Chapter-9-Indian Judicial Response

9.1-INDIVIDUAL RIGHT AND CONSERVATION

Indian Judiciary through various decisions made it clear that the pollution of the environment is the violation of fundamental right. Moreover court further stressed the importance of conservation of natural resources.

Human Right To Environment

Environmental degradation is a serious problem and considering its impact on the nature and court society law should rise to deal with the situation, as it demands in the present day today. The burning example of judicial action is *Ratlam Municipality case*[1]. The court held that the state would realize that Art. 47 makes it a paramount principle of governance that steps are taken for the improvement of public health as amongst its primary duties[2] and human right has to be respected regardless of budgetary provision. The Supreme Court of India has developed two important concepts one is environment a human right and the other is absolute liability of industry to pay compensation to the victims.

Role of United Nations

Pollution of environment is a global problem. In this regard international efforts have been made to present the pollution of environment by involving human right to environment. The Economic and Social Council of the United Nations passed a resolution No. 2346 (XLV) on the 30th July 1968 on the question of concerning an international conference on problems of human Environment. This was followed by a resolution No. 2398 (XXIII) passed on the 3rd December 1968 by the United Nationals General Assembly. One part of the resolution reads as follows:[3]

"Concerned about the consequent effect on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights, in developing as well as developed countries."

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[1] Municipal Council, Ratlam v. Vardhichand, AIR 1980 SC 1622.
[2] Ibid, para 24.
[3] Subhash Kumar v. State of Bihar AIR 1991 SC 420.

Principle one of the United Nations Conference on Human Environment took place as Stockholm from 5th to 16th June, 1972 declares the environment as a human right. It says[4].

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

Article one of the United Nations World Commission on Environment and Development held during 18-20 June 1986 at the peace palace in The Hague declared human right to environment. Article states[5].

"All human beings have fundamental right to an environment adequate for their health and well being."

Principle one of Rio Declaration held during 3 to 14 June, 1992 also declares that human being has right to clean environment. It says.

"Human beings are to the center of concerned for sustainable development. They are entitled to a healthy and productive life in harmony with nature".[6]

Enforcement of Right to Environment in India

Under Indian Constitution Indian judiciary through Articles 32 and 226 can enforce fundamental rights. *Locus standi* has been deviated from earlier-concept. Now a public-spirited citizen can also file suit through public interest litigation other than a person whose fundamental rights has been infringed. Previously, right to clean environment was not included in fundamental rights. Now, the Supreme Court has

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[4] Lal's- "Commentaries on Water and Air Pollution Laws", 3rd Ed. 1997. Allahabad Law Publishers, p. 355

[5] Singh, H. -"Right to Environment and Sustainable Development"- JILI 1987, Vol. 29 No. 3 at p. 309

[6] Official Documents- JILI, Vol. 32, 1992 at p. 205.

held that right to pollution free environment is a fundamental right under Article 21 of the constitution of India.[7] Article 226 provides that notwithstanding anything in Article 32 every High Court shall have power, thought the territorial limits in relation to which it exercise jurisdiction to issue to any person or authority including the appropriate cases, any Government, within those territories, directions, or orders of with (a) for the enforcement of fundamental rights conferred by Part III and (b) for any other purpose.

The Public Interest Litigation is new *locus standi* to move to the court to enforce fundamental rights. The traditional rule of *locus standi* that a petition under Article 32 can only be filed by a person whose fundamental right is in fringed has now been considerably relaxed by the Supreme Court. The court now permits public interest litigations or social action litigations at the instance of 'public spirited citizens' for the enforcement of constitutional and other legal rights of any person or group of persons who because of their poverty or socially or economically disadvantaged position are unable to approach the court for relief. [8]

The *Rural Litigation and Entitlement Kendra v. State of U. P.*[9] is the first case where the Supreme Court made an attempt to look into this question. The Court considered the hardship caused to the lessees but thought that it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance to ecological balance. The Court said:

"..... there can be no gain saying that limestone quarrying and excavation of the limestone deposits do seems to affect the perennial water springs. This environmental disturbance has however to be weighted in the balance against the need of limestone quarrying for industrial purposes in the country and we have taken this aspect into account while making this order".

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[7] Thus, enforcement of right to clean environment can be made by the Supreme Court under Article 32 and by the High Courts under Article 226 of Indian Constitution.

[8] Access to Justice through 'class actions', 'public interest litigation' and representative proceedings' is the present constitutional jurisprudence.

[9] AIR 1985 SC 652.

The case was filed under Act 32 of the Constitution and order was given with emphasis on the need to protect the environment. The Court obviously was evolving a new right to environment without specifically maintaining it.[10]

In *Ratlam Municipality v. Shri Vardhichand*[11], the environment pollution in Ratlam affected large community of poor people and arose from a combination of diffuse: private polluters, slack and under financial enforcement agencies and haphazard town planning. The Supreme Court asserted that human rights are to be respected. This implies that right to pollution free environment must be included under Article 21 of the constitution.

In *Bandhua Mukti Morcha v. Union of India*[12]. Justice Bhagwati said, "Right to life with human dignity enshrined in Article 21 derive it life breath from the Directive Principles of State Policy." Article 48A[13] of the directive principles of state policy declares that "The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country".

In *M. C. Mehta v. Union of India*[14], the court had to deal specifically with the impact of activities concerning manufacturing of hazardous products in a factory. Many condition were lain down under which industries of hazardous products should be allowed to restart in doing so the court found that the case raised some seminal questions concerning the scope and ambit of Articles 21 and 32 of the constitution[15] by making such comment, the court was manifestly referring to the concept of right to life in Article 21 and the process of vindication of that right in Article 32. If such a policy were adopted, it would mean the end of all progress and development. Such

[10] A step to induce right to pollution free environment under Article 21 of Indian Constitution, though, is of recent in origin but endeavour had been started quite earlier.
[11] See Supra 1.
[12] AIR 1984 SC 802.
[13] Added by 42nd Amendment Act, 1976.
[14] AIR 1987 SC 965
[15] Ibid at p. 966.

industries, even if hazardous have to be set up since they ore essential for economic development and advancement of well being of the people[16].

In *M. C. Mehta's* [17]case an important question concerning the amount of compensation payable to the victims affected by leakage of Oleum gas from the factory. The court held that it could entertain a petition under Act 32 of the constitution, namely, a petition for the enforcement of fundamental rights, and lay down the principles on which the quantum of compensation could be computed and paid. This case is significant as it evolved a new jurisprudence of liability to the victims of pollution caused by an industry engaged in hazardous and inherently dangerous activity[18]. The court said:

"An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding area owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has under taken"[19].

Right to Life Under Article 21 of the Constitution of India

The concepts 'the right to life' 'personal liberty' and 'procedure established by law' contained in Art 21[20] of the Indian constitution were in a state of inertia, during the year 1976. Tables were turned by the landmark decision of the Supreme Court in *Maneka Gandhi v. Union of India*[21], which held that the right to life and personal liberty, guaranteed under And 21 could be infringed only by a just fair and reasonable procedure. The Post Maneka developments truly reflect the ideals of democratic

[16] Ibid para 21.
[17] M.C. Mehta v. Union of India AIR 1987 SC 1086.
[18] Ibid at p. 1099.
[19] Ibid para 31.
[20] Article 21 says, "No person shall be deprived of his life or personal liberty except according to the procedure established by law."
[21] AIR 1978 SC 597.

freedom[22]. The Supreme Court held that Art. 21 not only generate, a procedural justice but also widen the scope of the substantive right to life[23]. The Supreme court strengthened Article 21 in two way, First it required laws affecting personal liberty to also pass, the tests of Article 14 and Article 19 of the constitution[24], thereby ensuring that the procedure depriving a person of his or her personal liberty be reasonable, fair and just. Second the court recognized several unarticulated liberties that were implied by Article 21[25]. It is by the second method that the Supreme Court interpreted the right to life and personal liberty to include the right to a wholesome environment[26].

