

## **Application of Judicial Activism in Protecting The Environment: An Analysis**

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**Abstract:** This article discusses and analyzes the Judicial Activism and its application in protecting environment, and steps taken by judiciary to accelerate this objective. The main objective behind this research is to identify the contemporary picture and study the nature and extent of till date developments in various environmental statuses through judicial procedure. It also analyzes the role of judiciary, recent development and improvement of environment protection. It further views upon the constitutional aspects and the new trends in judicial approach in environmental protection.

**Key Words:** Judicial Activism, environment, role of judiciary, recent development, sustainable development, precautionary principles, and polluter pays.

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### **I. Introduction**

Acid rain, depletion of the earth's protective ozone layer, alarming level of global warming and climate change; rapid diminishing of biological diversity, toxic and hazardous wastes, pollution of river, and depletion of freshwater resources, the danger of nuclear and threaded wild life species posed a great concern to the international community.<sup>1</sup> Recently a considerable number of environmental disputes have been resolved by law and international law such as; dispute between Sweden and Finland in respect environmental damage by cement factory in north Finland, and dispute between Sweden and Denmark in respect of latter's attempt to expand coal production in Anger, and in respect of proposed expansion of chemical plant.<sup>2</sup>

The great concern has been strained by the judicial body of Indian Subcontinent as regard to environmental disputes resolution through the Judicial Activism.

Previously the Judiciary was totally reluctant to adopt the concept of Judicial Activism in where the fundamental rights, principles of state & state constitution were interpreted in a static and colonial manner, but recently it seems to be shifted towards Judicial Activism. The contemporary tendency of judiciary is to safeguard and enlarge the individual rights through the medium of judicial decisions that depart from established principles, precedent & legislative intent. Recently the judiciary delivering many landmarks verdict concerning personal liberty, illegal detention, environmental & consumers matters, health related problems, rights of children and women, minority affairs and human rights issues by interpreting the procedural rules and various laws for a better regime of social justice of what is known as Judicial Activism.

A remarkable feature of this development is the growing application of the judicial activism in environmental protection goes beyond the mere enforcement of the statutory provision of the environmental laws and embraces restitutionary as well as injunctive relief on the basis of constitutional jurisprudence and weaving environmental law buzzwords such as 'sustainable development', 'polluter pays', 'precautionary principle', doctrine of trust, and intergenerational equity.<sup>3</sup>

In Bangladesh, like many other developing countries, is facing multitude of environmental problems such air pollution, hazardous waste, land degradation, water pollution etc. Pressure of rising population, rapid industrialization, urbanization and agricultural development has largely contributed to the environmental degradation in Bangladesh. It has large number of environmental legislation and many laws contain provisions on environmental protection. In Bangladesh, there are about 180 laws, which deal with or have relevance to environment. Apart from statutes, Bangladesh has also well-developed environment policy and many separate policies which have relevance on preservation and conservation of environment.<sup>4</sup> In today's emerging jurisprudence, environmental rights incorporates of collective rights are describe as "third generation rights". The first generation rights are called political rights while second generation rights are called

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<sup>1</sup> Md. Iqbal Hossain, *International Environmental Law Bangladesh Perspective*, (5<sup>th</sup> edn, Ain Prokashan: Dhaka, 2014) p.4.

<sup>2</sup> Lachs, Manfred, "The Challenged of the Environment", *International Law and Comparative Law Quarterly*, Vol. 39, July 1990, p. 663 as cited in Md. Iqbal Hossain, *International Environmental Law Bangladesh Perspective*, (5<sup>th</sup> edn, Ain Prokashan: Dhaka, 2014) p.3.

<sup>3</sup> Harish Slave, 'Justice Generations: Environment and Social Justice' in: B.N. Kirpal et al (edn), *Supreme But Not Infallible*, Oxford University Press, New Delhi, 2000, p.360-380.

<sup>4</sup> Syed Rizwana Hasan, 'Application and Reforms Needs of the Environmental Laws in Bangladesh', *Bangladesh Journal of Law*, Vol. 9 Nos. 1 & 2 2005, p. 85-108 at 89.

socioeconomic rights as found in the international convert on economic, social and cultural rights.<sup>5</sup> There is prominent saying “the times have changed and you must too unless the times won’t forgive you”. So according to the changing trends of the society from time to time, law also evolves accordingly.<sup>6</sup> And the judiciary is not turned into deaf ear towards environmental problems. In a case<sup>7</sup> personal grudges of two parties the judiciary put life in the cold letters of the constitution i.e. the environmental protection which previously was fundamental duty under article 519(A) also came as a fundamental right under article 21 of the constitution of India. No matters how criticized it is, no matter how unidentified it is but one thing to which everyone takes leave to doubt is the massive contribution to the welfare of the environment.

## **II. Conceptual Frameworks Of Environment, Environmental Law & Judicial Activism**

### **2.1 Meaning of Environment**

Environment means the milieu in which an organism lives. It includes the sum of all of its surroundings. This includes natural forces and other living things. It defines the conditions of danger and damage to existence, as well as development and growth<sup>8</sup> and it refer to ‘environmental factors’.<sup>9</sup> It also refers to “living and non living things and how they interact with their surroundings including the atmosphere, air, water and land. It is the surrounding which includes human as well as environment ecological dimensions and physical environment”.<sup>10</sup>

From a legal point of view, a substantial right regarding the environment is very often the paradigm used for explaining the sort of protected position within a legal system that could be referred to the citizens faced with the environment.<sup>11</sup> It should mean that law ensures the guarantee of the final outcome the individual is aiming at, since no one can interfere with his interest. As a consequence, environmental law might be defined as the set of legal rules that protects these “full” rights.<sup>12</sup>

### **2.2 Meaning of Environmental Law**

Environmental Law means “The field of law dealing with the maintenance and protection of the environment, including preventive measures such as the requirement of environmental impact statements, as well as measures to assign liability and provide cleanup for incidents that harm the environment”.<sup>13</sup> It also refers to the body of international law relevant to issues.<sup>14</sup> Environmental law draws from and is influenced by principles of environmentalism including ecology, conservation, stewardship, responsibility and sustainability. Pollution control laws generally are intended to protect and preserve both the natural environment and human health.<sup>15</sup>

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<sup>5</sup>Geetika Walia & Prashish Kanwar, Environmental Protection VIV-A- VIS Judicial Activism , walia and kanwar OIDA International Journal of Sustainable development 02:05 (2010), ISSN 1923-6662, available at <<http://www.ssrn.com/link/oida-intl-journal--sustainable-dev.html>>.

<sup>6</sup>Ibid.

<sup>7</sup>*Subhash Kumar vs. State of Bihar* (1991) AIR SC 420.

<sup>8</sup>Environment, <<http://thelawdictionary.org/environment/>> Accessed on 15.10.15.

<sup>9</sup>Which means Known characteristics in an environment that impact the survival, operations, and growth of an organization. This identifiable element exists as a physical, cultural, demographic, economic, political, regulatory, or technological characteristic.

<sup>10</sup>Md.Iqbal Hossain, *International Environmental Law Bangladesh Perspective*, ( 5<sup>th</sup> edn, Ain Prokashan:Dhaka,2014) p.8.

<sup>11</sup> As for the Environmental Human Rights Doctrine, see 1972 United Nations Conference on the Human Environment, U.N. Doc. A/Conf. 48/14/Rev.1, U.N. Sales No. E.73.II.A.14 (1973). See e.g. Michaela. R. ANDERSON, *Human Rights Approaches to Environmental Protection: An Overview*, in *Human Rights Approaches to Environmental Protection* 1, 4 (Alan E. BOYLE & Michaela R. ANDERSON eds. 1996); Michael BURGER, *Bi-Polar and Polycentric Approaches to Human Rights and the Environment* 28 COLUM. J. ENVTL L, 371 (2003); John LEE, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law* 25 COLUM. J. ENVTL L, 282 (2000). In Italy, for instance, see Amedeo POSTIGLIONE, *Ambiente: suo significato giuridico unitario*, RIV. TRIM. DIR. PUBBL., 32 (1985); Luca MEZZETTI, *Manuale di diritto ambientale* passim (2002); Salvatore PATTI, *Diritto all'ambiente e tutela della persona*, GIUR. IT., 859 (1980); Franco GIAMPIETRO, *Diritto alla salubrità dell'ambiente* passim, (1980). See also Beniamino CARAVITA, *Diritto dell'ambiente* 33 (2001), and Antonello GUSTAPANE, *Tutela dell'ambiente*, XLV *Enc. Dir.*, 413 (1992). With regard to the distinction (and the relationship) between “droit à l’environnement” and “droit de l’environnement” see Michel DESPAX, *Droit de l’Environnement* 810 (1980). As cited Fracchia, Fabrizio, *The Legal Definition of Environment: From Rights to Duties* (November 17, 2005). Bocconi Legal Studies Research Paper No. 06-09. Available at SSRN: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=850488](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=850488)> . Accessed on 15.10.15.

