

SUSTAINABLE DEVELOPMENT IN THE INDIAN SUB-CONTINENT'S JURISPRUDENCE AND POLITICAL THEORIES*

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The doctrine sustainable development in the Indian sub-continent's jurisprudence and political theories has long-standing recognition. An ancient hymn from the Upanishads reminds us of this. '*Kautilya's Arthashastra*' in 300 B.C. – also refers to preservation of land and its surrounding nature. The concept thus is not new and India has a long cultural tradition of frugality and simple living in harmony with nature. The concept thus is not new and India has a long cultural tradition of frugality and simple living in harmony with nature. All great religions which have traversed in our country have preached the unity of humankind with nature.

Presently however, the doctrine of sustainable development is no longer in the realm of a concept to be shaped and focused differently in different circumstances but now it stands as an established principle and is placed at par even with the very concept of democracy, human rights and sovereign equality of states as stated by Prof. Lowe in his article on “sustainable development and unsustainable arguments.”

The doctrine of sustainable development in the present phase though launched initially at the Rio declaration but the same has found its recognition both in major international legal instruments as also in number of judicial decisions since nineties.

In *New Zealand v. France Nuclear Test's*¹ case the International Court of Justice was rather categorical that the order was without prejudice to the obligation of states to respect and protect the natural environment. The Court stated that environment represents the quality of life and health of human beings and that includes unborn persons as well.

Similar is the situation in its judgment concerning Gabcikovo and Nagymaros Projects between Hungary and Slovakia delivered on September 25, 1997 and has been categorical in its findings. It is in this context, it would be worthwhile to note the separate opinion expressed Judge Weeramantry in that decision.

* Extract from a Lecture delivered by the Hon'ble Mr. Justice Umesh C. Banerjee to the students of NALSAR on February 22, 2011.

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1. ICJ Reports 1995, Para 64.

The Judge said -

Had the possibility of environmental harm been the only consideration to be taken into account in this regard, the contentions of Hungary could well have proved conclusive.

Yet there are other factors to be taken into account—not the least important of which is the developmental aspect, for the Gabčíkovo scheme is important to Slovakia from the point of view of development. The Court must hold the balance even between the environmental considerations and the developmental considerations raised by the respective Parties. The principle that enables the Court to do so is the principle of sustainable development.

The Court has referred to it as a concept in paragraph 140 of its Judgment. However, I consider it to be more than a mere concept, but as a principle with normative value which is crucial to the determination of this case. Without the benefits of its insights, the issues involved in this case would have been difficult to resolve.

Since sustainable development is a principle fundamental to the determination of the competing considerations in this case, and since, although it has attracted attention only recently in the literature of international law, it is likely to play a major role in determining important environmental disputes of the future, it calls for consideration in some detail. Moreover, this is the first occasion on which it has received attention in the jurisprudence of this Court.

Reference is also made to a decision by the WTO Appellate Body in the notable case of Shrimps and Turtles between United States and India, Malaysia, Pakistan and Thailand. The Appellate Body did express its concern for the maintenance of natural resources and for protection of environment. The acceptance of exception to the GATT Rules under Article XX may not stand in line with my concurrence as below but the fact remains that there was a specific recognition of the concept of sustainable development and protection of environment. It is at this stage I would also like to draw your attention to a judgment of mine when I was a Judge of the High Court of Calcutta in 1993² wherein I have stated:

“While it is true that in a developing country there shall have to be developments, but that development shall have to be in closest possible harmony with the environment, as otherwise there would be development

2. *Calcutta Wetland Judgment*, AIR 1993 Cal. 215.

but no environment, which would result in total devastation, though however, may not be felt in present but at some future point of time, but then it would be too late in the day, however, to control and improve the environment. Nature will not tolerate us after a certain degree of its destruction and it will, in any event, have its roll on the lives of the people. Can the present-day society afford to have such a state and allow the nature to have its toll in future – the answer shall have to be in the negative. The present-day society has a responsibility towards the posterity for their proper growth and development so as to allow the posterity to breathe normally and live in a cleaner environment and have a consequent fuller development. Time has now come therefore to check and control the degradation of the environment and since the Law Courts also have a duty towards the society for its proper growth and further development, it is a plain exercise of the judicial power to see that there is no such degradation of the society and there ought not to be any hesitation in regard thereto.....”