The Right to Life and Pollution Free Environment

The Supreme Court

In *M. C. Mehta's* [27]case, the tanning industries located on the banks of Ganga were alleged to be polluting the river. The court issued directions to them to set up element plants writhing six months from the date of the order. It was specified that failure to do so would entail closure of business. In the supporting judgement however, Justice K. N. Singh noted that the pollution of river Ganga is affecting the life, health and ecology of Indo-Gangetic plain[28]. He concluded that although the closure of tanneries might result in unemployment and loss of revenue, like health and ecology and greater importance.[29]

In *Chhetriya Pradushan Mukti Sangrash Samiti v. State of UP*[30] Chief Justice Sabyasanchi Mukherjee Observed, "Every citizen has a fundamental right to have the

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[22] Sunil Batra v. Delhi Administration AIR 1978 SC 1675.
[23] Francis Coralie Mullin v. Union Territory of Delhi AIR 1981 SC 746.
[24] See supra 18.
[25] E.g. the right to free legal assistance; the right of a prisoner to be treated with humanity.
[26] Rosencranz, A. - "Environmental Law and Policy in India," 2nd Reprint 1995, N.M. Tripathi Publication at p. 56.
[27] M.C. Mehta v. Union of India AIR 1988 SC 1037.
[28] Ibid at p. 1047.
[29] Ibid at p. 1048.
[30] AIR 1990 Sc 2060 at p. 2062.

enjoyment of quality of life and living as contemplated in Art 21 of the constitution of India".

In *Subhash Kumar v. Sate of Bihar* [31] a PIL was filed to prevent the pollution of Bokaro river water from the sludge slurry discharged from the washeries of the Tata Iron of Steel Company Ltd. The court held that

".... right to life is a fundamental right under Art 21 of the Constitution and it includes the right to enjoyment of pollution of pollution free water and air for the enjoyment of life".

In *Indian Council for Enviro-legal Action v. Union of India*[32] a PIL under Article 31 of the constitution was filed for the invasion of their right to life under Article 21 of the other anti-pollution laws. The court said:

"The damage caused by the untreated highly toxic wastes resulting from the production of 'H' acid and the continued discharge of highly toxic effluent from sulphuric acid plant flowing through the sledges is indescribable. It has inflicted untold miseries upon the village and long lasting damage to the soil, to the under ground water and to the environment of the area in general, Properties of respondents (4 to 8)[33] were attached. The court justified its action in the following words."

In *Vellore Citizens Welfare Forum v. Union of India*[34] the Supreme Court said that Article 21 of the constitution contains environmental protection. Any violation of environmental law will also violate Art 21. The Court said:

"The precautionary principles and the polluter pays principle have been accepted as part of the law of the land. Article 21 of the Constitution of India guarantees protection to life and personal liberty."[35]

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[31] See supra 3. At p. 424.
[32] AIR 1996 SC 1446 at p. 1467
[33] Hindustan Agro Chemicals Limited (R-4), Silver Chemicals (R-5), Rajasthan Multi Fertilizers (R-6), Phosphates India (R-7), Jyoti Chemicals (R-8).
[34] AIR 1996 SC 2715. (The Sludge Cases)
[35] Ibid at Para 12.

The Supreme Court held that such industries through are of vital importance to the country's development but they cannot be allowed to destroy the ecology, degrade the environment and pose a health hazard and cannot be permitted to continue their operation unless they set up pollution control devices.[36]

In *M.C. Mehta v. Union of India*[37], the Supreme Court prevented environmental pollution in and around Taj Trapezium by shifting the industries and held that:
" Based on the reports of various technical authorities, we have already reached the finding that the emissions generated by the coke/coal consuming industries are air-Pollutants and have damaging effect on the Taj and the people living in the TTZ.[38] It is rather, proved beyond doubt that the emissions generated by the use of coke/coal by the industries in TTZ are the main polluters of the ambient air".[39]

The Supreme Court in this case revealed that right to clean environment is maintain under Article 21 and pollution caused by Industries[40] in the locality should be shifted outside the reach and the workmen should also be provided with the continuity of the employment.

In *Nayuda's*[41] case the Supreme Court elaborately discussed the scope if Article 21 with the right to clean environment. The Supreme Court said:

" Environmental concerns arising under Article 32 or under Article 136 or under Article 226 are of the equal importance of Human rights concerns. In fact both are to be traced to Article 21, which deals with fundamental right to life and liberty. While environmental aspects concern life human rights aspects concerns liberty.

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[36] The court suggested for constituting a special bench "Green Bench" of the Madras High Court to deal with these and other environmental cases as they are in better position to monitor these matters.
[37] AIR 1997 SC 734 (Taz Pollution Case)
[38] Taz Trapezium (TTZ).
[39] Ibid at Para 27.
[40] Total Polluted Industries were 292 in numbers.
[41] A.P. Pollution Control Board v. M.V. Nayudu Air 1997 SC 812.

Under Article 32 or under Article 136 or Arising before the High Courts under Article 226 of the constitution of India"[42].

The required standard now is that the risk of harm to the environment or to human health is to be deciding in public interest according to a reasonable persons' test[43].

In *M.C. Mehta v. Kaml Nath*[44], the Supreme Court discussed in detail about the enforcement of rights under Article 21 and provided provision for awarding damages on environmental pollution. The court said:

"…. Article 21 of the constitution provides that no persons shall be deprived of his life and liberty except in accordance with the procedure established by law. Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for life, would be hazardous to life within the meaning of Article 21 of constitution"[45].

In order to protect the life in order to protect "environment" and in order to protect "environment" and in order to protect "air, water and soil" from pollution this court through its various judgements has gives effect to the rights available, to the citizens and persons alike, under Article 21 of the constitution.[46]

The Court further said:

"In the matter of enforcement of Fundamental Rights under Article 21 under public law domains, the court in exercise of its powers under Article 32 of the constitution has awarded damages against those who have been responsible for disturbing the ecological balance either by running the industries or by other activity which has the effects of causing pollution in the environment.[47].

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[42] Ibid at para 55.
[43] Ibid at paras 35,36 and 37.
[44] AIR 2000 SC 1997.
[45] Ibid at para 8.
[46] Ibid at para 10.
[47] Ibid.

In *Noise Pollution (V), In re v*[48] it was held that the Article 21 of the Constitution guarantees life and personal liberty to all persons. It is well settled by repeated pronouncements of this Court as also the High Courts that the right to life enshrined in Article 21 is not of mere survival or existence. It guarantees a right of persons to life with human dignity.

In *N.D. Jayal v. Union of India*[49] the Apex Court held that to ensure sustainable development is one of the goals of the Environment (Protection) Act, 1986 (for short "the Act") and this is quite necessary to guarantee the "right to life" under Article 21. If the Act is not armed with the powers to ensure sustainable development, it will become a barren shell. In other words, sustainable development is one of the means to achieve the object and purpose of the Act as well as the protection of "life" under Article 21.

In *A.P. Pollution Control Board II v. Prof. M.V. Nayudu*[50] the Supreme Court said that a power in favour of a particular industry must be treated as arbitrary and contrary to public interest and in violation of the right to clean water under Article 21 of the Constitution of India.

In *Narmada Bachao Andolan v. Union of India*[51] the Court held that Water is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in Article 21 of the Constitution of India and can be served only by providing source of water where there is none. The resolution of UNO in 1977 to which India is a signatory, during the United Nations Water Conference resolved unanimously inter alia as under:

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[48] (2005) 5 SCC 733, at page 747
[49] (2004) 9 SCC 362, at page 383
[50] (2001) 2 SCC 62, at page 78
[51] (2000) 10 SCC 664, at page 767

"All people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs."