<sup>12</sup>The fact that the term “right” is often used in a indiscriminate way was pointed out by Wesley N. HOHFELD, in *Fundamental Legal Conceptions as Applied in Judicial Reasoning* 13 (David CAMPBELL and Philip TOMAS eds. 2001). This Scholar described legal relations in terms of various opposites (right/no-right, privilege/duty, power/disability, and immunity/liability) and correlatives (right/duty, privilege/no-right, power/liability, and immunity/disability). As cited Fracchia, Fabrizio, *The Legal Definition of Environment: From Rights to Duties* (November 17, 2005). Bocconi Legal Studies Research Paper No. 06-09. Available at SSRN: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=850488](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=850488)> . Accessed on 15.10.15.

<sup>13</sup>Bryan A. Garner, *Black's Law Dictionary*, 8<sup>th</sup> edn, Thomson West. P. 575.

<sup>14</sup>Md. Iqbal Hossain, *International Environmental Law Bangladesh Perspective*, ( 5<sup>th</sup> edn, Ain Prokashan: Dhaka,2014) p.6.

<sup>15</sup>Ibid.

Environmental issue is corned with international community because as Weiss aptly notes, “no one country or even a group of countries has the capability to protect the environment over time by its own isolated efforts”.<sup>16</sup>

So, International Environmental Law, is a branch of public international law, is a growing field of law that is setting the legal standards to deal with various global environmental issues. It encompasses a separate body of law for the protection of the environment.<sup>17</sup> Besides, a new horizon emerged, as international law of sustainable Development which covers social and economical aspect of growth, participatory role of major groups and financial and modes of implementation, which is more wider than international environmental law.<sup>18</sup>

### 2.3 Concept of Judicial Activism

"Judicial activism" may be defined as a "philosophy of judicial decision making whereby judges allow their personal views about public policy, among other factors, to guide their decisions"<sup>19</sup>. An earlier version of Black's is more partisan, proclaiming that it is "a philosophy which motivates judges to depart from strict adherence to judicial precedent in favor of progressive and new social policies which are not always consistent with the restraint expected of appellate judges"<sup>20</sup>. The term Judicial Activism has also been described by Judge Robert Bork as a "judicial disease, one that knows no boundaries".<sup>21</sup> As virtually the entire world has ratified the International Covenant on Civil and Political Rights<sup>22</sup>—an international bill of rights<sup>23</sup> judiciaries are now charged with authoritatively declaring what it prohibits, without meaningful legislative input.<sup>24</sup>

According to Menski, “Judicial activism is inherent in judicial review. Whether it is positive or negative depends upon one’s vision of social change. Judicial activism is not an aberration but is a normal phenomenon and judicial review is bound to mature into judicial activism. Judicial activism also has to operate within limits”.<sup>25</sup>

There have a correlation between Environment and Judicial Activisms. Judiciary keeps active role in protecting environment. Keeping in mind the correlation the Supreme Court of Bangladesh have come forwards and pronounced a number of judgments and issued various directions with the objectives of securing the protection and preservation of Environment and Ecosystem.<sup>26</sup> The Supreme Court of India worked from case to case for making environment as a fundamental right and then extending its meaning to right for compensation, clean water and air.<sup>27</sup>

## III. Role Of The Judiciary In The Case Of Environmental Protection

### 3.1 Role of Judiciary in India

In recent years, there has been a sustained focus on the role played by the higher judiciary of India in devising and monitoring the implementation measures for pollution control, conservation of forests and wildlife protection. Many of these judicial interventions have been triggered by the persistent incoherence in policy

<sup>16</sup>Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the emergence of a New World Order*, 81 Geo. L.J. 706 (1993) AS quoted Anita Margrethe Halvorsen, *Equity among Unequal's in International Environmental Law: Differential Treatment for Developing Countries*, Westvies Press (1999) p. 3. As cited in Md. Iqbal Hossain, *International Environmental Law Bangladesh Perspective*, (5<sup>th</sup> edn, Ain Prokashan: Dhaka,2014) p.6

<sup>17</sup>Patricia W. Birnie & Alan E. Boyle, *International Law and Environment*, CLARENDON Press, Oxford (1992) as quoted in Anita Margrethe Halvorsen, *Equity Among Unequals in International Environmental Law: Differential Treatment for Developing Countries*, Westvies Press (1999) p. 1, also cited in Md. Iqbal Hossain, *International Environmental Law Bangladesh Perspective*, (5<sup>th</sup> edn, Ain Prokashan: Dhaka,2014) p.6.

<sup>18</sup>Marry Pat Williams Silveira & with Baebara Ruis, *International Law for Sustainable Development: An Attempt at Definition*, 2 NAFTA Law and Business Review of the Americas 13 (1996) as cited Md. Iqbal Hossain, *International Environmental Law Bangladesh Perspective*, (5<sup>th</sup> edn, Ain Prokashan: Dhaka,2014) p.7.

<sup>19</sup>Judicial activism, < <https://en.wikipedia.org/wiki/>> Accessed on 08.10.2015 as cited in Black's Law Dictionary, 8th ed. (West Group, 2004), Bryan A. Garner, editor, ISBN 0-314-15199-0.

<sup>20</sup>Bryan A. Garner, *Black's Law Dictionary*, 8<sup>th</sup> edn, Thomson West. P. 847.

<sup>21</sup>Judicial activism, < <https://en.wikipedia.org/wiki/>> Accessed on 08.10.2015 as cited in Robert H. Bork, 'Coercing Virtue: The Worldwide Rule of Judges', i (AEI Press, 2010).

<sup>22</sup>The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and in force from 23 March 1976. It commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. As of April 2014, the Covenant has 74 signatories and 168 parties.

<sup>23</sup>The generally-accepted definition is somewhat broader, including the hortatory Universal Declaration of Human Rights (which is essentially coterminous with the ICCPR) and International Covenant on Economic, Social and Cultural Rights, <[https://en.wikipedia.org/wiki/International\\_Bill\\_of\\_Human\\_Rights](https://en.wikipedia.org/wiki/International_Bill_of_Human_Rights)>.

<sup>24</sup>International Covenant on Civil and Political Rights, 4art. 3, § 2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by the United States Sept. 8, 1992).

<sup>25</sup>Werner Menski, 'Public Interest Litigation: Deliverance from All Evils?' *Bangladesh Journal of Law*, Vol. 6, Nos. 1&2, 2002, pp.1-10.

<sup>26</sup>M. Enayetur Rahim, *Judicial Innovation in Environment cases in Bangladesh*, <[http://www.asianjudges.org/wp-content/uploads/2014/03/Rahim\\_Judicial-Innovation-in-Environmental-Cases-in-Bangladesh.pdf-1.pdf](http://www.asianjudges.org/wp-content/uploads/2014/03/Rahim_Judicial-Innovation-in-Environmental-Cases-in-Bangladesh.pdf-1.pdf)>, last accessed 15.10.15.

<sup>27</sup>Mhajan Niyati, *Judicial Activism for environment protection in India*, vol. 4(4 7-14, april (2015, Issn: 2319-3565) <<http://www.isca.in/IJSS/Archive/v4/i4/2.ISCA-IRJSS-2014-327.pdf>> last accessed 15.10.15.

making as well as the lack of capacity building among the executive agencies. Devices such as public interest litigation have been prominently relied upon to tackle environmental problem.<sup>28</sup>

In *Ratlam Municipality case (1980)*<sup>29</sup> where the Supreme Court directed a local body to make proper drainage provisions there have been numerous cases where such positive directions have been given.

In the *Dehradun Valley case (1985)*<sup>30</sup> the court itself appointed a committee to look into the adverse effects of the illegal and indiscriminate mining activities being carried out in the Uttarakhand region. The respondent government was also asked to show the national importance of the lime stone procured from those quarries so as to determine whether the demand could be satisfied by mining in others area.

A similar approach was adopted in *Tarun Bharat Sangh, Alwar v. Union of India (1992)*<sup>31</sup> where the court adopted a firm stand against the owners of mines that were being operated inside the reserve forest areas. In both the cases mentioned above, the court appointed independent committees of experts to ascertain the environmental impact of the commercial activities that were being undertaken.

