Lal Sahu v. Union of India [54] the court held that although the Central Government is a joint tort feasor, nonetheless, it is *Parens Patria* i.e. a protector of the rights of all its citizens. Hence the Central Government is competent to carry out case against delinquent company on behalf of their victims. The Union Carbide Corporation v. Union of India [55] relooked certain provisions of the Bhopal Gas Leak Disaster (Processing of Claims) Act-1985 and held that the absence of fair hearing and reopening clause doesn't vitiate the settlement clause; however, if a settled compensatory fund is found insufficient then the Central Government will be able to make good for its citizens.

In the M. C. Mehta v Union of India (Kanpur Tanneries Case) [56] the court directed Kanpur Nagar Mahapalika to take action under the UP Nagar Mahapalika Adhiniyam-1959 and other relevant bye-laws to prevent water pollution of the Ganga River by waste accumulated from a large number of cattle either shifting them outside

the city or making alternate disposal arrangements. The court, further, considered that it is the constitutional duty of the Central Government to direct all educational institutions across India to teach at least one hour in a week lessons on the protection and improvement of the natural environment up to class ten distributing free text books and training teachers. The court directed polluting tanneries to install effluent treatment plants at their own cost.

In the Indian Council for Enviro-Legal Action v Union of India [57] the court was invited to preserve ecology from damage caused by pernicious effluent of the 'H' acid production unit in Bichhari Village of Udaipur, Rajasthan. The production of this acid was banned in Western countries, but its products were supplied by countries like India. Effluents cause enormous damage to water, plants, cattle and the entire locality in general. Applying the universally recognized 'Polluter Pays' principle to reverse ecological damage, the court directed the polluting undertaking to bear the financial costs of preventing and remedying damage caused by pollution. The offending industry must pay damage to the people affected and the cost of ecological restoration to the government. The court suggested that the establishment of regional environmental courts be presided over by judicial members along with environmental experts.

In Vellore Citizens' Welfare Forum v Union of India [58] the court moved ahead borrowing Polluter Pays Principle and Precautionary Principle from the Rio Declaration 1992 ruling these principles an essential features of 'Sustainable Development.' The court took note of the Brundtland Report to cull out some of the salient features of 'sustainable development' like intergenerational equity, use and conservation of natural resources, environmental protection, the polluter pays principle, the precautionary principle, and the State's obligation to assist and cooperate and eradicate poverty. The court noted that within the domestic law regime the precautionary principle is applied to prevent environmental damage from the new establishments. It imposes liability on the Government and statutory authorities to anticipate environmental threats likely to be caused by new establishments and take appropriate measures to prevent that ecological harm. This theory puts obligation on the owner of the establishment that his action is environmentally benign. On the other hand, the 'polluter pays' principle imposes absolute liability on the developer- owner of the establishment to compensate for the suffering and restoration of ecology for the damage caused by hazardous activities. The court emphasized that the precautionary principle and polluter pays principle are part of the Indian Constitution under articles 21, 47, 48A and 51A(g).

In M. C. Mehta v. Kamal Nath [59] the court held that natural properties such as river, water bodies, water, trees, plants, seas and seashores are the properties of the people, and the State is the trustee of these properties on behalf of the public under the 'Public Trust Doctrine.' This doctrine imposes three types of restrictions on the governmental authorities- first, these properties should not only be used by the government for a public purpose but also be made available for general public use; second, the property may not be sold even for fair cash; and third, the State has to maintain property for a particular type of use. The court ruled that the 'public trust doctrine' is part of our constitution.

Based on these rulings and directions, Indian courts have dealt with a number of cases pertaining to environmental conservation. The NGT has also been very inquisitive to prevent environmental pollution. However, recently, the Indian Supreme Court has departed from its earlier views, prioritizing economic activities over environmental conservation. It has developed an exceptional 'proportionality principle' to bargain about the economy over ecology.

In Lafarge Umiam Mining Private Limited v. Union of India [60] the Supreme Court has ruled for the application of the constitutional 'doctrine of proportionality' in environmental matters as a part of judicial review. Outweighing the principles of sustainable development and intergenerational equity, the court has preferred the judicial review of the decision relating to the utilization of natural resources on the grounds of its lack of bias because the decision was not influenced by any extraneous factors; it was in strict conformity with the legislation and it consistent with the principle of sustainable development. The court said that once this is ensured, then the doctrine of 'margin of appreciation' will be attracted in favor of decision makers.