Global maturity in recent years in regard to this concept is now a practical reality and not in the realm of consideration or mere ideas – but what does that expression ‘ecology’ mean and imply : ‘Ecology’ in common parlance means the study of home or the household of nature to be kept in order. George I, Clarke in his ‘Elements of Ecology’ has stated that every living thing is surrounded by materials and forces which constitute its environment and from which it must derive its needs and contact with the environment is inescapable.

In support of the concept of development, one school of thought, however, considers that industrial expansion ought not to be deterred on the concept of ecology, since ecology, it is argued, is simply a price which has to be paid for industrial development in a developing country. As a matter of fact, this school of thought firmly believes that ecological imbalance is a cost that one should be prepared to pay and not a problem at all. The issue arises on the basis of the aforesaid, however, is for consideration whether it is acceptable in 21st century, when there is a total global awareness in regard to maintenance of ecological balance, one would be justified in keeping their eyes shut in regard to this concept of ecological imbalance. In my view the answer cannot but be in this negative. Ecological imbalance undoubtedly is a social problem and in this context observations of mine in *Calcutta Youth Front v. State of West Bengal*,³ seem to be rather apposite. In that decision, I have stated:-

“An ecological problem, in contrast, is a special type of social problem. To speak of a phenomenon as a ‘social problem’ is

3. 1986 (2) CLJ 26.

not to suggest merely, or perhaps at all, that we do not understand how it comes about; it is labeled a problem not because, like a scientific problem, it presents an obstacle to our understanding of the world but rather because – consider alcoholism, crime, deaths on the road – we believe that our society would be better off without it.”

Subsequently, in order to avoid bio-diversity crises, I have had the occasion whilst in the Bench of the Supreme Court of India in *M.C. Mehta v. Union of India*⁴ to state the law more or less in the similar vein and as such I do not wish to reiterate the same to avoid prolixity.

The Calcutta Wetland Judgment was pronounced on the apprehended danger of a severe bio-diversity crisis and in my view since the Law Courts exist for the society and the rule of law is meant to benefit the society, it is in discharge of that social duty and obligation and as a guardian-angel of the society, it is a duty cast on to the Law Courts to protect the society from environmental devastation but does that mean and imply stoppage of all developmental activities – In 21st century the response of the Courts ought to be assertive though not at the cost of environment – there shall have to be balance proper between environment and development so that both can co-exist without affecting the other and inter and intra governmental actions ought to proceed in accordance therewith and not de hors the same.

Sustainable development is not a fixed state of harmony but rather the process of change in which the exploitation of resources, the direction of investment, the orientation of technological development and institutional change are made consistent with future as well as present needs. It thus involves and requires reorientation of the entire perspective of governance not only in its internal affairs but in the international sphere. The rich and the poor nations exist and the same is a doubtless reality and the reorientation spoken of is to reduce the gap between the rich and the poor since participation of all countries – large, small, rich and poor, cannot but be said to be an invariable requirement to reach the goal of sustainable development in the matter of population, food, security, loss of species and genetic resources, energy, industry and human settlements being part of one goal and cannot thus be treated in isolation from one another.

Our Prime Minister Dr. Singh in a recently held conference on Sustainable Development in Delhi on February 3, 2011 last stated:-

“We have to act at two levels, the local and the global – in

4. AIR 2011 SC 1544.

dealing with the issue of sustainable development. We require collective action at both levels so that good and global good can be aligned and can reinforce each other. Unfortunately this symbolic relationship weakens as societies develop and as population begins to rise. But modern societies cannot get away from the fact that if they damage the environment in the pursuit of material gains today, they do so by risking the well being of future generations to come. The solution lies in two dimensions. First, we must put in place a structure of regulatory policies which will prevent potentially damaging behavior. This is what we do by setting regulatory standards and enforcing them. I must emphasize that standard are not enough. They must also be enforced which is often difficult. It is also necessary to ensure that these regulatory standards do not bring back the license Permit Raj which we sought to get rid of in the wake of economic reforms of the early nineties. Second, we must deal with residual pollution that may be caused despite regulatory efforts. The principle that should be followed in such cases is that the polluters must pay. This will discourage the polluters and also provide means of financing the corrective steps necessary to counter the pollution caused. We in India are trying to do this by setting appropriate standards in several areas especially in the most energy using industries. As a general rule we are trying to establish the principle that the polluter must pay though that is much more difficult to achieve in all cases. Last year, for example we introduced a cess of 5% on the use of coal both either domestic or imported to build the corpus of a National Clean Energy Fund. Another aspect of sustainability is the management of common pool resources in India, as in many other developing countries, indigenous tribes, cattle rearing groups, as well as cultivators use and access common pool resources like forests, water bodies, pastures and farmland without clearly defined property rights. The traditional wisdom of the management of such commons was that they would tend to get over-used if individuals were left free to exploit them for their individual ends and therefore, these common resources, and related environment matters, should be managed by central authorities and governments. This conventional view is challenged now by new research in economics, ecology and the environment. The Noble Laureate,