Previously the judiciary of India was not so concerned to protect the environment effectively & adequately. It was the incident of Bhopal mass disaster, in where the judicial & legal relief system came actively to protect environment. In this incidence 40 tons of deadly toxic methyl isocyanate from union carbide's pesticide factory, leaked into the atmosphere causing 3,500 causalities and injuring 200,000 people<sup>32</sup>. The disaster caused severe soil and groundwater pollution around the plant<sup>33</sup>. However a number of policy and law reform measures were catalyzed by the Bhopal tragedy, and in this effort, an already activist judiciary has been unwilling to play the role of a passive spectator<sup>34</sup>. Supreme Court and High Court worked from case to case for making clean environment as a fundamental right and extending its boundaries to formulate the right for compensation, clean water and air. In the process, the court tried to fill gap between development and enforcement of environmental laws such as mining laws, water act and environment protection act. The reason for adopting an activist stance by the Supreme Court is based on its perception that there is no proper remedy in existing legislation and thus, it has greatly extended its judicial activism to environmental issues and concerns. One of the major outcomes of Bhopal disaster is the EPA (environment protection act), the umbrella legislation which has filled the existing gap in the legislative framework. Before the enactment of the EPA, only government could prosecute under Indian environmental laws, while there was no statutory remedy for public interest groups or citizens who were willing to act against a polluter discharging an effluent beyond the permissible limit. However, under section 19 of the EPA, a citizen can now prosecute any offender provided a 60-day notice is given to the government of his intention to prosecute. Other provisions like section 43 of the Air Act (amended in 1987) allow citizens to participate in the enforcement of pollution laws. Both of these Amendments demands from pollution control board to disclose their internal reports to citizens seeking to prosecute a polluter. The EPA and other Act have been an important guideline to sort out the environmental problems. However, EPA can improve the situation to a limited extent. The citizens' initiative provision under section 19 of EPA appears to give public significant power is characterized as mere eyewash. In practice, there are no significant reported decisions in cases arising citizen's complaint under section 19 of the EPA. Most environmental groups and concerned citizen prefer to obtain redress through the PIL channel developed by High Court and the Supreme Court under their constitutional jurisdiction.<sup>35</sup>

**Public Interest Litigation (PIL):** PIL is a result of judicial activism and a mechanism to agitate public issues before the courts within the confines of legal and constitutional mould<sup>36</sup>. The use of PIL through litigants ensures them a wide *locus standi*. In addition, there are no adverse effects of the proceedings, prompt action is taken on the decision, the court can also assist in examinations and investigations, the various judgments of the courts shape up the future rulings and policy decisions and public hearing helps in mass awareness. The judiciary evolves methods to bring justice to the victims by providing *locus standi* to persons or voluntary organizations that act in public interest by taking up cases on behalf of affected people. As a leading Indian jurist Dr. Upendra Baxi said that for the first time, the Supreme Court of India became a Supreme Court of

<sup>28</sup>K.G. Balakrishnan, 'the role of the judiciary in environmental protection <[http://supremecourtindia.nic.in/speeches/speeches\\_2010/dp\\_shrivastava\\_memorial\\_lecture\\_20-3-10.pdf](http://supremecourtindia.nic.in/speeches/speeches_2010/dp_shrivastava_memorial_lecture_20-3-10.pdf)> last accessed 15.10.15.

<sup>29</sup>Municipal Council Ratlam v. Vardichan (1980) 4 SCC 162 as cited [http://supremecourtindia.nic.in/speeches/speeches\\_2010/dp\\_shrivastava\\_memorial\\_lecture\\_20-3-10.pdf](http://supremecourtindia.nic.in/speeches/speeches_2010/dp_shrivastava_memorial_lecture_20-3-10.pdf) > last accessed 15.10.15, p. 3.

<sup>30</sup>Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh and others, AIR 1985 SC 652.

<sup>31</sup>AIR 1992 SC 514.

<sup>32</sup>Rosencranz and Divan, Environmental Law and Policy in India, Oxford Uni. Press, 2<sup>nd</sup> edn, (2011).

<sup>33</sup>Verma vs., Bhopal the unfolding of tragedy, alternatives, 11, 133-145(1986).

<sup>34</sup>A Dias', 'Judicial activism in the development and enforcement of environmental law: some comparative insight from the Indian experience, j. envtl l, 6(2), 243-262 (1994)

<sup>35</sup>Mahajan Niyati, Judicial Activism for environment protection in India, International Research Journal of Social Science, vol. 4(4), 7-14, April (2015).

<sup>36</sup>S.K Verma and K. Kumar, Fifty Years of Supreme Court of India, Oxford Uni. Press (2000).

Indians<sup>37</sup>. Now citizens can challenge environmentally unsound practices on behalf of others, even though they may not directly suffer any harm. The courts intervened in different ways in response to the plethora of environmental cases brought before the courts through PIL.

The courts monitored implementation of existing laws and policies and issued directions in various types of cases to ensure a safe and clean environment along with development. For the first time indication towards a wholesome environment as part of life was given in the R.L and *Kendra, Dehradun v. State of U.P A.I.R 1985 SC 1259*, popularly known as Dehradun Quarrying Case. The case categorically emphasized that the right to life without clean and hygienic environment is meaningless. In this case the court observed that industrial development is necessary for economic growth of the country. If, however, industrial growth is sought to achieve by haphazard and reckless working of mines, resulting in loss of life, property and basic amenities like the supply of water, creating thereby an ecological imbalance, there may ultimately be no real economic growth and no real prosperity. It is necessary to strike a proper balance.

Often, financial deficiency, political pressure, technical and manpower incompetence serve as reason for non-performance of government agencies. The court can intervene through appropriate order to make implementing agency work, which deliberately not performing its duties. In sep. 2014, the supreme court while acting on PIL filed by M.C Mehta for cleaning drive of river Ganges, alleged government by saying that it seems that the steps taken so far will not lead to the cleaning of the countries holiest river even after 200 years and asked for formulating stage wise plan<sup>38</sup>. The high volume of pollution in the river Ganges poses a severe threat to its health and life. The situation is critical and cleaning of river is a subject of political agenda. About Rs. 20,000 core has been spent on the cleanup programme called Ganges Action Plan, which was launched under the then prime minister Rajib Ghandi in 1985, but with little to show on the ground<sup>39</sup>. The project is reinvigorated following Prime Minister Narendra Modi's personal commitment to clean up the river and the center has given clearance for six new sewage treatment plants (STPs). A number of case on the issue of ganga pollution have been initiated through PIL in Supreme Court, in where the Central Government, state pollution boards were asked to monitor the enforcement of its orders. In 1985, M.C. Mehta, filed the first river pollution case as a writ petition under Article 32 of the Indian constitution. Among other thing, the petition was directed at the Kanpur Municipality's failure to stop sewage from polluting the Ganga River. Mehta in his PIL asked the court to give directions to the government authorities and tanneries in Khanpur to prevent polluting the river with waste water and trade effluents. Justice Kuldeep Sings expanded this petition to include all large cities in the Ganga basin. In Ganga pollution (tanneries) case, the Supreme Court noticed industries were inevitably disregarding the instructions of pollution board and deliberately violating the consent conditions for their operation. It also observed negligence of boards in their functioning. According to Mehta the court ordered more than 5000 industries located in the Ganga Basin to install effluent treatment plants (EPT) and air pollution control devices<sup>40</sup>

*In L. K. Koolwal v. State of Rajasthan*, the Rajasthan High Court observed that a citizens duty to protect the environment under Article. 51-A (g) of the Constitution bestows upon the citizens the right to clean environment. The judiciary may go to the extent of asking the government to constitute national and state regulatory boards or environmental courts. In most cases, courts have issued directions to remind statutory authorities of their responsibility to protect the environment. Thus, directions were given to local bodies, especially municipal authorities, to remove garbage and waste and clean towns and cities.<sup>41</sup>

In *Indian Council for Environ-legal Action v. Union of India*, Supreme Court felt that such conditions in different parts of the country being better known to them, the high courts would be the appropriate forum to be moved for more effective implementation and monitoring of the anti-pollution law.<sup>42</sup>

*In Subhash Kumar v. State of Bihar*<sup>43</sup>, the Supreme Court upheld that affected persons or even a group of social workers or journalists, but not at the instance of a person or persons who had a bias or personal grudge or enmity could initiate PIL for environmental rights.

The apex court in landmark *judgement of S.P.Gupta v. Union of India*<sup>44</sup>, elucidated in the following words: "but we must hasten to make it clear that the individual who moves to court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be activated at the instance of such person and must reject his application at the threshold".

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<sup>37</sup>U. Baxi, 'Taking Suffering Seriously: Social Litigation Before the Supreme Court', Third World Legal Stud., 4(6), 107-132 (1985).

<sup>38</sup>Your Plan will take 200 years to clean Ganga: Supreme Court to Centre, Deccan Chronicle (2014).