In Alembic Pharmaceuticals Ltd. v. Rohit Prajapati [61] the Supreme Court held a grant of ex post facto EC is contrary to the basic principles of environmental jurisprudence. It circumvents the essential procedures of precautionary principles and sustainable development to anticipate plausible environmental harm by screening, scoping, public hearing and appraisal of the new establishments. The pre- EC prescribes terms and conditions to operate new establishment or expand, modernize or shift an existing establishment with due safeguards and care to the environment; whereas the ex post facto EC condones these basic requirements and environmental safeguarding conditions, which in turn results in irreparable environmental loss if the EC is ultimately refused.

In Electrosteels Steels Ltd. V. Union of India [62] the Supreme Court was invited to a question of law that 'if an establishment is in compliance with the pollution laws and it is not causing pollution but has been shifted to other places without prior EC, should it be closed without giving opportunity to remove the irregularity?' The establishment is giving livelihood to a large number of its employees and contributing to the national economy. The court has held that in such circumstances, the deviant establishment shall not be declined ex post facto EC

merely for penalizing; nevertheless, the post- EC should be granted in strict conformity with the applicable Rules, Regulations and Notifications. However, deviant establishment may be penalized by the polluter pay principle for the restoration of ecological damage, if any.

Overruling NGT in Pahwa Plastics Pvt. Ltd. V. Dastak NGO [63], Indian Supreme Court has applied the 'proportionality principle' to hold ex post facto EC valid under the EP Act-1986 legalizing the Central Government's Notification of 2017, providing ex post facto EC. The court allowed the functioning of the unit calculating the economic loss to be caused by the closure of unit pending a grant of EC. The court observed that ex post facto EC shall not be ordinarily granted but at the same time shall not be declined with pedantic rigidity to remove technical irregularities in terms of a Notification under the EP Act.

The Supreme Court of India has introduced a new chapter of ex post facto EC in Indian environmental jurisprudence through the 'proportionality principle', giving weight to the economic development and interest of employees. The court had missed the opportunity to fix some accountability to deviant government authorities in the Electrosteels and Pahwa Plastics.

6. Conclusion, Suggestions and Future Research

Good environmental health is essential for sustenance and development. In the growing arena of environmental law across the globe, the prevention of environmental pollution has been considered better than the imposition of heavier costs on deviant industry owners for the restoration of good ecology. The EIA process is a Standard Operating Procedures (SOP) used anticipate and assess plausible environmental damages by a proposed establishment or activity. The EIA procedure includes four stages for the anticipation and assessment of plausible environmental harms- screening of the proposal, scoping of the proposal, public hearing on the ecological impacts of the proposal and ultimately, appraisal of the proposal. After completing these stages of the EIA, the MoEF&CC and other authorized agencies issued the EC with certain terms and conditions to be strictly complied with during operation of the establishment. This modality of EC countenance international environmental principles viz. precautionary principle, polluter pays principle, public trust doctrine, sustainable development, intergenerational equity, and free and informed participation of stakeholders in the decision making process.

No nation of the world has agreed regarding granting a pre- EC to any establishment, whether new, modernized or shifted. India has shifted its earlier approach to sustainable development. It permitted ex post facto EC to running establishments applying exceptional 'proportionality principle' to favour national economy legalizing administrative orders in Electrosteels and Pahwa Plastics. Although the court us of the reminded significance of pre- EC in sustainable development, nevertheless, it allowed ex post fact EC to the non-polluting and zero trade discharging industries as an exceptional case for removing procedural lapses. Here arises issue of negligence of law on the part of the State Pollution Control Board which had issued Condition to Operate (CTO) to owners of these industries without pre-EC from the competent authority. The court had totally overlooked this negligence. Furthermore, the court relied upon the affidavit of the deviants that their units are non-polluting and zero trade discharge units. The court didn't appoint any expert committee to inquire about the veracity of these affidavits.

Suggestions

Nowadays, the ex post facto EC is becoming a part of Indian environmental jurisprudence. Judiciary has shifted approach from ecology to economy. SD principles such as 'precautionary principle', 'polluter pay principle' and 'public trust doctrine' are compromised by 'proportionality principle' of economy. Grant of EC before executing any industry is being diluted permitting post- EC to remove procedural irregularities. This research proposes the following suggestions to combat with adverse impacts of post- EC on sustainable development in India:

1. The court shouldn't permit ex post facto EC to any industry, even if it is non-polluting or bonafide, only because it contributes to the national economy and provides livelihood to a significant population, unless the court is satisfied with the report of the expert committee that industry is not causing pollution hazards;
2. An expert committee report should be obtained within a fortnight along with free and informed opinions of the local community;
3. The court should impose heavy exemplary costs on the deviants to set examples for the forthcoming cases;
4. The court should take action against the members of public authority to irresponsibly let that industry operate without obtaining EC;
5. The EIA procedure initiated for grant of post- EC must give importance to public hearings;
6. If the post- EC is ultimately denied, the deviant industry should be closed down with a heavy penalty on its owner and deviant public authority.