In *M.C. Mehta v. Union of India*[52] it was held that all private operators, who operate their buses in Delhi are bound by these orders, which were made to safeguard the health of the citizens, being a facet of Article 21 and had been publicised from time to time both in the electronic as well as print media. Besides, directions given for safeguarding health of the people, a right provided and protected by Article 21 of the Constitution, would override provisions of every statute including the Motor Vehicles Act, if they militate against the constitutional mandate of Article 21.

In *M.C. Mehta v. Union of India*[53] this Court has repeatedly said that the right to live is a fundamental right under Article 21 of the Constitution and it includes the right to enjoyment of pollution-free water and air for full enjoyment of life.

High Court on right to clean environment

The decisions of the Supreme Court had their influence on high courts. In comprehending the right to environment the high courts were more specific and direct.[54]

In *Damodar Rao v. S.O. Municipal Corporation, Hyderabad*[55], looking at the problem from an environmental perspective, the court observed[56] that protection of environmental is not only the duty of citizens[57], but also the obligations[58] of the state.

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[52] (2001) 3 SCC 756, at page 759
[53] (2004) 12 SCC 118, at page 166
[54] Leelakrishnan, P-"Environmental Law in India," 1999, Butterworth at p. 115.
[55] AIR 1987 AP 170.
[56] Ibid at p. 180. Into the domain of this doctrine of ownership, it is the collectivist jurisprudence of municipal administration that has made its first inroad.
[57] Constitution of India, Article 51-A (g).
[58] Ibid ,Article 48-A.

Thus it can be seen, that high courts were more active in protecting and improving the environment in many cases[59] earlier to Apex Court by interpreting the right to life so as to include right to pollution free environment. Besides environment being a compendium of many things, the expression person in Article 21 may be interpreted as an entity having legal personality. However, a question arises whether enforcement of a specific individual right to human environment, explicit or implied in the constitution affords sufficient flexibility in balancing environmental values, as opposed to economic and other interests.[60] Even though this due process clause does not articulator concern over the quality of environment, the agreeable juristic views to be that a right to a decent environment can be induced from the judicial pronouncement, on civil liberties.[61] In a fast developing country like India, where enormous activities take place everyday, environmental issues may crop up any time. The balancing function is of course with the administration and legislature. As in every other welfare measures the contributions of the courts will only be marginal in achieving social political and economic set up conducive to sustainable development. However, Judicial vigilance with Judicial Restraint will be a guarantee for disciple and helps orientation of administrative and legislative authorities in their battle for environmental protection. The decisions of courts have widened the scope of the right to life by reading into it. The right to clean environment. The counts in India have lived up to the needs of the time and have made significant contributions in evolving new principles and remedies. Public Interest Litigation also became the weapon for conservation of natural resources, as discussed in the next topic.

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[59] Rural Litigation & Entitlement Kendra v State of Uttar Pradesh (Dehradun Quarrying Case) AIR 1985 SC 652. Kinkeri Devi v State of Himachal Pradesh AIR 1988 HP 4. L.K. Koolwal v State of Rajasthan AIR 1998 RAJ 2. Madhavi v. Tilakan 1989 KLT 730. Attakoya Thangal v. Union of India 1990 KLT 580. V. Lakshmipathy v. State of Kerala AIR 1992 Kant 57. Law Society of India v Fertilizers and Chemical Travancore Ltd. AIR 1994 KER 308. Obayya Pujari v. Member Secretary K.S.P.C.B. Bangalore AIR 1999 Kant 157.

[60] The rights to environment can be negative as well as positive. While the negative rights are those that protect the individual or groups from interference, the positive rights require affirmative action on the part of the state for environmental protection.

[61] This is exactly what happened in India. The state cannot deprive a person life without due process of law, because life being dependent in the ultimate analysis upon health, it was inherent in the constitutional recognition of a right to a healthy environment.

9.2-PUBLIC INTEREST LITIGATION (PIL)

In the last topic of this research work Art. 21 was the subject matter for conservation of natural resources and in the present topic Arts. 32 & 226 are the subject matter for conservation. Indian judiciary took Public Interest Litigation as weapon for conservation of natural resources.

PIL Jurisdiction Evolved for Socio-Economic Justice

It is to be stated that the gulf between objective of socio-economic justice enshrined in the Constitution and the governmental action for the attainment of the same caused the emergence of Public Interest Litigation Jurisdiction. The Supreme Court pointed it out[1],

"The compulsions for the judicial of the technique of a public interest action is the constitutional promise of a social and economic transformation to usher in an egalitarian social order and a welfare State. Effective solutions to the problems peculiar to this transformation are not available in the traditional judicial system.[2] The technique of public interest litigation serves to provide and effective remedy to enforce these group rights and interests."

The Court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning[3].

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[1] Sheela Barse v Union of India AIR 1988 SC 2211

[2] The proceedings in a public interest litigation are, therefore, intended to vindicate and effectuate the public interest by prevention of violation of the rights, constitutional or statutory, of sizeable segments of the society, which owing to poverty, ignorance, social and economic disadvantages cannot themselves assert – and quite often not even aware of those rights.

[3] Judges Transfer Case AIR 1982 SC 149

Locus Standi Today: Scope And Restrictions

In 1981, a seven-judge bench of the Supreme Court delivered a definitive judgment on standing in the *Judges 'Transfer Case*[4]*'* although every judge delivered a separate opinion; there was general agreement with Justice Bhagwati's view on the issue of *Locus standi.* Justice Bhagwati upheld the standing of practicing lawyers to challenge a government policy to transfer High Court judges, thereby undermining judicial independence. His judgment comprehensively describes the enlarged scope of what we have termed 'representative standing' (A)[5], and 'citizen standing' (B)[6]. But we must hasten to make it clear that the individual who moves the court for judicial redress in cases of this kind must be acting bona fide with 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 activities at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter address to the court or even in the form of a regular writ petition filed in court[7]. It has necessarily to be left top the discretion for the court[8]. Unfortunately, as a rule of practice, neither the litigants nor the courts make the distinction between representative and citizen standing. Indeed, some later Supreme Court judgments have failed to appreciate this distinction and have muddled the separate rationales into a confused single doctrine[9].

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[4] AIR 1982 SC 149, 194

[5] High Court under Art. 226 and in case of any fundamental right of such person or determinate class of persons, ion this court under Art. 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class or persons.

[6] If public duties are to be enforced and social collective 'diffused' rights and interests are to be protected, we have to utilize the initiative and zeal of public-minded persons and organizations by allowing them to move the court and act for a general or group interest, even though they may not be directly injured in their own rights.

[7] AIR 1982 SC 149, 189

[8] AIR 1982 SC 149, 192

[9] e.g., Forward Construction Company v Prabhat Mondal AIR 1986 SC 391, 393; Sachidanand Pandey v State of West Bengal (Calcutta Taj Case) AIR 1987 SC 1109, 1134; and Ramsharan

In *Subhash Kumar*[10] the Supreme Court reprimanded the petitioner for abusing the process of the court. The court dismissed the petition with costs, holding:

Personal interest cannot be enforced through the process of this court under Art. 32 of the Constitution in the garb of public interest litigation. Public interest litigation contemplates legal proceedings for vindication or enforcement of fundamental rights of a group of persons or community, which are not able to enforce their fundamental rights on account of their incapacity, poverty or ignorance of law[11].