<sup>39</sup>Supreme Court for Stage-wise Plan to Restore Ganga to its Pristine Glory, Economic Times (2014).

<sup>40</sup>M.C. Mehta, 'Growth of Environmental Jurisprudence in India', Acta Juridica, 75, 71-79 (1999).

<sup>41</sup>AIR 1988 Raj 2, 1987 (1) WLN 134.

<sup>42</sup>1996 AIR 1446, 1996 SCC (3) 212.

<sup>43</sup>1991 AIR 420, 1991 SCR (1)5.

<sup>44</sup>AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365.

### 3.2 Role of Judiciary in In Bangladesh

Judicial activism contributes to proper implementation of environmental laws and allows the vast majority of the backward section access to the justice system. As a result of progressive interpretation by the judiciary of some constitutional and legal provisions, 'right to environment' has received express legal recognition.<sup>45</sup>

PIL has helped the implementation of various laws related the protection of environment and control of pollution in Bangladesh. PIL has remained main vehicle through which the higher judiciary asserted in the arena of environment and thereby developed the new form of jurisprudence, which is known as environmental jurisprudence. There are many examples of environmental PIL where the judiciary has displayed enthusiasm and concern for the environment.<sup>46</sup>

The judiciary developed the PIL in environmental matters with the help of numerous methods as the relaxing of standing, *suo motu* actions, interpreting the law in a manner congenial to environmental protection, framing various remedies and applying international environmental law in the national legal system.<sup>47</sup>

PIL is the most effective way to provide innovative and accessible remedies to the people affected by environmental degradation. From civil society's point of view, PIL means awareness of the people and making environmental justice accessible to the common people and thus, enhancing their participation in environmental decision-making. PIL also helps initiates legal reform by filling the gaps in the law, the inconsistency in the regulatory regime between law, policies and institutional framework. Even a wholly unsuccessful PIL can serve several purposes. The publicity generated by a court action can a very useful tool as part of the wider political process of attracting attention to environmental issues and persuading governments, businesses or individuals to change their ways. Demonstrating the possibility of recourse to the courts may influence decision makers to act differently in future.<sup>48</sup> Judicial intervention and activism have made industry more aware of environmental concerns. PIEL also facilitates accountability of the government for its failure to protect environment.<sup>49</sup>

The judges through judicial activism have redressed the injustices committed by the agencies of the government or persons in contravention to the fundamental rights guaranteed by the constitution. PIEL extended meaning of fundamental rights under the Constitution of Bangladesh to protect environment<sup>50</sup>

However, it should be remembered that PIL is not substitute of environmental laws and regulation. In particular, three cautions have been articulated in regard to an optimistic use of PIL: First one is that the judges and lawyers have a great responsibility towards avoiding an over-use of PIL. The legal profession must know where this valuable resource can be used most efficiently. Second, PIL can cause disillusionment if it lingers on for an inordinately long period.<sup>51</sup>

Third, the greatest care and vigilance, responsibility and sensitivity are needed before the extraordinary jurisdiction in PIL goes into action.<sup>52</sup>

The environmental protection is apprehensive phenomenon for Bangladesh. The Constitution of Bangladesh does not provide any direct protection to the environment. Nowhere of the constitution specifically mentioned about the right to health and sound environment.<sup>53</sup> Article 31 states that every citizen has the right to protection from 'action detrimental to the life, liberty, body, reputation or property unless these are taken in accordance with law'. It added that the citizens and the resident of Bangladesh have the inalienable right to be

<sup>45</sup>Justice Mainur Reza Chowdhury, 'Legal and Institutional Framework in Promoting Environmental Management' in Bangladesh, available at <[http://www.unep.org/law/Symposium/Documents/Country\\_papers/Bangladesh.doc](http://www.unep.org/law/Symposium/Documents/Country_papers/Bangladesh.doc)> also cited in Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at

<[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

<sup>46</sup>Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at

<[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>, last accessed 12.11.15.

<sup>47</sup>Jona Razzaque, 'Public Interest Environmental Litigation in India, Pakistan and Bangladesh', Kluwer Law International, The Hague, 2004, p. 12., also cited in Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at

<[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

<sup>48</sup>Colin T. Reid, 'Environmental Citizenship and the Courts', Environmental Law Review, Vol. 2, 2000, p. 188, also cited in Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at

<[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

<sup>49</sup>Altafur Rahman, 'Public Accountability through Public Interest Litigation', Bangladesh Journal of Law, Vol. 3, No. 2, (1999), pp. 161-180, also cited in Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at

<[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

<sup>50</sup>Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at <[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

<sup>51</sup>Preface by S. P. Sathe in: Sangeeta Ahuja, People, Law and Justice: Casebook on Public Interest Litigation, Vol. 1, Orient Longman, New Delhi, 1997, p. xlv –xlv, also cited in Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at

<[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

<sup>52</sup>V. R. Krishna Iyer, 'Judicial Justice, *N.M. Tripathi Private Ltd., Bombay*', 1985, p. 148, also cited in Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at

<[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

<sup>53</sup>Badsha Mia, Kazi Shariful Islam, Humane Rights Approach to Environment Protection: An Appraisal of Bangladesh, Journal of Law, Policy and Globalization, Vol. 22, 2014, ISSN 2224-3240.

treated in accordance with law. If these rights are taken away, compensation must be paid. Article 32 states, “No person shall be deprived of personal liberty given in accordance with law”. These two articles together incorporate the protection of right to life. The next question peeps into mind is whether the right to life includes the right to environment capable of supporting the growth of meaningful existence of life and includes the right to healthy environment?<sup>54</sup>

In PIL cases on environment protection, the higher judiciary has provided directives and injunctive relief against industrial pollution, vehicular pollution, river encroachment, unlawful filling of flood plain zones, water and air pollution, violation of construction law, pollution from brick fields, environmental hazards of shrimp cultivation, destruction of hills, gas explosion without environmental impact assessment (EIA), protection from hazardous wastes.

The judiciary in PIL cases also provided directives for protection of wildlife, bio-diversity, compensation for environmental damages and so on.<sup>55</sup>

Injunctive relief: The judiciary of Bangladesh in several cases granted injunctive relief to reduce environmental harm or pollution.

*In Sharif N Ambia vs Bangladesh and Other, the High Court Division*, after issuing a show cause notice, granted an ad interim injunction on the construction of a 10 storied market in violation of the Dhaka Master Plan causing environmental obstruction to its neighborhood.<sup>56</sup>

*In Dr. Mohiuddin Farooque, BELA vs. Bangladesh*, the judiciary granted injunction on government body to prevent them from releasing radioactive milk in open market.<sup>57</sup>

The judicial activism through PIL also helped protect river from encroachment. In the case of Bangladesh Environmental Lawyers Association vs. Bangladesh and others,<sup>58</sup> judicial Intervention was sought to protect the only river flowing through Dhaka from illegal Encroachment. The HCD directed the concerned statutory authorities to submit before the

Court an action plan setting out definite time frame and measures to be undertaken for removing the encroachers. Following the petition, the government acted to remove the encroachers and the river now stands free from illegal occupation.

The HCD, in a recent decision in the case of Bangladesh Environmental Lawyers Association vs. Bangladesh and others, gave six directives in a comprehensive judgment<sup>59</sup> to fight vehicular pollution at different from.

*In Mrs. Parveen vs Chairman, Rajdhani Unnayan Kartipakha*,<sup>60</sup> the locus standi of the petitioner was disputed as the respondent contended that the petitioner was not espousing any public cause or grievance. The petition was framed as a personal as well as public interest litigation. The petitioner challenged RAJUK action to construct a road and carve out some residential plots by filling up the Gulshan Lake and the lakeside adjacent to her residential house at Gulshan. She asserted that the RAJUK action would destroy the greenery and the beauty of the lake and effect the environmental situation in the Gulshan Model Town. The action of the RAJUK had violated the petitioner’s fundamental right to protection of law and the right to hold property. The court recognized that the petitioner has the locus standi.

The court held that the petitioner had come before the court with personal interest as well as interests of all other residents who are sharing the beauty greenery of the lake and the environmental facilities.<sup>61</sup>

Unregulated ship breaking industry produces profound negative environmental effect in the surrounding area of operation. It is reported that ship breaking industry is causing serious environmental pollution with resultant loss of biodiversity and ecosystem of marine life. In 2003, BELA filed a writ petition<sup>62</sup> (No.-2911/2003) before the High Court Division for a direction upon the ship breakers, concerned Government Agencies to ensure the

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<sup>54</sup>Ibid.