Dr. Elinor Ostrom and her associates have demonstrated that in such situations local action for managing common resources through activities by small user groups can lead to optimal results provided the stakeholders are adequately informed and also empowered to act. This has profound implications for policy makers. In India, we enacted landmark legislation in 2006 popularly called the Forest Rights Act that seeks to assure the rights of millions of tribal and other forest dwellers by restoring to them both individual rights to cultivated forest land and community rights over common property resources. We hope this will spur local initiative on a sustainable use of resources, conservation of bio-diversity and maintenance of ecological balance.”

That was Dr. Man Mohan Singh speaking at the New Delhi Summit on Sustainable Development. Attention ought however to be focused on two specific counts, *viz.*, - (i) Population (ii) Human Rights – Conceptually population and development are inter-linked – since the development aspect is dependent on the population, though the latter cannot be said to be dependent on the former. Population is growing at rates outstripping reasonable exploitations of improvements in using health, care, food, security or energy supplies. There are thus, to reach a proper and effective sustainable development, two different dimensions of this theory namely, not only to have the education to manage the resources but to its control as well. Population explosion acts as a deterrent to the theory of sustainable development. To cater to the needs of population there thus must be made available food and shelter, energy and prospect and it is the efficient management of these four elements that can, apart from other factors, bring about a state of sustainable development. Education is a requirement so as to make available the ill-effects of uncontrolled growth of population to the people at large.

The doctrine of Sustainable Development, requires the promotion of values that encourage consumption standards that are within the bound of ecological possibility : Sustainable development requires that societies meet human needs, both by increasing productive potential and by ensuring equitable opportunities for all : Meeting the need should, however, include not only in present but inter-generational future needs as well.

Development thus must be people oriented so as to promote human dignity and welfare so as to provide for the basic needs of the people as regards shelter, food, health, education and financial capability for sustenance.

Human Right is thus the other sphere where proper and effective remedy ought to accrue so as to attain fuller development. While it is true Universal Declaration of human rights did take a concrete shape and stands accepted and adopted throughout the globe but the cry for protection is still on and that too irrespective of major international instruments. It is now time thus to recognize human rights in such a way so as to have it enforced in a manner proper and befitting : Development must also work to eliminate all forms of discrimination against women, both as regards employment, education, services and other entitlements. Empowerment of women shall have to be considered in a method and manner conducive to the 21st Century situations.

My views as regards environmentally sustainable development have been amply stated in two judgments noticed earlier and it be noted that promoting a rule of law is the ultimate objective in the development so that the civic culture gets properly ensured by the enforcement procedure established by a rule of law.⁵

Economic policies of individual countries and international economic relations both have great relevance to sustainable development. The reactivation and acceleration of development requires a dynamic and a supportive international economic environment is crucial. The development process will not gather momentum if the global economy lacks dynamism and is beset with uncertainties. Neither will it gather momentum if the developing countries are weighted down by external indebtedness: If development finance is inadequate, if barriers restrict access to markets and if commodity prices and the terms of trade of developing countries remain depressed the doctrine suffers to the detriment of the entire developing world. The record of the 1980s was essentially negative on each of these counts and needs to be reversed. The policies and measures needed to create an international environment that is strongly supportive of national development efforts on this direction. International cooperation in this area thus should be designed to complement and support – not to denounce domestic economic policies, in both developed and developing countries if global progress towards sustainable development is to be achieved.

The Brundtland Commission asserted that only economic growth can eliminate poverty. It is the UNCED's efforts to put on record that economic growth cannot be based on over exploitation of the resources but must be managed in such a way so as to enhance the resource base and on a global

5. Vide Harward International Law Journals, vol.36, p.307.

consensus. Thus economic growth is the requirement of the day and the need of the hour in order to achieve sustainability or sustainable development.