Class Actions: In a class action one or more members of numerous class, having 'the same interest', may sue or defend on behalf of themselves and all the other members of the class. It is a procedural device designed to promote deficiency and fairness in the handling of large numbers of similar claims. A 'representative' or 'class' suit is recognized under Order I rule 8[12] of the Code of Civil Procedure of 1908.[13]

Class Actions And The Environment: Although an examination of class suits in India shows that the class action device has been rarely, if ever, used in any personal injury tort case; there is no reason why it cannot be shaped into an instrument for the vindication of group interests in environmental torts. In fact, in

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Autyanuprasi v Union of India AIR 1989 SC 549, 553. The expanded standing doctrine as formulated in all three judgments appears to ignore the 'citizen standing' dimension.

[10] Subash Kumar v State of Bihar AIR 1991 SC 420

[11] Ibid at 424.

[12] Rule 8 of Order 1 of the Code of Civil Procedure if 1908, as it stands after the Code's 1976 amendment, prescribes the following conditions for a representative action: (1) that the class be numerous; (2) that members of the class have 'the same interest' in the suit; (3) that the court permit a few persons to sue or be sued on behalf of the entire class; and (4) that the court issue notice of the suit to all persons having the same interest.

[13] Class suits are an exception to the general rule of compulsory joinder of all interested arties. They are allowed on the premise that members of the class who are made parties will protect their *own interests,* and in protecting them, the interest *of the absent members* of the class will also be protected.

moist environmental cases, it is hard to conceive of individual relief apart from class relief. A class action would measurably assist in securing redress. Reversing the class alignment, the defendant class action by an individual plaintiff is an effective way to enjoin a large number of polluters, as the *Ganga Pollution (Tanneries) Case*[14] shows:

When this petition came up for preliminary hearing, the court directed the issue of notice under Order I of Rule 8 of the Court Civil Procedure treating this case as a representative action by publishing the gist of the petition in the newspapers in circulation in northern India and calling upon all the industrialists and the municipal councils having jurisdiction over the areas through which the river Ganga flows to appear before court and to show cause as to why directions should not be issued to them.

In *Hussainara Khatoon v. State of Bihar*[15], the Court ordered that all such prisoners whose names were submitted to the Court should be released forthwith. Since speedy trial was held to be fundamental right guaranteed by Art. 21 the Supreme Court considered its constitutional duty to enforce this right of the accused persons.

In *Bandhua Mukti Morcha v. Union of India*[16], it has been held that it is not at all obligatory that an adversary procedure must be followed in proceedings under Art. 32 for the enforcement of fundamental rights. There is no such compulsion in clause (2) of Art. 32 or in any other part of the Constitution. *Public interest litigations* for the enforcement of fundamental rights are very much included in Art. 32.[17]

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[14] M.C. Mehta v Union of India AIR 1988 SC 1037, 1038
[15] AIR 1979 SC 1369.
[16] AIR 1984 SC 802.
[17] The Supreme Court has now realized its proper role in a welfare State, and it is using this new strategy not only or helping the poor by enforcing their fundamental rights of persons but for the transformation of the whole society as an ordered and crime free society.

This could not have been possible without liberalization of the traditional rule of locus standi, facilitating "access to justice" by invoking the writ jurisdiction. In the process, instead of manly delivering legal justice he higher judiciary, especially the Supreme Court, has been dealing with issues of "social justice" as well[18].

Judicial Interpretation

The Supreme Court in *Subash Kumar's*[19] case, categorically asserted that right to clean environment is a fundamental right and it shall come under Article 21 of the Constitution as right to life, thus, it is apparent that violation of right to clean environment is a violation of right to life and vise versa.[20]

In *M.C. Mehta v. Union of India*[21], public interest litigation we filed under Article 32 of the Constitution of India. That the pollution caused by the hazardous industries is a violation of right to life under Article 21 of the constitution for the workmen of the industries and neighbors as well. The Supreme Court came forward to protect the rights of the people residing adjacent to the industry under Article 32 and held that damages as the natural consequence of environment pollution caused by the enterprises, which carry on inherently dangerous activities.

In *Rural Litigation Entitlement Kendra v. State of U.P.*[22], public interest litigation under Article 32 of the Constitution was filed to control the environment pollution caused by mining industries. The Supreme Court held that the rights of the people

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[18] Bharat Desai, "Enforcement of the right to Environment Protection through Public Interest Litigation in India", I.J.I.L., Vol. 33, 1993 p. 39.
[19] AIR 1991 SC 420.
[20] Prior to the Subhas Kumar's case the environmental pollution cases, though, came under Article 32 but that was related with the industries coming under the definition of the state for the purpose of incurring compensation.
[21] AIR 1987 SC 965.
[22] AIR 1988 SC 2187

who are residing in the vicinity of the mining industries must be protected for the purpose of social safety, which shall be completed by creating a hazardless environment.

In *M.C. Mehta v. Union of India*[23], the petitioner brought public interest litigation under Article 32 of the Constitution against the Ganga Water Pollution. In spite of having sufficient provision under water Act the Kanpur Mahapalika did not take necessary stets to prevent the pollution. Accordingly the Supreme Court felt that the people who are residing nearby Ganga River, their rights must be protected against the pollution under Article 32 and directed the Kanpur Mahapalika to take necessary steps.

In *Chhetriya Pradushan Mukti Sangharsh Samittee v. State of U.P.*[24], the Supreme Court held that Article 32 is a great and salutary safeguard for the preservation of fundamental rights of the citizens. Every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated by Article 21 of the Constitution. Anything which endangers by a conduct of anybody either in violation or in derogation of laws, that quality of life and living by the people is entitled to be taken recourse of Article 32 of the constitution.

In *Subhash Kumar v. State of Bihar*[25], the Apex Court opined that a person invoking the Jurisdiction of this court under Article 32 as public meters litigation must litigation must approach this Court for the vindication of the fundamental rights of affected persons and not for the purpose of vindication of his personal enmity. It is the duty of this court to discourage such petition and to ensure that invoking the extra ordinary jurisdiction of this court for personal matters does not obstruct the course of justice.

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[23] AIR 1988 SC 1115. (*Kanpur Nagar Mahapalika Case*).
[24] AIR 1990 SC 2060.
[25] AIR 1991 SC 420.

In *Bichhri Village*[26] case, the villager's right to life was invaded and infringed by the respondents on account of the pollution caused by hazardous chemical wastes. The petitioner filed a writ petition under Article 32 for the enforcement of right to life under Article 21. The Court held that where the government of authorities concerned has not taken the action required of them by law and this has resulted in violation of the fight to life of the citizens it will be the duty of the court to intervene through Article 32 of the Constitution.

In *Pradeep Krishan v. Union of India*[27] a public interest litigation under Article 32 of the constitution was filed to encourage the rights mentioned under Articles 14, 21, 48-A, 51-A (g) and challenged the validity of forest department government of Madhya Pradesh permitting the tribals residing adjacent to the sanctuaries and national Park to collect the Tendu leaves as it is a matter of their traditional rights. The Supreme Court directed the state government to enforce its obligation under Article 48(A) and take necessary precautions while notifying for the maintainability of the traditional rights of the tribals.

In *Vellore Citizens Welfare Forum v. Union of India*[28], public interest litigation under Article 32 of the Constitution was filed to provide the tanneries filed constitution to provide constitutional remedies to the people who were the victims of environmental pollution due to the discharge of untreated effluents. The Supreme Court categorically mentioned that this activity is violation of right to life under Article 21 of the Constitution therefore; Article 32 of the Constitution is the perfect weapon to stop the infringement of the right to life and the proper enforcement of the same.

In *M.C. Mehta v. Union of India*[29], public interest litigation under Article 32 was filed to protect the Taj Mahal an ancient monument from environmental pollution.

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[26] *Indian Council for Enviro-Legal Action v. Union of India,* AIR 1996 SC 1446.
[27] AIR 1996 SC 2040.
[28] AIR 1996 SC 2715.
[29] AIR 1997 SC 734.