<sup>55</sup>See, Justice Mainur Reza Chowdhury, ‘Legal and Institutional Framework in Promoting Environmental Management ‘in Bangladesh, available at <[http://www.unep.org/law/Symposium/Documents/Country\\_papers/Bangladesh.doc](http://www.unep.org/law/Symposium/Documents/Country_papers/Bangladesh.doc)>, also cited <[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

<sup>56</sup>Unreported Writ Petition No. 937 of 1995. Also cited in Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at <[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

<sup>57</sup>Unreported Writ Petition No. 92 of 1996. Also cited in Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at <[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

<sup>58</sup>Writ Petition No. 4098 of 2000, Bangladesh Environmental Lawyers Association vs. Bangladesh and others, also cited in Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at <[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

<sup>59</sup>Writ Petition No. 300 of 1995, Judgment Delivered on 27 March 2002., also cited in Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at <[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

<sup>60</sup>18(1998) BLD 114, at p. 117. Also cited in Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at <[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

<sup>61</sup>Ibid, at p. 124. Also cited in Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at <[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

<sup>62</sup>Writ petition No.-2911/2003., also cited in Judicial Activism and Protection of Environment in Bangladesh: A Critical Appraisal, available at <[http://www.culaw.ac.bd/files/judicial\\_activism\\_and\\_Environment\\_in\\_bangladesh.pdf](http://www.culaw.ac.bd/files/judicial_activism_and_Environment_in_bangladesh.pdf)>.

compliance under the Environment Conservation Act 1995 and the Environment Conservation Rules 1997, the compliance under the gas free certificate issued by the Department of Explosives, the compliance under the Basel Convention 1989 for import of ship for scrapping etc.

The appellate division in the case of *Dr. Mohiuddin Farooque vs. Bangladesh*, has been expounded that article 31 and 32 of Bangladesh Constitution protect right to life as fundamental right. It encompasses within its ambit the protection and preservation of environment, ecological balance free from pollution air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said protection of right to life. The High Court Division in the case of *Dr. Mohiuddin Farooque vs. Bangladesh and others* (*Dr. Mohiuddin Farooque vs. Bangladesh*, 1996) stated that right to life includes right to fresh air and water and a situation beyond animal existence in which one can expect normal longevity of life. As mentioned above that there is right to environment under the constitution of Bangladesh. However, due to prolonged movement of civil society and environmentalists, provision on conservation and development of environment has been inserted in part of fundamental principle of state policy of the constitution of Bangladesh through 15<sup>th</sup> amendment. Obviously, this is a welcome development. But this provision imposes obligation on the state to protect and develop environment and to ensure conservation and security of natural resources, bio-diversity, wetland and wild lives (art. 18A). Thus, it does not establish right to safe environment for individuals, rather it is proclaimed as one of the fundamental principles of state policies which can be used a guideline in the interpretation of constitution and of the other laws of Bangladesh, shall be applied in making of laws and form the basis of the work of the state (article 8(2)). This constitutional duty to protect environment can be borne by state, its agencies, individuals, and legal persons. The Government Bangladesh missed the opportunity to include the right to environment as a fundamental right, which has already been established through judicial interpretation.

In some environmental PIL cases, the judiciary invoked international environmental law to protect environment and directed the government to adopt legislative and administrative measures under environment treaties, which Bangladesh ratified or acceded to. In most recent and groundbreaking judgment pronounced in the case of *Bangladesh Environmental Lawyers Association (BELA) vs. Bangladesh*<sup>63</sup>, the High Court Division declared that allowing import of hazardous waste and vessels containing hazardous materials, without proper scrutiny by the Ministry of Shipping is flagrant disregard to the safety and security of workers in the ship-breaking yards as well as demonstrating blatant indifference to the integrity of the environment and humans who live in the vicinity of the ship-breaking yards. The court observed that Bangladesh, being a signatory to the Basel Convention, is obliged to follow the norms laid down in that Convention. The Court issued the following directions:

Firstly, the Ministry of Environment and Department of Environment are directed to immediately take steps to ensure closure of all ship-breaking yards which are operating without necessary Environmental Clearance as required by law.

Secondly, the Department of Environment shall deal with the application expeditiously and supply the clearance certificate only upon satisfaction that all the facilities required for proper dismantling of the vessels, safety measures for the workers and in particular disposal of hazardous waste generated by the dismantling process, are in place.

Thirdly, the Ministry of Environment is also directed to frame Rules and regulations for the proper handling and management of hazardous materials and wastes, keeping in view the Environment Conservation Act, 1995 and the Conservation Rules of 1997, and the Basel Convention, 1989.

Indiscriminate hill cutting in different municipal areas posed serious threat to bio-diversity and ecological balance. In several PIL cases, the indiscriminate, unlawful and unauthorized cutting and raising of hills was challenged.<sup>64</sup> The court on hearing the cases directed the authorities to take steps against hill cutting.

In another writ petition filed by BELA to stop pollution from some ultra hazardous industries, A.B.M Khairul Hoque J. mentions that life means a “qualitative life among others, free from environmental hazards”.<sup>65</sup> In another case, in where failure of the Government to seal tube-wells that were contaminated with arsenic, the Appellate Division of Bangladesh Supreme Court recognized the connection between environmental pollution and the violation of the right to life, as well as the need to improve the natural and manmade environment with a view to protecting this right. In this case, Md. Tafazzul Islam, J., citing the decision of the Indian Supreme Court the *Virendra Gour v. State of Haryana*,<sup>66</sup> observed that:

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<sup>63</sup> Judgment on 05.03.2009 & 17.03.2009.

<sup>64</sup>*Dr. Mohiuddin Farooque vs. Bangladesh and others*, Writ Petition No. 6020/1997, *Bangladesh Environmental Lawyers Association vs. Bangladesh and others*, Writ Petition No. 2020 of 2006.

<sup>65</sup>*Dr. Mohiuddin Farooque v. Bangladesh and others*, 55 DLR (HCD) 69 (2003)

<sup>66</sup>(2)SCC 577 (1995), P. 7



Hygienic environment is an integral facet of right to healthy life, and it will be impossible to live with human dignity without a humane and healthy environmental protection. Therefore, it has now become a matter of grave concern for human existence. Promoting environment protection implies maintenance of environment as a whole comprising the manmade and natural environment. Therefore, there is constitutional imperative of the State government and the municipalities not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect, and improve both the manmade and the natural environment.<sup>67</sup>

#### IV. Recent Development Of Environmental Jurisprudence In Bangladesh

Law informs societal actions and cultures such that judicial pronouncements seem to be one way to introduce internationally recognized environmental principles into the national discourse in a jurisdiction where official endorsement and application is slow. A survey of decided cases in Bangladesh reveals that the activists shared this view, because one of the consequences of the sort of legal activism discussed in the foregoing paragraphs is the development of the environmental jurisprudence of Bangladesh, including, in particular, the recognition of emerging international environmental laws and norms in the domestic arena. The international environmental law norms that the activists have sought to implement in Bangladesh include Intergenerational Equity, the Polluter Pays Principle, and the Precautionary Principle.<sup>68</sup>

These they sought to highlight through PIL as well as legislative advocacy; however, the response from the judiciary has been mixed at best. The Bangladesh Supreme Court mentioned intergenerational equity on some occasions but has generally not been supportive of the principle, though there are signs that this attitude is changing. However, the High Court Division adopted a slightly different view in a recently decided case filed by BAPA.

In Bangladesh *Paribesh Andolon and another v Bangladesh and others, Imman Ali, J.*, observed that the “right to have open space, parks, water bodies, etc. are rights accruing to Nature and the Environment, which it is the bounden duty of the State to preserve for the sake of future generations.[emphasis added]”<sup>69</sup>

This case equally heralded a new direction for environmental jurisprudence in Bangladesh. A group of environmental activists challenged the legality of construction of residences for the Speaker and Deputy Speaker within the National Assembly Area through alteration of the original plan of the National Assembly Complex. The complex is recognized as a masterpiece: the work of a globally renowned architect, Louis Isadore Kahn, which is regarded as one of the best monuments of International Architectural Modernism. The court prohibited any kind of change in the original plan of the complex.<sup>70</sup> It directed the government to consider declaring the complex a National Heritage Site and to apply to UNESCO to declare it a World Heritage Site in order to protect it from further defacement.<sup>71</sup>

This judgment could result in the application of the terms of the World Cultural and Natural Heritage Convention<sup>72</sup> in Bangladesh, and perhaps pave the way for its implementation in the country. The Supreme Court also indirectly recognized the “Precautionary Principle” when it recognized the rights of potential consumers in the Radiated Milk Case.<sup>73</sup>

Additionally, in one of the more recent cases filed by BELA, the Supreme Court directed government authorities to make necessary rules and regulations so that no hazardous ships can enter the territorial waters of Bangladesh for breaking purposes. It reasoned that the breaking of ships with hazardous substances may cause significant harm to the coastal and marine environment of the country.<sup>74</sup>

<sup>67</sup>*Rabia Bhuiyan, MP v. Ministry of LGRD and others*, 59 DLR (AD) 176 (2007), P. 25

<sup>68</sup>J. Razzaque, ‘Public interest environmental litigation in India, Pakistan and Bangladesh’ (The Hague: Kluwer Law International, 2004, p.333–73., also cited in Md. Saiful Karim & Mia Mahmudur Rahim, legal activism for ensuring environmental justice, Asian Journal of Comparative Law, Volume 7, Issue 1, (2012), available at <http://eprints.qut.edu.au/61471/4/61471.pdf>

<sup>69</sup>*Bangladesh Paribesh Andolon and another v Bangladesh and others*, 58 DLR (HCD) 441 (2006)p. 28, also cited in Md. Saiful Karim & Mia Mahmudur Rahim, legal activism for ensuring environmental justice, Asian Journal of Comparative Law, Volume 7, Issue 1, (2012), available at <http://eprints.qut.edu.au/61471/4/61471.pdf>.