It is noteworthy; however, that in the pre UNCED period say 1990 there was no call as such for an international participation as regards the sustainable development. The issue mainly was development and environment thus a restrictive one and it is in Rio Conference only that such an extension of the environmental protection has been thought of. Agenda 21 has been the foremost one in such an international participation and this Agenda stands composed of four sessions, namely:-

- i) Social and Economic Dimensions;
- ii) Conservation and Management of Resources;
- iii) Strengthening the Roles of Major Groups;
- iv) Means of Implementation

The challenges of environment and development are daunting. The real work of integration of environment and development lies ahead. The survival of mankind rests on the implementation of the concept of sustainable development. The agreements at UNCED mark the beginning of an international political will to take the necessary steps to protect the earth. What the mankind needs is to supplement the framework conventions adopted at Rio with the adoption of specialized protocols. At the first meeting of the Parties to the Convention on Biological Diversity held in December 1994 at Nassau, Bahamas, India demanded immediate and adequate safeguards against hasty experimentation and use of Genetically Modified Organisms (GMOs), since these could have unimaginable repercussions. The indiscriminate and unregulated use of GMOs poses a threat to the mankind which can only be checked through a legally binding agreement. It is, therefore, necessary to adopt clear comprehensive and legally binding international protocol on bio-safety under the convention on bio-diversity.

The Convention on Climate Change does not contain specific targets and timetable for the reduction of greenhouse emissions. In view of the horrifying threat of the extinction of mankind as a result of global warming, the Climate Change Convention needs to be supplemented by a protocol containing specific targets to be followed by the States. This would equip the Convention with necessary authorities to implement the concept of sustainable development.

It is in this context Dr. Singh in the New Delhi convention stated:

“The growth in environmental awareness and the capacity to manage local environmental problems” is a very positive

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development. However, local or national action would be of no avail when the externalities cross natural boundaries, as in the case of climate change. For example, even if India were able to eliminate all its greenhouse gas emissions. We will not make a significant difference to our climate since our emissions account for only 4 % of the global total. The solution for this particular problem clearly lies in coordinated global action. Our view has been that those who have been primarily responsible for the build up of green gases and who have the greatest capacity to act should bear the brunt of the responsibility. Developing nations are obviously much less culpable, and have a much greater need for continued growth. These countries should be helped to achieve sustainable development paths. The most recent Conference of Parties to the UNFCCC at Cancun in Mexico did not resolve these problems, but it did produce some modest results. I compliment Mexico and its leadership for its outstanding leadership and stewardship of the Summit, and for achieving some forward movement. This shows that with collective will, building a meaningful international consensus it still possible even though it is turning out to be more difficult than before. India, China and many other developing countries have all responded with significant voluntary goals and specific plans on emission intensity reduction. But, if we have to tackle global inertia, we need to see clear commitments from the industrial countries on emission reduction targets for 2020 that are consistent with the Copenhagen goal of containing the likely temperature increase to no more than 2 degree centigrade or less. We do not have yet a response from the industrialized countries which is consistent with meeting that objective. So, here is a viable agenda for concerned global action to deal with the problem of climate change”.

The Indian Supreme Court has been for quite some time now dealing with the issue of environment rather candidly with a specific direction as regards the avoidance of bio-diversity crisis. The efforts, starting from the decision of the *State of H.P. v. Ganesh Wood Products*,⁶ is still on and from the year 1995 at least in 20 doctrine of sustainability but law courts of country cannot formulate an international policy and it is where the concept

6. 1995 (6) SCC 363.

will have to have its stronger and deeper foundations in order to build consensus pertaining thereto.

Thinking Futuristically

It may be a solution or at least attention may be focused on four different aspects:

- i) Implementation of one global village theory
- ii) Introduction of model law, amongst others, on –
 - a) Preservation of Environment
 - b) Human Rights and
 - c) Economic/ Fiscal Laws
- iii) Adaptation of Model Law
- iv) Introduction of local municipal law in line with the model law – So that implementation of the model law could be effected as in the model law in the matter of settlement of disputes through arbitration (uncitral model).

Thank you all for your very kind attention. In particular, I must thank the Vice-Chancellor of NALSAR University for his very kind invitation extended to me.

Good luck to you all! God Bless!!