The Supreme Court held that it is the duty of the Stat to protect and improve environment as stated under Article 48 – A of the constitution which also includes that the State should involve herself to protect the national asset which helps in increasing foreign revenues. Moreover, to maintain the natural beauty of Taz Trapezium is a right in rem because it is one of the Seven Wonders of the World.

In *Calcutta Tanneries*[30] case, the Supreme Court held that it is the nature of the Article 32 of the Constitution to enforce the rights, which have been violated. Where the hazardous industries are not maintaining the mandatory provisions of existing environmental laws and thereby violating the right to life. It is the duty of the court to enforce that right with the help of Article 32 of the constitution.

In *Re Bhavani Rivers*[31], case, a public interest litigation was filed under Article 32 of the constitution to protect the right to life of the people residing nearby the river from the discharge of objectionable effluents from distillery. The Supreme Court held that the object of Article 32 of the constitution is to protect and enforce the fundamental rights of the citizens. Therefore, the rights of the people residing nearby the polluted river have the right to the shelter of Article 32 of the Constitution.

In *M.C. Mehta v. Union of India*[32], the Supreme Court held that the vehicular pollution is the main pollution of Air Act and since this pollution affects the large number of people hereby violating the right to clean environment. Any public spirited citizen will have the right to file a petition under Article 32 in the form of public interest litigation for the proper enforcement of fundamental rights.

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[30] *M.C. Mehta v. Union of India* (1997) 2 SCC 411.
[31] AIR 1998 SC 2578.
[32] AIR 1999 SC 291.

In *A.P. Pollution Control Board v. M.V. Naidu*[33], the Supreme Court held that the environmental protection has become the part and parcel of Article 32 of the Constitution and now it not enforces fundamental rights but also enforces the remedial measures in the of precautionary principle and polluter pays principle.

In *M.C. Mehta v. Kamal Nath*[34], the Supreme Court specified the scope of Article 32 of the Constitution that to grant compensation to betimes of environmental pollution, pollution fine cannot be imposed without proper trial upon the person found to have disturbed the environment and ecology.

In *M.C. Mehta v. Union of India*[35], the Supreme Court held that where it has been found that hazardous and noxious industries viz. brick kilns causing environment pollution and violating the rights of the people residing around. It is the Article 32 of the Constitution, which shall provide the appropriate remedy by enforcing the rights of the people either by way of shifting the industry of closure of hazardous enterprises. It may be mentioned that the Supreme Court has been recognized as very progressive and super innovative' in the field of environ justice[36].

In *Narmada Bachao Andolan v. Union of India*[37] it was held by the Supreme Court that even in PIL cases the directions cannot be issued if that is violating the statute.

In *N.D. Jayal v. Union of India*[38] it was observed that the protest of ecologists, as is brought before us in this public interest litigation, is not to be seen as obstructionist and anti-progress because the petitioners are actuated by the desire to obstruct ecological destruction and to halt the process that results in progress for a few and hardships for many.

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[33] AIR 1999 SC 812.
[34] AIR 2000 SC 1997.
[35] AIR 2000 SC 3052.
[36] C.M. Jariwala, "*Direction of Environmental Justice in India : Critical Appraisal of 1987 case Law*" 35 JIL1 92, 114 (1993).
[37] (2000) 10 SCC 664
[38] (2004) 9 SCC 362 at page 410

In *M.C. Mehta v. Union of India*[39] the Apex Court stated that though notification dated 27-1-1994 is not applicable to minor minerals, but having regard to what we have discussed above in regard to degradation of environment and the required standard about the risk of harm to the environment or to human health to be decided in public interest according to "reasonable person's test", and the report of CMPDI, we direct the Monitoring Committee to examine the leases granted for extraction of minor mineral in light thereof and file its report. The Committee would; however, bear in mind that the notification dated 27-1-1994 as such is not applicable to these leases.

Article 226

Article 226 of the Constitution confers a power on all the High Courts of India, which they did not enjoy before the commencement of the Constitution. It enables them to issue to any person or authority, including in appropriate cases any government, orders of writs, including writs in the nature of Habeas corpus, mandamus, prohibition, quo warranto and certiorari, for the enforcement of any of the rights conferred by Part III and "for any other purpose" i.e., for the enforcement of any other legal right[40].

Judicial Interpretation

In comprehending the right to environment, the high courts were more specific and direct *Damodar Rao v. S.O. Municipal Corporation; Hyderabad*[41] is a landmark case in this regard. In this case, the development plan earmarked an area as open space for recreational purposes. The residents living in the vicinity challenged this attempt to convert open space into a residential area. Agreeing with them, the court

[39] (2004) 12 SCC 118 at page 182
[40] V.N. Shukla, *"Constitution of India"*, 10th ed. 2001. Eastern Book Co. p. 544.
[41] AIR 1987 AP 170.

held that the directions in the development plan on the nature of use of the open space would prevail, and the ownership subsequently acquired stood curtailed by the development plan, and that the attempts to build houses in such open space was contrary to law. Looking at the problem from an environmental perspective, the court observed that protection of the environment is not only the duty of the citizens[42], but also the obligation[43], of the state. The court further held, Environmental law has succeeded in unshackling men right to life and personal liberty from the clutches of common law theory of individual ownership. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should cause by environmental pollution and spoliation should also be regarded as amounting to violation of Art. 21 of the Constitution[44].

In *L.K. Koolwal v State of Rajasthan*[45] public interest litigation was filed under Article 226 of the Indian Constitution. In this case, it was sought to clean the city of Jaipur and save it from its unhygienic condition. Looking at the impact of Art. 51 – A (g) of the constitution, the Rajasthan High Court was of the view that though termed as duty, the provision gives citizens a right to approach the court for a direction to the municipal authorities to clean the city and that maintenance of health, Sanitation and environment falls within Art. 21, thus rendering the citizens the fundamental right to ask for affirmative action[46].

In *Goa Foundation v. Konkan Railway Corporation*[47], the petitioner filed a public interest litigation under Article 226 of the constitution by alleging that the large projects like this corporation when works a large area of forest including ponds, rivers are polluted and thereby causes violation to the right to pollution free environment. The Bombay High Court held that a public project of such a great

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[42] Constitution of India, Art 51 – A, (g)
[43] Ibid, Art 48 – A.
[44] Supra note 36 at p. 181.
[45] AIR 1988 Raj 2.
[46] Ibid at p. 4.
[47] AIR 1992 Bom. 471.

magnitude, which is undertaken for meeting the aspiration of the people on the West Coast, couldn't be turned down on such considerations because here by this project a great number of people shall be benefited and very few persons shall be affected.

In *Rajiv Ranjan Singh v. State of Bihar*[48], a Social worker filed public interest litigation under Article 226 of the Constitution enforce the rights mentioned under Water Act. The High Court held that the Distillery can restart its functions on the condition that it protects the rights of the people residing nearby the water resources.

In *Murali Purshothaman v. Union of India*[49], the Kerala High Court held that where there is air pollution due to the emissions from automobiles the court can give directions to the State Government to take necessary steps so that the fundamental right of the citizens can be enforced under Article 226 of the Constitution.

In *Law Society of India v. Fertilizers and Chemicals Travancore Ltd*[50], the Kerala High Court held that where the ammonic storage tank is hazardous to the life of the people is the sheer violation of right to life under Article 21 of the constitution. Therefore, Article 226 can be invoked to enforce the right to life of the people thereby protecting the environment from pollution.

In *M/s. Narula Dyeing and Printing Works v. U.O.I.*[51], the Gujarat High Court held tat Article 226 of the constitution has the jurisdiction to include the rights mentioned under Water Act and has the scope to enforce the rights where water resources have been polluted by the industrial effluents beyond its permissible limits.

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[48] AIR 1992 Pat. 86.
[49] AIR 1993 Ker. 297.
[50] AIR 1994 Ker. 308.
[51] AIR 1995 Guj. 185.