<sup>70</sup>Ibid, p. 29, also cited in Md. Saiful Karim & Mia Mahmudur Rahim, legal activism for ensuring environmental justice, Asian Journal of Comparative Law, Volume 7, Issue 1, (2012), available at <http://eprints.qut.edu.au/61471/4/61471.pdf>.

<sup>71</sup>Ibid, p. 34, also cited in Md. Saiful Karim & Mia Mahmudur Rahim, legal activism for ensuring environmental justice, Asian Journal of Comparative Law, Volume 7, Issue 1, (2012), available at <http://eprints.qut.edu.au/61471/4/61471.pdf>.

<sup>72</sup>Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975), also cited in *Md. Saiful Karim & Mia Mahmudur Rahim*, legal activism for ensuring environmental justice, Asian Journal of Comparative Law, Volume 7, Issue 1, (2012), available at <http://eprints.qut.edu.au/61471/4/61471.pdf>.

<sup>73</sup>Radiated Milk Case, supra note 61. See Razzaque, Public interest environmental litigation in India, Pakistan and Bangladesh, supra note 59, at 357–58, also cited in *Md. Saiful Karim & Mia Mahmudur Rahim*, legal activism for ensuring environmental justice, Asian Journal of Comparative Law, Volume 7, Issue 1, (2012), available at <http://eprints.qut.edu.au/61471/4/61471.pdf>.

<sup>74</sup>*Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh and others*, Writ Petition No. 3916 of 2006, judgment delivered on 6 July 2006, unreported (hereinafter MTAfaship Case) at 4, also cited in *Md. Saiful Karim & Mia Mahmudur Rahim*, legal activism for ensuring environmental justice, Asian Journal of Comparative Law, Volume 7, Issue 1, (2012), available at <http://eprints.qut.edu.au/61471/4/61471.pdf>.

This, indeed, is a tacit precautionary approach to environmental protection. Furthermore, in one of the writ petition cases now pending for further hearing in the High Court Division, government authorities were directed to undertake investigation to identify and measure the areas within a pristine island, Sonadia, where shrimp cultivation/forest clearing is taking place or has taken place. The government is also to list those who are involved in such cultivation/clearing and the enabling arrangements; assess, in monetary terms, the loss of forest resources for such individual shrimp cultivation/forest clearing; and submit a report to the court within two months.<sup>75</sup>

The activists' hope is that the court will apply the polluter pays principle. In yet another Writ Petition, also related to commercial shrimp cultivation, the High Court Division issued a Rule

Nisi, calling upon the respondents to show cause as to why they should not be directed to compensate the affected people for the loss suffered by them due to the flow of saline water over their lands.<sup>76</sup>

The activists also hope that the Supreme Court would consider these pending cases from a different viewpoint by positively responding to their arguments and, thereby, play an instrumental role in implementing emerging international environmental law norms in Bangladesh. While intergenerational equity, the precautionary principle, and the polluter pays principle may not be said to have become firmly established legal norms in Bangladesh, these dicta represent important strides in the right direction.<sup>77</sup>

## **V. . Improving The Role Of Judiciary In Bangladesh And India For Protecting The Environment**

Recently, Judiciary of Bangladesh as well as India, improving its part by disseminating the concepts of Sustainable Development, Polluter pay and Precautionary principle.

### **5.1 Sustainable development**

Sustainable development<sup>78</sup> reflects the principle of sustainable and equitable use of natural resources and its integration in the Bangladesh legal system. As an umbrella concept,<sup>79</sup> it tends to reconcile the conflicting goals of economic development and environmental protection.

It needs to be based principles that would apply to all issues whether they are classified as environmental, social, economic or any mix of the three. Haughton (1999) outlines five equity principles: (i) futurity-inter-generational equity; (ii) social justice-intra-generational equity; (iii) transfrontier responsibility-geographical equity; (iv) procedural equity-people treated openly and fairly-and (v) inter-species equity-importance of biodiversity.<sup>80</sup>

In the FAP case, the Bangladeshi court applied sustainable development in an indirect manner and gave priority to a development project funded by international donors.<sup>81</sup> Taking an anthropocentric view, the court defined sustainable development which integrates a quality of life that is economically and ecologically sustainable. Though the national environmental policy and legislation reflect the concern for a balance between

<sup>75</sup>Bangladesh Environmental Lawyers Association (BELA) v. Ministry of Land and others, Writ Petition no. 4286 of 2003, also cited in *Md. Saiful Karim & Mia Mahmudur Rahim*, LEGAL ACTIVISM FOR ENSURING ENVIRONMENTAL JUSTICE, Asian Journal of Comparative Law, Volume 7, Issue 1, (2012), available at <<http://eprints.qut.edu.au/61471/4/61471.pdf>>.

<sup>76</sup>*Gaurang Proshad Roy and Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh and others*, Writ Petition No. 5732 of 2005, also cited in *Md. Saiful Karim & Mia Mahmudur Rahim*, legal activism for ensuring environmental justice, Asian Journal of Comparative Law, Volume 7, Issue 1, (2012), available at <<http://eprints.qut.edu.au/61471/4/61471.pdf>>.

<sup>77</sup>*Md. Saiful Karim & Mia Mahmudur Rahim*, legal activism for ensuring environmental justice, Asian Journal of Comparative Law, Volume 7, Issue 1, (2012), available at <<http://eprints.qut.edu.au/61471/4/61471.pdf>>.

<sup>78</sup> The Brundtland Report defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. WCED: Our Common Future (Brundtland Report) London 1987, p.43. According to G. Handl: the essence of this concept is rather living off nature's 'income' than squandering its 'capital'. G. Handl, 'Environmental Security & Global Change: The Challenge of International Law' YIEL (1990) at 24. Also cited in Jona Razzaque, *Access to Environmental Justice Role of the Judiciary in Bangladesh*, available at <<http://www.eng-consult.com/ben/papers/paper-jona.pdf>>. p. 4.

<sup>79</sup> The principle of sustainable development has been linked to various other concepts, such as, intergenerational and intergenerational equity, principle of integration, sustainable use of natural resources and biological diversity. (28) The 1972 Stockholm Conference acknowledges the need to provide assistance to developing countries to enable them to meet their obligations towards the environment and, on the other hand, to secure their right to development. Principle 4 of Rio Declaration 1992 states that 'in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.' At the same time, it talks about the 'right to development' which has recently been recognized by the General Assembly. According to many academics: this article, which is required to be read with article 4, is a part of a 'bargain' struck between developing and developed countries. For GA Resolution, See: Environmental Policy and Law 28/1, 1998 at 51. Also cited in Jona Razzaque, *Access to Environmental Justice Role of the Judiciary in Bangladesh*, available at <<http://www.eng-consult.com/ben/papers/paper-jona.pdf>>. p 4.

<sup>80</sup>Bob Giddings, Bill Hopwood and Geoff O'Brien (2002), *Environment, Economy and Society, Sustainable Development* 10, 187-196, Sustainable cities research institute, new castle upon tyne, UK.