Future Research and Development

Ex post fact EC (post- EC) is anathema to sustainable development. However, it is becoming a part of Indian environmental law. This research is limited by the small sample size. There could be a number of Micro, Small and Medium Enterprises (MSMEs) in operation without EC causing unchecked irreparable pollution hazards. Broad-scale empirical research will be helpful for ensuring that these MSMEs conform to the essential principles of sustainable development viz. the

precautionary principle, the polluter pays principle, the intergenerational equity principle, the public trust doctrine, and free and informed consultation with the stakeholder local community in the decision making process.

Funding
No Funding

Author Contribution
SNU: Conceptualize the topic, Designed Research Methodology, Reviewed literature, analyzed data, prepared figures, wrote paper. MS: Supervised entire process of the paper

Conflict of Interest
None

Ethical Considerations
N/A

Acknowledgement
Authors are thankful to Prof. Ashok Singh, Hon'ble Vice Chancellor of the Sant Gahira Guru Vishwavidyalaya, Sarguja, Ambikapur, CG (India) for encouraging and providing logistics to write this paper. Author (SN Upadhyay) is also thankful to his wife Mrs. Sarita Upadhyay for her continuous support and motivation to write this paper.

References

[1] Saman Narayan Upadhyay, 'Global Legal Norms on Environment and Sustainable Development in the 21st Century', *Advances in sustainable development and management of environmental and natural resources*, vol 2 (First edition, Apple Academic Press 2022); Shalini Iyengar, Nives Dolšak and Aseem Prakash, 'Selectively Assertive: Interventions of India's Supreme Court to Enforce Environmental Laws' (2019) 11 Sustainability 7234 <https://www.mdpi.com/2071-1050/11/24/7234>

[2] M.C. Mehta v. Union of India, AIR 1987 SC 1099 (Oleum Gas Leak case)

[3] Vellore Citizen Welfare Association v. Union of India, AIR 1996 SC 2715

[4] Vellore Citizen Welfare Association v. Union of India, AIR 1996 SC 2715; Indian Council for Enviro-Legal Action v. Union of India, JT 1996 (2) 196

[5] M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388

[6] M.C. Mehta v. Union of India, AIR 1987 SC 1099 (Oleum Gas Leak case)

[7] Michael R Anderson, 'International Environmental Law in Indian Courts' (1998) 7 Review of European Community & International Environmental Law 21 <https://onlinelibrary.wiley.com/doi/10.1111/1467-9388.00123>

[8] M/S Pahwa Plastics Pvt. Ltd. V. Dastak NGO, Civil Appeal No. 4795/ 2021 decided on 25 March 2022.

[9] Electrosteel Steels Limited v. Union of India, Civil Appeal No. 7576-7577/ 2021 decided on 9 December 2021.

[10] Devarshi Tathagat and Dr Ramesh D Dod, 'The Inception and Evolution of EIA and Environmental Clearance Process – Laying Emphasis on Sustainable Development and Construction' (2015) 5 International Journal of Engineering Research and Applications 22 <https://www.ijera.com/papers/Vol5_issue3/Part%20-%202/E53022228.pdf>.

[11] Naveen Thayyil, 'Public Participation in Environmental Clearances in India: Prospects for Democratic Decision-Making' (2014) 56 Journal of the Indian Law Institute 463 <https://www.jstor.org/stable/43953725>.