In *Talcher Swasthya Surakshya Parishad v. Chairman-cum- M.D. M.C.L.*[52], public interest litigation was filed under Article 226 of the constitution to prevent the air and water pollution, which was due to the operatic of collieries and mining activities. The Orissa High Court held that Article 226 of the Constitution has ample scope to enforce the rights mentioned in the Air and Water Acts and directed the pollution board to take strict steps to prevent the same.

In *Jacob Badakkancherry v. State of Kerala*[53], the Kerala High Court categorically opined that Article 226 of the Constitution has the valuable provision to protect the environment by enforcing the rights and duties mentioned under the Environment Protection Act, and thereby can direct the State Government to take necessary steps for the prevention and control of pollution.

In *Obayya Pujari v. Member Secretary K.S.P.C.B., Bangalore*[54], the Karnataka High Court held that where a stone crushing industry has a proper license and necessary permission to carry on the business, but if is engaged in environmental pollution, would not prevent the court from issuing necessary directions to enforce the rights as mentioned under Article 226 of the constitution.

Thus, it is clear from the above decisions of the High Courts that in a petition under Article 226, the High Court has jurisdiction over issues of both fact and law; but ordinarily such a petition is based on facts established by affidavits. A high Courts reluctance to receive evidence under Article 266 proceeding is a rule of practice and not of jurisdiction. PIL acted as weapon and the concept of liability held polluter or wrongdoer responsible for damages. The concept of absolute liability has been discussed in the next topic.

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[52] AIR 1996 Orissa. 195.
[53] AIR 1998 Kerala. 114.
[54] AIR 1999 Kart. 157

9.3-ABSOLUTE LIABILITY

Conservation of natural resources and liability are the two sides of a coine. He who commits a wrong is said to be liable or responsible for it. Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy for the wrong. Where the remedy is neither a civil nor the party wronged has a right to demand the redress allowed by law, and the wrongdoer has a duty to comply with this demand. In the case of a criminal remedy the wrong door is under a duty to pay such penalty as the law through the agency of the courts prescribes.[1]

9.3.1-Concept of Liability Developed by Untied Nations

United Nations through world commission on environment and development (i.e. Brundtland Report) has made a concert step of liability in environmental pollution, while elaborating the dimensions of sustainable development, the concept of polluter pays and precautionary principles were developed. However, it was a final touch of the previous work of the United Nations, because previous conference had traced the necessity to involve the liability of environmental pollution.[2] The resolution traces the important of liability in environmental pollution, which runs as.[3]

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[1] Liability is the first place either civil or criminal, and in the second place either remedial or penal. In the case of penal liability the purpose of the law, direct or ulterior is or includes the punishment of a wrongdoer; in the case of remedial liability, the law has no such purpose at all, its sole intent being the enforcement of the plaintiff's right, and the idea of punishment being wholly irrelevant. The liability of a borrower to repay the money borrowed by him is remedial; that of the publisher of a libel to be imprisoned, or to pay damages to the person injured by him, is panel. All criminal liability is panel; civil liability on the other hand, is sometimes panel and sometimes remedial.

2 The Economic and social council of the United Nations passed a resolution No. 1346 (XLV) on the 30th July, 1968 on the question of convening an International conference on problems of human Environment. This was followed by a resolution No. 2398 (XXIII) passed on the 3rd December 1968 by the United Nations General Assembly.

[3] Reported in Lal's Commentaries on Water And Air Pollution Laws," 3rd Ed. 1997, Allahabad Law Publishers, at p. 355/56

The protection and improvement of the human environment is a major issue, which affects the well being of people and economic development through the world; it is the urgent desire of the peoples of the whole and the duty of all Government.[4] The first legal step to involve liability towards environmental pollution was taken by the United Nations in World Commission on environment and development i.e., Brundtland Report in peace of Hague. Article 11 of the conference runs as: [5]

"If one or more activities create a significant risk of substantial harm as a result of a trans boundary environment interference, and if the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risk for exceeds in the long run the advantage which such prevention or reduction would entail, the state which carried out or permitted the activities shall ensure that compensation is provided should substantial harms occur in an area under national jurisdiction of another state or in an area beyond the limits of national jurisdiction."

The United Nations through its Earth Summit of 1992 specifically discussed the liability relating to precautionary principles. Principle 3 of Article 3 of Earth Summit runs as: [6]

"The parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its Adverse effects where there are threats of serious or irreversible damage, lack of all scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with ensure global benefit at the lowest possible cost.

Liability for Environmental Pollution: In measuring liability towards environmental pollution the measures of civil and criminal liability have been

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[4] See Supra Note. 2 at p. 359

[5] *Reported in Singh . N – Right to Environment – JILI* Vol. 29 No. 3 at p 311

[6] Indian Journal of International Law Vol.32 1992 at 213

combined together which constitute a very efficient instrument for the maintenance of justice and relief of the victims.[7]

9.3.2-The theory of strict liability

In environmental law there are the acts for which a man is responsible irrespective of the existence of either wrongful intent or negligence. They are the exceptions to the general requirement of fault. It may be thought, indeed, that in the civil as opposed to the criminal law, strict liability[8] should be the rule rather than the exception. In 1868 the House of Lords laid down in *Rylands V. Fletcher*[9] the rule Recognizing 'No fault' liability. The recognized was 'strict liability' i.e. even if the defendant was not negligent or rather, even if the defendant did not intentionally cause the harms or he was careful, he could still be made liable under the rule. In *Rylands v. Fletcher* the thing so collected was a large body of water. The rule has also been applied to gas[10], electricity[11] vibrations[12] yewtrees[13] sewage[14] flag-pole[15], expolsion[16], noxious fumes[17], and rusty wire[18].

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[7] In India liability to give relief either through cooperation or penalty is of recent origin. In previous days stenos were taken to provide relief to the victims of environmental pollution. But concern steps were taken after some conferences made by United Nation in which also participated.

[8] The expression formerly used was 'absolute" liability, but since exceptions are always recognized to so-called absolute liability. Sir peery Winfield suggested that a better term was 'strict" liability (The Myth of Absolute liability" (1926) 42 Q.L.R. 37) and this suggestion has since been judicially adopted.

[9] (1868) L.R. 3.H.L. 330

[10] Bacheller v Tunbrige wells Gas Co. (1900) 84 L.T. 765

[11] National Telephone Co v Baker, (1893) 2 ch.186

[12] Hoare And Co. v Me. Alpine (1893) 1ch.167

[13] Crowhurst v Amersham Burial Board (1878) 4 Ex. D.5

[14] Tenant v Goldwin (1704) 1 Salk, 360 Jones v Lanrust U.D.C. (1911)

[15] Shiffman v Grant priory, etc (1936) 1 All E.R. 557

[16] T.C. Balakrishnan v T.R. Subramanian . AIR 1968 Karala 151

[17] West v Bristol Tramways Co., (1908) 2 K.B.14

[18] Firth v Bowling Iron Co. (1878) C.P.D. 254

9.3.3-Position in India[19]

Recently, the liability without fault has been recognized in case of motor vehicle accidents. The Motor vehicles Act. 1939 recognises 'liability without fault' to a limited extent[20]. Recognition of 'liability without fault' in case of motor vehicle accident is a welcome measure. It is submitted that the recognition of such a liability will in fact be the application of the rule in *Rylands v. Fletcher* in its true spirit because the activity of running the motor vehicles today is in no way less hazardous than the escape of water in that case, more than a century ago.