<sup>81</sup>*M. Farooque V Bangladesh* (WP no. 998 of 1994): The petitioner alleged that FAP was adversely affecting and injuring more than a million people by way of displacement, causing damage to soil and destruction of natural habitat, of fishes, flora and fauna. The High Court declined to interfere with the FAP project as foreign assistance was involved and the whole project was meant to be for the benefit of the public. The court directed the concerned Ministries that no 'serious damage' to the environment and ecology is caused by the development activities. Also cited in Jona Razzaque, *Access to Environmental Justice Role of the Judiciary in Bangladesh*, available at <<http://www.eng-consult.com/ben/papers/paper-jona.pdf>>. p. 4.

the trade, development and environment, no case directly mentions this concept. In India, however, the court adopted a balancing approach to deal with pollution from leather industries or tanneries, to prevent encroachment of wetlands or to preserve forests and vegetation.<sup>82</sup>

### **5.2 The precautionary principle**

The precautionary principle provides guidance in the development and application of international environmental law where there is scientific uncertainty. The purpose is to encourage the decision-makers to consider harmful effects of their activities on the environment before they pressure those activities<sup>83</sup>

Precautionary principle is considered in Bangladesh as a guiding non-binding principle for policy making. Because of the frequent use of this principle in the substantive law,<sup>84</sup> the judiciary in Bangladesh, while deciding environmental cases, can apply this principle with considerable ease.

In one case<sup>85</sup>, the court examined the seriousness of environment damage to determine whether there is any need for precautionary approach. However, the threshold of the seriousness of such damage was not examined and the court did not accept it as part of customary law. In order to avoid the strict rules and procedures of evidence and causation, the Indian courts, on the other hand, applied precautionary principle as part of the customary law.<sup>86</sup>

### **5.3 Polluter pays principle**

The polluter pays principle (hereafter, PPP) is used to prevent, control and reduce environmental harm. This principle expects polluters to bear the costs of measures carried out by the public authorities with respect to potential and actual environmental damage.<sup>87</sup> There is no uniform way and the states are free to determine their own national standard. It is only after these standards are set by the public authorities, the polluters will take steps to comply with them. It should also be noted that minimum pollution is allowed by the legislation. The Indian court applied absolute liability for the polluters to pay up the cost of pollution and adopted more stringent threshold of liability than required by international law<sup>88</sup>. Moreover, the Indian courts followed the 'clean up or close down' formula and believed that the industries should be liable to pay the social cost of carrying out inherently dangerous activities. Having examined the treatment of other principles by Bangladesh judiciary, it is unlikely that PPP will be treated as a part of customary international law. However, if any cases on this issue are presented before the judiciary of Bangladesh, it should follow the absolute liability and should not allow any concession to the polluters, be it a company or a public body.

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<sup>82</sup>For example: Sustainable forest management: 1990 Forest Law Times, 119; AIR 1988 All 121. See generally: P. Leelakrishnan, 'Law and Sustainable Development in India' (1991) Journal of Energy and Natural Resources Law, Vol. 9:3, at 195. Restriction on mining operation causing ecological hazard: (1987) 1 SCR 637; AIR 1988 HP 4. Sustainable use of natural resources: 1990 KLT 580 at 583. Leather industries were closed in favor of environment: AIR 1996 SC 2715 and (1996) 5 SCC 647. Also cited in Jona Razzaque, *Access to Environmental Justice Role of the Judiciary in Bangladesh*, available at <<http://www.eng-consult.com/ben/papers/paper-jona.pdf>>, p. 5.

<sup>83</sup>The Stockholm Declaration 1972 and the Rio Declaration 1992 both recognized the urgent need to safeguard the natural resources. These documents agreed that there is a need to adopt cost-effective measure to reduce environmental damage. Also cited in Jona Razzaque, *Access to Environmental Justice Role of the Judiciary in Bangladesh*, available at <<http://www.eng-consult.com/ben/papers/paper-jona.pdf>>, p. 5.

<sup>84</sup>In Bangladesh, the Wildlife Acts, the Fisheries Act, and the Forest Act integrate the precautionary principle. The Bangladesh Environmental Conservation Act 1995 integrates the precautionary approach as well as the polluter pays principle. Any person affected or likely to be affected from the pollution or degradation of environment may apply to the Director General for remedying the damage or apprehended damage. (sec. 9 of the 1995 Act). Furthermore, a company would be liable for the violation of any provision of the Act. The burden of proof is shifted on them to show that they were ignorant of such contravention or exercised due diligence (sec. 16 of the Act). Also cited in Jona Razzaque, *Access to Environmental Justice Role of the Judiciary in Bangladesh*, available at <<http://www.eng-consult.com/ben/papers/paper-jona.pdf>>, p. 5.

<sup>85</sup>Dr Mohiuddin Farooque vs. Bangladesh and Others, (WP No. 92 of 1996): A potential customer's right to file a suit has been recognized by this case. The court simply assumed that such injury either had occurred or were 'likely to occur' and proceed to issue remedial directions. In the FAP case, cited earlier, the court took account of the seriousness of damage that could be caused to the environment by the project. However, the court did not apply the precautionary principle and did not bar the development project. Also cited in Jona Razzaque, *Access to Environmental Justice Role of the Judiciary in Bangladesh*, available at <<http://www.eng-consult.com/ben/papers/paper-jona.pdf>>, p. 6.

<sup>86</sup>(1996) 5 SCC 647 at 658; (1997) 2 SCC 353; (1997) 3 SCC 715; (1997) 2 SCC 87; (1997) 2 SCC 411: All these cases, in effect, stated that precautionary principle is considered as part of the law, that the allegation would require to be proved beyond reasonable doubt and that burden of proof would be shifted to polluting industries to show that there was no pollution. Also cited in Jona Razzaque, *Access to Environmental Justice Role of the Judiciary in Bangladesh*, available at <<http://www.eng-consult.com/ben/papers/paper-jona.pdf>>, p. 6.

<sup>87</sup>H. Smets, 'The Polluter Pays Principle in the Early 1990's' in Luigi Campiglio et al. (eds.) *The Environment After Rio: International Law and Economics* (1994)136-137; S.E. Gaines, 'The Polluter pays principle: From Economic Equity to Environmental Ethos', 26 Tex. International Law Journal 463 (1991)467-475. Access to Environmental Justice Role of the Judiciary in Bangladesh, available at <<http://www.eng-consult.com/ben/papers/paper-jona.pdf>>, p. 6.

<sup>88</sup>(AIR 1987 SC 965); (1996) 3 SCC 212; (AIR 1996 SC 2715); (1997) 2 SCC 411: all these cases dealt with the application of PPP, payment of the cleanup cost and absolute liability of the polluters. Access to Environmental Justice Role of the Judiciary in Bangladesh, available at <<http://www.eng-consult.com/ben/papers/paper-jona.pdf>>, p. 6.

## **VI. Contemporary Judicial Approach In India And Bangladesh For Protecting The Environment**

The anthropocentric approach of the judiciary is deep rooted and the unqualified right to environment has not been established. The express constitutional provisions in the Indian Constitution<sup>89</sup> have made the task of the environmentalists and of the judiciary much easier. The trend in South Asia shows that the environmental activists continuously used the constitutional writ petition to protect the environment<sup>90</sup>. Along with the legal aid and the environment court, perhaps, it is the right time to have environmental protection integrated in the Constitution.

The judiciary's good will would be of little use if the public does not have access to funding to move the petition. This includes the initial expenses of the applicant, the overall cost of the case, availability of legal aid and cost order of the court. At the moment, majority of the funding comes from private foundations and from foreign assistance. The unreliable nature of the source made it more important to have a state fund on environment. The *Jatiya Sangsad* has just passed the Legal Aid Bill 2000<sup>91</sup> and it is not yet clear how much access to public funding is there for environmental litigation. The prospect of having to pay the other side is usually one of the greatest deterrents to litigants. Another problem area is the cost order of the court. In most of the cases in India, the cost was decided in a case by case basis<sup>92</sup>. In two of the environmental cases in Bangladesh, the court disposed of the matter without any order regarding cost<sup>93</sup>.

Moreover, 'no-win, no-fee' could be an option to encourage more environmental litigation. This would allow the lawyers to take on cases without charging their clients. In a successful case, the other party is usually ordered to pay most of the lawyer's nominal fees. The client or the lawyer can also take out insurance to cover the risk of losing or having to pay the other side's cost. In that way, if the applicant loses the case, the insurance would cover the cost of the case. Though this system can help to reduce the number of unnecessary litigation and help the lawyers to accept cases with better chance to win, it has its own drawbacks<sup>94</sup>. To cope with that, a special fund for cases perceived as plainly in the public interest could help to examine environmental test cases with complex points of law and to establish precedents. At present, the Environment Court Bill is under the consideration of the Parliament<sup>95</sup>. The court will certainly help to create more expert judges, ease the standing and provide a better and consistent case law.