12 Mahabaleshwar Hegde, Kirit Patel and Alan P Diduck, 'Environmental Clearance Conditions in Impact Assessment in India: Moving beyond Greenwash' (2022) 40 Impact Assessment and Project Appraisal 214 <https://www.tandfonline.com/doi/full/10.1080/14615517.2022.2025689>

13 Ariane Dilay, Alan P Diduck and Kirit Patel, 'Environmental Justice in India: A Case Study of Environmental Impact Assessment, Community Engagement and Public Interest Litigation' (2020) 38 Impact Assessment and Project Appraisal 16 <https://www.tandfonline.com/doi/full/10.1080/14615517.2019.1611035>

14 Emilia Ravn Boess and others, 'Using Sustainable Development Goals to Develop EIA Scoping Practices: The Case of Denmark' (2021) 39 Impact Assessment and Project Appraisal 463 <https://www.tandfonline.com/doi/full/10.1080/14615517.2021.1930832>

15 Annika Reynolds, 'Conservation after the Fact: The Prevalence of Post-Approval Condition-Setting in Environmental Impact Assessment Processes in Australia and Its Implications for Achieving Ecologically Sustainable Development Outcomes' (2023) 99 Environmental Impact Assessment Review 107032 <https://linkinghub.elsevier.com/retrieve/pii/S0195925522002980>

16 BD Clarke and Cong C Vu, 'EIA Effectiveness in Vietnam: Key Stakeholder Perceptions' (2021) 7 Heliyon e06157

<https://linkinghub.elsevier.com/retrieve/pii/S2405844021002620>

17 2023 SCC 23 (Supreme Court of Canada)

18 Ibid. Accessed from < https://decisions.scc-csc.ca/scc-csc/scc-csc/en/20102/1/document.do>

19 Telesphore Kabera and Grace Mutavu, 'Evaluation of the Effectiveness of Environmental Impact Assessment in East Africa: The Case of Rwanda' (2023) 32 Environmental Quality Management 83 <https://onlinelibrary.wiley.com/doi/10.1002/tqem.21943>

[20] Laraib Ehtasham and others, 'A Review of the Status of Environmental Impact Assessment in Pakistan' (2022) 18 Integrated Environmental Assessment and Management 314 <https://setac.onlinelibrary.wiley.com/doi/10.1002/ieam.4499>

[21] Álvaro Enríquez-de-Salamanca and Rubén Díaz-Sierra, 'Impact Assessment of Temporary Activities and Events' (2023) 19 Integrated Environmental Assessment and Management 1320 <https://setac.onlinelibrary.wiley.com/doi/10.1002/ieam.4733>

[22] C Roos and others, 'Regulators' Perceptions of Environmental Impact Assessment (EIA) Benefits in a Sustainable Development Context' (2020) 81 Environmental Impact Assessment Review 106360 <https://linkinghub.elsevier.com/retrieve/pii/S0195925519304044>

[23] Zdeněk Keken and others, 'Environmental Impact Assessment – The Range of Activities Covered and the Potential of Linking to Post-Project Auditing' (2022) 93 Environmental Impact Assessment Review 106726 <https://linkinghub.elsevier.com/retrieve/pii/S0195925521001761>

[24] Saman Narayan Upadhyay, 'Global Legal Norms on Environment and Sustainable Development in the 21st Century', *Advances in sustainable development and management of environmental and natural resources*, vol 2 (First edition, Apple Academic Press 2022) 62-63.

[25] These details are available at the Homepage of United Nations (2024) <https://www.un.org/en/conferences/environment/stockholm1972>

[26] UN, 'United Nations Conference on Human Environment, 1972' United Nations, New York <https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/300/05/PDF/NL730005.pdf?OpenElement>

[27] Ibid.

[28] Ibid.

[29] UN Secretary General, 'Report of World Commission on Environment and Development' (1987) United Nations Digital Library <https://digitallibrary.un.org/record/139811?ln=en>

[30] Ibid.

[31] Saman Narayan Upadhyay, 'Global Legal Norms on Environment and Sustainable Development in the 21st Century', *Advances in sustainable development and management of environmental and natural resources*, vol 2 (First edition, Apple Academic Press 2022) 62-63; also see UN. Conferences, 'Environment and Sustainable Development' (2024) <https://www.un.org/en/conferences/environment/rio1992>

[32] UN, 'Rio Declaration on Environment and Development' (1992) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N92/836/55/PDF/N9283655.pdf?OpenElement>

[33] UN, 'Agenda 21' (1992) <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf?_gl=1*1fxaqs5*_ga*MTgwNTU5NjIwMS4xNjg4OTE0MTAz*_ga_TK9BQL5X7Z*MTcwMjg4Njk1Ny41LjEuMTcwMjg4ODExMS4wLjAuMA>

[34] UN, 'The Principles for a Global Consensus on the Management, Conservation and SD of all types of Forests' (1992) <https://www.un.org/esa/documents/ga/conf151/aconf151126-1.htm >

[35] UN, 'United Nations Convention on Biological Diversity' (1992) <https://www.cbd.int/doc/legal/cbd-en.pdf>