9.3.4-The Rule of Absolute Liability

In *M.C. Mehta v. Union of India*[21] the action was brought through a writ petition under Article 32 of the Constitution by way of public interest litigation (PIL). The Supreme Court took a bold decision holding that it was not bound to follow the 19th century rule of English law and it could evolve a rule suitable to the social and economic conditions prevailing in India at the present day. It evolved the rule of 'absolute liability' as part of Indian Law in preference to the rule of strict liability laid down in *Rylands v. Fletcher*. It expressly declared that the new rule was not subject to any of the exceptions under the rule in *Rylands v. Fletcher*.

In *Union Carbide Corpn. V. Union of India*[22], the Supreme Court held that the damages payable by the alleged tort feaster must be correlated to the magnitude

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[19] The rule of strict liability is applicable as much in India as in England. There has, however, been recognized of some deviation both ways, i.e., in the extension of the scope of the rule of strict liability as well as the limitation of its scope.

[20] Such Liability was first recognized by an insertion of Sec 91 – A in 1982 by an Amendment of the motor Vehicle, Act, 1939

[21] AIR 1987 S.C. 1086. This case was decided by a bench consisting of 7 judges on a reference made by a Bench of three judges.

[22] AIR 1990 SC 273 at p. 281-283

and capacity of the enterprise. One aspect of this matter was dealt with by this court in *M.C. Mehta v. Union of India*[23], which marked a significant stage in the development of the law. But, at the hearing there was more than a mere hint in the submission of the Union Carbide that in this case the law was altered with only the Union Carbide Corporation in mind, and was altered to its disadvantage even before the case had reached this court. The criticism of the Mehta principle, perhaps, ignores the emerging postulates of tuitions liability whose principal focus is the social – limits on economic adventurism. There are certain things that a civilized society simply cannot permit to be done to is members, even if they are compensated for their resulting losses.

In *Union Carbide Corpn V. Union of India*[24] the Supreme Court traced the importance of the concept of absolute liability. On 29th March 1985 the *Bhopal Gas Leak Disaster* (Processing of Claims) Act. 1985 was passed authorizing the Government of India, as parents partite exclusively to represent the victims so that interests of the victims of the disaster are fully protected, and that claims for compensation were pursued speedily, effectively, quotably and to the best advantage of the claimants. The concept of absolute liability has been tentatively done by passing of the *Bhopal Gas Lake Disaster* (PC) Act of 1985.

Absolute Liability in Legislative Shape

9.3.5-The Public Liability Insurance Act, 1991

The *Public Liability Insurance Act,* 1991[25] is also based on the concept of absolute liability. The Act aims at providing for public liability insurance for the purpose of providing immediate relied to the persons affect by accident occurring while

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[23] See Supra Note 27

[24] AIR 1992 S.C. 248 at 264, 309

[25] The Act received the assent of the President on 22.1.1991

handling any hazardous substance for matters connected therewith or incidental thereto[26].

Every owner, i.e., a person who has control over handling of any hazardous substance, shall take out, before he starts handling any hazardous substance, one or more insurance policies providing for contracts of insurance whereby he is insured against liability to give relief in case of death or injury to person, or damage to any properly, arising from an accident occurring while handling any hazardous substance. In respect of already established units insurance policy or policies have to be taken as soon as possible, but within a maximum period of one year from the commencement of the Act. Such liability shall be on the principle of "on fault" liability.

"Hazardous substance" means any substance or preparation which by reason of its chemical or its chemical or physico-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plant, micro-organism, property or the environment[27]. "Handling" in relation to any hazardous substance means the manufacture, processing, treatment, package, storage, transportation by vehicle, use, collection, destruction, sovereign, offering for sale, transfer of the like of such hazardous substance[28].

The Act imposes through *Section 3(1)* [29]absolute liabilities upon the owner of enterprise handling hazardous substances to provide immediate relief to the persons for the harm they have sustained in the event of accidents.[30]

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[26] Mehdi. Dr. Ali – "The Public Liability Insurance Act, 1991 – a critical appraisal, AIR 1992 Journal 36

[27] Section 2 (d)

[28] Section 2.9c) of the Public Liability Insurance Act, 1991.

[29] Section 3(1) records as "Where death or injury to any person (other than workman) or damage to any property has renulted from an auident the owner shall be liable to give such relief as is specified in the shedule for such death, injury or damage.

In view of the above development it can be said that judiciary has maintained the concept of liability and accepted the United Nation's view of liability as well. Most of the environmental cases faced trouble during strict liability regime. Due to the presence of unwanted exceptions cases escaped from their liability. Even after that concept of state also created a tangle between victims and polluter. No doubt, absolute liability minimized these problems and provided greater amount of relief by way of compensation. This was not an end because the concept of polluter pays principle came into existence with the grace of United Nations World conference on environment and development. Indian Judiciary made a way in which both the concepts were intermingled to provide relief to the victims of environmental pollution. Since the precautionary principle and polluter pays principle have been accepted in India, so, now a days most of the environmental cases are being dealt with polluter pays principle to make the industry absolutely liable.

The concept of absolute liability is the protector of the notion of sustainable development. In the next topic sustainable development has been discussed in details of this research work.

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[30] Section 4(1) of the Act makes compulsory to take insurance policy but it does not suggest any guidelines with reference to the valuation of the policy. The Central Government may exempt certain owners namely (a) the Central Government; (b) any State Government; (c) any corporations owned or controlled by the Central or State Government; or (d) any local authority, form the requirements of *Section 4(1)* of the Act.

9.4-SUSTAINABLE DEVELOPMENT

9.4.1-Concept of Sustainable Development in Relation to Conservation

The right to development and conservation do have certain limitations in as much as it cannot be asserted of the expense of the community or even of the expense of neighbouring States whose prospects may be jeopardized.[1] The effects of WCED need to be briefly reviewed at this juncture. Its emphasis on sustainable development is vital to the well being of humanity- and not only present generations, but also generation, still to come[2].

The Supreme Court of India in *Vellore Citizens Welfare Forum v. Union of India*[3] elaborated and discussed the concept of sustainable development, which has been accepted as part of the law of the land. Both the problems have been given priority within the UN framework and other international bodies[4]. The planet is passing through a period of dramatic growth and fundamental change[5].

The definition of sustainable development[6] by WCED, sheds light on the short-falls of our past unsustainable development patters, namely global environmental threats depletion of the ozone layer risks of climate change, loss of biodiversity and

[1] For example, a state cannot, in the name of development make applications of nuclear energy in such a way as to harm the environment and imperil human life, whether in the immediate neighbourhood or in the surrounding region. The implementation of development activities must be carried out in a sustainable fashion. In this connection attention may be drawn to the recommendations of the UN World Commissions on Environment and Development (WCED), which has submitted its report to the United Nations.WCED rightly holds the view that as environment and development go together they have to be examined simultaneously in the present context. When advocating sustainable development one has to examine the rights and responsibilities of States, both in a bilateral context and in relation to the international community as a whole.

[2] Singh, Nagendra-"Right to Environment and Sustainable Development" JILI, Vol, 29, 1998 at p. 239

[3] AIR 1996 SC 2715 at 2720

[4] Malviya, R.A.-"Sustainable Development and Environment"-IJIL, Vol. 36. No. 4. 1996, at p. 58

[5] Ibid at p.59

[6] UN Chronicle, June, p. 46

degradation of waters that clearly compromise the ability of future generations to meet their our development needs.[7]

"Sustainable development, therefore, depends upon accepting a duty to seek harmony with other people and with nature" according to caring for the Earth. A strategy or sustainable living[8] and the guiding rules are: People must respect the rights of each other. From this moral premise flow certain ecological obligations, not to cut down trees, for example[9].