Therefore, it is expected that proper financial assistance will be offered to the judges for training and research. By encouraging more non-governmental organizations to be involved in the policy making and by appointing environmentally aware judges in the higher courts, the government can easily make the public interest environment litigation an interesting option for the general people. Following the examples in India, the court should use their power<sup>96</sup> to appoint a commission to examine any person, to question the conflicting scientific reports<sup>97</sup>, to make a local investigation, to examine or adjust accounts or to make a partition. It should

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<sup>89</sup> The Constitution (42nd) Act 1976 explicitly incorporated environmental protection and improvement. Article 48A and 51A (g), both directive principles of state policy and not directly justiciable, state that both the state and the citizens have duty and responsibility to protect and improve the environment.

<sup>90</sup> Favoring the use of constitutional provisions, some Asian environmentalists argue that lack of developed procedural law in these countries paved the way for this resort. There are quite a few other supporting arguments, such as the nature of the legal system, non-implementation of the substantive law and lack of an integrated environmental management.

<sup>91</sup> Under the law, the state will finance lawyers for those who are needy, helpless and unable to get justice for various socio-economic reasons. Such people can apply for legal assistance from the state. A state-financed panel of lawyers will come in aid to the deserving person after scrutiny of their applications by a committee. Source: The Daily Star (January 25, 2000). Website: [www.dailystarnews.com/](http://www.dailystarnews.com/).

<sup>92</sup> In many of the public interest litigation, the court either did not make any cost order or the cost and the expenses of the inquiry were ordered to be paid by the respondents. For examples of some of these cases: S. Ahuja, *People, Law and Justice: A Casebook of Public Interest Litigation* Vol. II (New Delhi, Orient Longman, 1997).

<sup>93</sup> *Mohiuddin Baroque V. Bangladesh and others* (48 DLR 1996) p.438 and *Bangladesh Environmental Lawyers' Association V. Election Commission and Others* (46 DLR 1994) P235.

<sup>94</sup> In UK, this system is being used in personal injury cases where the injury arises from exposure to toxins or pollution or injuries resulting from a one-off accident. The critics say that this system will destroy the chance of environmental test cases as most of the lawyers would not take such risk under the conditional fees system. Moreover, the insurance companies may not be willing to provide commercial cover with reasonable premiums. Most of the environmental lawyers may be unwilling to take such cases due to the high investigative costs, time taken and overall risk in terms of success.

<sup>95</sup> According to the bill, six environment courts shall be established in six divisional head quarters. All cases about conservation of environment and environmental pollution shall be filed and dissolved in these courts. Any aggrieved person whose right has been infringed can directly file a suit in the Environment Court. No case filed in the Environment Court shall be adjourned for hearing more than three times. Every suit shall be dissolved within a period of 6 months from the date of filing a suit. There is a provision for damages to be determined depending on the facts and circumstances of each case. The maximum level of fine and imprisonment is Tk.10 lacs and 10 years respectively. Moreover, the draft bill states that this court will be recognized as criminal court and it will enjoy all powers and jurisdiction like criminal court according to the Code of Criminal Procedure 1898.

<sup>96</sup> Art. 104 of the Constitution: Appellate Division's power in providing complete justice; 102(1) and (2): enforcement of fundamental rights; Art.109: High Court's power to intervene suo motu.

<sup>97</sup> There was a possibility in the case where the radioactive milk was questioned in the court.[W. P. No. 92/1996]

have more power to monitor the development of the case and to ensure that the directions are carried out<sup>98</sup>. Moreover, tortious claim and class suit<sup>99</sup> should be encouraged as there is an added advantage of monetary compensation and courts generally opt for detailed evidence.

Furthermore, the NGOs involved in the environmental protection and public interest litigation can build a database of lawyers to provide free legal assistance, at least for the first consultation, to people suffering with environmental problems. In that way, the general people would be aware of their environmental rights and the options available to them.

At the same time, the lawyers would be able to participate actively in the environmental protection, not to mention having a successful profession at the same time. Also, the court can ask *amicus* to provide them with supporting legal documents. In that way, the court will have some useful legal research prepared for them and, on the other hand, the NGOs would be able to introduce their own views for the knowledge of the court<sup>100</sup>.

## VII. Recommendations

The judiciary is responding to the global call for protection of environment. With the adoption of new sets of laws and rules, the legal regime as it stands today sounds more progressive and sensitive. The following recommendations may add a new value to keep the environment free from pollution through judicial activism:

1. Besides the regular court procedure, alternative dispute settlement mechanism should be initiated for better protection of environment.
2. The mediation process should be incorporated to provide a better solution between local groups and big companies.<sup>101</sup>
3. A strong and comprehensive regulatory framework should be made in protecting the environment.
4. The non-government organization requires participating more in the policy making and making the politicians aware of the loopholes in the environment; and an environment law reform body should be made for analyzing the environmental law.<sup>102</sup>
5. Public consciousness and effective public participation should be ensured through different government and non-government organization.<sup>103</sup>
6. Criminal liability should be ensured to the wrongdoer of environment polluters.
7. A check and balance system should be introduced between the judiciary and the environmental activists.
8. A special committee should be established to monitor the direction of the court.
9. Awareness and special education system relating to the environmental law and its protection can be taken to enhance its strong base.
10. Contribution of Public Interest Litigation in the protection of environment should be more wide

Furthermore, different regulatory bodies, instead of co-operating with one another, appear to be at odds due to their lack of understanding and communications. At the moment, the Department of Environment is in charge of bringing together the fragments of the authorities and to promulgate the necessary guidelines. But, there is a lack of personnel, budgetary resources and motivation to enforce the existing legislation. Nevertheless, better public consciousness, effective public participation in the environmental decision making and strong environmental regulations would certainly help to strengthen the role of judiciary in the environmental field.<sup>104</sup>

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<sup>98</sup> For example: in India, in the R. L. and E Kendra case (AIR 1985 SC 652; AIR 1987 1 SCR 637; AIR 1987 SC 359; AIR 1988 SC 2187 and AIR 1989 SC 594): concerned with illegal limestone quarries which were posing considerable hazard to environment. The court appointed an expert committee to inspect the mines and a working committee to classify the mines. Based on the report, the court decided which mines should stop operating and set up a monitoring committee to examine whether any mining operation was being illegally undertaken. The court ordered the government to establish an initial fund to set up the monitoring committee.

<sup>99</sup> These are actions prescribed by the Civil Procedure Code (1908). Less used because of longer time frame, delays and cost. Moreover, it is sometimes difficult to narrow down the expansive issues of environmental damage.

<sup>100</sup> The *amicus* appears to have been originally a bystander who, without any direct interest in the litigation, intervened in his own initiative to make a suggestion to the court on matters of fact and law within his knowledge. An *amicus* brief should generally contain materials submitted to the court and are additional to that submitted by any other parties. It may support the argument of one party or indeed support the argument of one party in part and another party in part.

<sup>101</sup> It allows parties to resolve disputes quicker, more efficiently and more privately than judicial process. Participation in the mediation does not waive the right to use more formal means of dispute resolution. If the environmental problem is of complex nature and settlement process is difficult because of the number of the parties, mediation would be a suitable option.

<sup>102</sup> In India, there are several incentive-based mechanisms. For example, the Trade in Environmental Services Technologies (TEST) programme was created to improve environmental protection and productivity in Indian industries. TEST, an assistance programme between USA and India, is provided in the form of loans, conditional grants and technical assistance. Moreover, under the eco-labelling scheme, any product is made; used or disposed of in a way that significantly reduces the environmental harm would be considered as environmental friendly product.

<sup>103</sup> Jona Razzaque, *Access to Environmental Justice Role of the Judiciary in Bangladesh*, available at < <http://www.eng-consult.com/ben/papers/paper-jona.pdf>>. p. 13.

<sup>104</sup> *Ibid*, p.8.

### **VIII. Conclusion**

After discussing the above all it is apparent that the concept of Judicial Activism has provided an important tool for the protection environment. The liberalization of the traditional role of *locus standi* has brought the better access to justice in case of environmental protection by invoking public interest litigation. Besides, the judiciary has initiated the concept of social justice, which led to remarkable judicial activism and innovations. The contemporary judiciary has blazed a new trail of constitutional and legislative interpretation; and that build up a new era in the environmental jurisprudence through the judicial activism.<sup>105</sup> Despite legislations, rules and regulations, protection and preservation of the environment is still a pressing issue. Hence, there is a need for an effective enforcement of the constitutional mandate and other environmental legislations. A strong foundation for environmental jurisprudence helped in the protection and preservation of its environment as well as its people.<sup>106</sup>

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<sup>105</sup> Bharat H. desai, Enforcement of the Right to Environment Protection through Public Interest Litigation in India, Indian Journal of International Law, Vol. 331993, p.39.

<sup>106</sup> Mhajan Niyati, Judicial Activism for Environment Protection in India, International Research Journal of Social Sciences, Vol. 4(4), 7-14, April (2015), ISSN 2319-3565.