[36] UN, 'United Nations Convention on Climate Change' (1992) <https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf >

[37] Saman Narayan Upadhyay, 'Global Legal Norms on Environment and Sustainable Development in the 21st Century', *Advances in sustainable development and management of environmental and natural resources*, vol 2 (First edition, Apple Academic Press 2022) 62-63. Rafael Leal-Arcas, *Solutions for Sustainability: How the International Trade, Energy and Climate Change Regimes Can Help* (Springer International Publishing 2019) <http://link.springer.com/10.1007/978-3-030-23933-6>

[38] UN, 'Kyoto Protocol to the United Nations Framework Convention on Climate Change' (1997) (entered into force on 16 February 2005); Saman Narayan Upadhyay, 'Global Legal Norms on Environment and Sustainable Development in the 21st

Century', *Advances in sustainable development and management of environmental and natural resources*, vol 2 (First edition, Apple Academic Press 2022); KF Kuh, 'The Law of Climate Change Mitigation: An Overview', *Encyclopedia of the Anthropocene* (Elsevier 2018) <https://linkinghub.elsevier.com/retrieve/pii/B9780128096659100278>; Felix Ekardt, *Sustainability: Transformation, Governance, Ethics, Law* (Springer International Publishing 2020) <http://link.springer.com/10.1007/978-3-030-19277-8>; Dionysia-Theodora Avgerinopoulou, *Science-Based Lawmaking: How to Effectively Integrate Science in International Environmental Law* (Springer International Publishing 2019) <http://link.springer.com/10.1007/978-3-030-21417-3>

[39] Rafael Leal-Arcas, *Solutions for Sustainability: How the International Trade, Energy and Climate Change Regimes Can Help* (Springer International Publishing 2019) <http://link.springer.com/10.1007/978-3-030-23933-6>

[40] David Sifonios, *Environmental Process and Production Methods (PPMs) in WTO Law*, vol 3 (Springer International Publishing 2018) <http://link.springer.com/10.1007/978-3-319-65726-4>

[41] Taiwo Odumosu, 'Public Participation and Constitutional Impediments to Sustainable Development in Nigeria', *Legal Aspects of Sustainable Development* (Springer International Publishing 2016) <http://link.springer.com/10.1007/978-3-319-26021-1>

[42] Marcos Orellana, 'Governance and the Sustainable Development Goals: The Increasing Relevance of Access Rights in Principle 10 of the Rio Declaration' (2016) 25 Review of European, Comparative & International Environmental Law 50 <https://onlinelibrary.wiley.com/doi/10.1111/reel.12153>

[43] Justice Mensah, 'Sustainable Development: Meaning, History, Principles, Pillars, and Implications for Human Action: Literature Review' (2019) 5 Cogent Social Sciences 1653531 <https://www.tandfonline.com/doi/full/10.1080/23311886.2019.1653531>

[44] UNDP, 'Stockholm+50: A Global Synthesis Report of National Consultations: a healthy planet for the prosperity of all- our responsibility, our opportunity' (2022) <https://www.undp.org/publications/stockholm50-global-synthesis-report-national-consultations?gad_source=1&gclid=CjwKCAiAyp-sBhBSEiwAWWzTnuDMo5DnwVH8CiJSjIL3kSUI1MYWZUAIzvpOicvBtI6g2qL-wUzGNRoCRSkQAvD_BwE>

[45] Ibid. p. 83.

[46] Center for Science and Environment, 'Understanding EIA' (2023) <https://www.cseindia.org/understanding-eia-383#:~:text=On%2027%20January%201994%2C%20the,listed%20in%20Schedule%201%20of >

[47] Rule 2, EIA Notification 1996 <https://environmentclearance.nic.in/writereaddata/EIA_Notifications/1_SO1533E_14092006.pdf >

[48] Ibid. Rule 9.

[49] Ibid. Rule 11.

[50] Ibid. Rule 7.

[51] Ibid. Rule 10.

[52] AIR 1985 SC 652

[53] AIR 1987 SC 1086, 1987 SCR (1) 819

[54] AIR 1990 SC 1480

[55] AIR 1992 SC 248

[56] AIR 1988 SC 1037

[57] AIR 1996 SC 1446

[58] AIR 1996 SC 2715

[59] (1997) 1 SCC 388

[60] (2011) 7 SCC 338

[61] 2020 SCC Online SC 347

[62] 2021 SCC Online SC 1247

[63] 2022 SCC OnLine SC 362