9.4.2 Environment and the future generations

For example states must maintain ecosystems and related ecological process essential for the functioning of the biosphere in all its variety. The latter principle means that living natural resources or ecosystems must only be utilized in such a manner and to such an extent that benefits from those resources will be made available indefinite, bearing in mind the needs of generations to come.[10] In order to meet this requirement to ensure that the environment and natural resources are conserved and used for the benefit of present and future generations.[11]

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[7] For an interesting and detailed discussion, see Khanna and Kulkarni. "Policy options for Environmentally Sound Technology in India." In the Souvenir of the Indian Law Institute which organized the International Conference on Shaping of the future by Law. Children, Environment and Human Health. March 21-25, 1994 New Delhi, p. 183

[8] Prepared jointly by the UNEP, the World Conservation Union and the World Wide Fund for Nature.

[9] Intergenerational Equity is use full in placing sustainable economic development and natural resources use in a moral context. The disadvantage or limitation of intergenerational approach is that it is completely human centred. As such it recognises nature only in its relation to human utility or enjoyment. Rosencranz, A. "Recent Development in International Law and Rights of Children to a clean Environment" in the Souvenir, p. 227

[10] It this principle is not implemented, the resource will diminish or may even be extinguished. In this extent we may refer to the efforts of the legal experts of WCED. By promoting the principle of optimum sustainable use, they go beyond the concept of maximum sustainable yield, which, an scientific analyses have indicated, still entails severe risks of stock depletion as it makes no allowance for a margin of error, lack of adequate data and /or uncertainty.

[11] They shall in addition ensure that the conservation of natural resources and the environment is treated as an integral part of the planning and implementation of development activities. In the fulfillment of all their obligations shall also cooperate in good faith with other states or through competent international organization.

9.4.3 Sustainable Development and Inter-generational Equity

What is meant by the phrase "sustainable development"? The definition, which is used most often, comes from the report of the Brundtland Commission, in which it was suggested that the phrase covered "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*" However, different levels of societies have their own concept of sustainable development and the object that is to be achieved by it. [12] How has this phrase been understood in India? Perhaps the answer lies in the decision of the Supreme Court in *Narmada Bachao Andolan* v. *Union of India*[13] wherein it was observed, "*Sustainable development means what type or extent of development can take place, which can be sustained by nature/ecology with or without mitigation.*" In this context, development primarily meant material or economic progress. This ethical mix is termed sustainable development, and has also been recognized by the Supreme Court in the *Taj Trapezium case*[14].

In *State of Himachal Pradesh v. Ganesh Wood Products*[15], the Supreme Court invalidated forest-based industry, recognizing the principle of inter-generational equity as being central to the conservation of forest resources and sustainable development[16].

In *A.P. Pollution Control Board v. Prof. M.V. Nayudu*[17] the Apex Court held that the principle of inter-generational equity is of recent origin. The 1972 Stockholm

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[12] For instance, for rich countries, sustainable development may mean steady reductions in wasteful levels of consumption of energy and other natural resources through improvements in efficiency, and through changes in life style, while in poorer countries, sustainable development would mean the commitment of resources toward continued improvement in living standards.

[13] 2000 (10) SCC 664 at p.727.

[14] *M.C. Mehta* v. *Union of India*, AIR 1997 SC 734. (per Kuldip Singh, J.).

[15] AIR 1996 SC 149.

[16] **See also** *Indian Council for Enviro-Legal Action* v. *Union of India* (*CRZ Notification* case), (1996) 5 SCC 281. The Court noted that the principle would be violated if there were a substantial adverse ecological effect caused by industry.

[17] (1999) 2 SCC 718, at page 739

Declaration refers to it in Principles 1[18] and 2[19]. In this context, the environment is viewed more as a resource basis for the survival of the present and future generations.

9.4.4-Precautionary Principle

Precautions make one Avoid possible danger. 'Precautionary approach' is a principle meant to event environment disaster. Rio Declaration 1992 reeds:

> *In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where these are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for post poning cost-effective measures to prevent environmental degradations*[20].

Basing itself on this theory, the Supreme Court said in *Nayudu's*[21] cause that it is better to err on the side of caution and prevent environmental harm that to run risk of irreversible harm.

> *The principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is based at protecting health, properly and economic interest but also protect the environment for its own sake; precautionary*

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

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

[20] Rio Declaration, Principle 15

[21] A.P. pollution Control Board v M.V. Nayudu AIR 1999 SC 812

duties must not only be triggered by suspicious of concrete danger but also by (justified) concern or risk potential[22].

The Stockholm declaration laid emphasis on the4 assimilative principle, which was addressed to halting discharge of toxic substance or release of threat beyond the carrying capacity of the environment[23]. In 1982 the pendulum swung towards precautionary approach when the United Nations Laid down the activities should not be permitted to proceed when their adverse effects are not fully understood[24]. This is basically a duty to foresee and assess environmental risks, to warn potential victims of such risks and to behave in ways that mitigate suck risks[25]. However, the said defect is supplied by the Supreme Court by way of laying down the principle of "The Polluter pays" and precautionary principle[26]:

The Supreme Court of India in the context of the municipal law state the 'precautionary principle' as[27] Environmental measures – by the State Government and the statutory authorities – must anticipate, prevent and attack the causes of environmental degradations. The "onus of proof" is on the actor or the developer industrialist to show that his action is environmentally benign. The relevant observations in *Vellore's*[28] case in this behalf reads as follows: *"In view of the above – mentioned constitutional and statutory provisions we have no hesitation in*

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[22] Ibid, at pp. 820-821

[23] Stockholm Declaration 1972. Principle 6 "The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon eco system".

[24] World Charter for Nature 1982, Article II (6) "Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits out weight potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed".

[25] Malvia, R.A.-"Sustainable Development"-IJIL, Vol. 36, 1996, at p. 68

[26] Padia, Dr. R.G.-"Environmental Jurisprudence"-IBR, Vol, xxxvi (3&4) 1999

[27] Vellore Citizens Welfare forum v Union of India AIR 1996 SC 2715 OF PARA 11

[28] See Supra Note 8 at para 13

holding that the precautionary principle and polluter pays principle are part of the environmental law of the country"

The learned judge also observed that the new concept, which places the burden of proof on the Developer or Industrialist who is proposing to alter the *status quo,* has also become part of our environmental law[29]. The precautionary principle suggest that were there is an identifiable harm, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment.[30] The precautionary principle has been accepted as a Law of the Indian Land. Article 21 of the constitution of India guarantees protection of life and personal liberty. Articles 47[31], 48A[32] and 51A(g)[33] of the constitution are as under[34]".

Effects of a project an environment have more dimensions than one. No wonder the burden makes the proposer more responsible and vigilant even at the stage of planning and designing a project.[35]

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[29] See Supra Note 2 at para 29

[30] It is also explained that if the environmental risks being run by regulatory in actions are in some way "uncertain but non – negligible" then regulatory action is justified. This will lead to the question as to what is the non negligible risks". In such a situation, the burden of proof is to be placed on those attempting to alter the *status quo.* They are to discharge this burden by showing the absence of a reasonable ecological or medical concern. This is the required standard of proof. The result would be that if insufficient they to alleviate concern about the level of uncertainty present evidence, the n the presumption should operate in favour of environmental protection.

[31] 47. Duty of the state to raise the level of nutrition and the standard of living and to improve public health. The states shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the state shall endeavor to bring about prohibition of the consumption except for medical purpose of intoxicated drinks and of drugs, which are injurious to health.

[32] 48A. Protection and improvement of environment and safeguarding of forests and wild life – The state shall endeavour to protected and improve the environment and to safeguard and forests and wild life of the country.

[33] 51A(g). To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

[34] See Supra note 2 and 8 of para 26 and 12 respectively

[35] It is also explained that if the environmental risks being run by regulatory in actions are in some way "uncertain but non – negligible" then regulatory action is justified. This will lead to

Precautionary approach was not an uncommon doctrine in the pre- Rio era of international environmental Law. As early as in 1993, reclamation of wealth and for building a trade center was presented, as the benefits of wetland to the society could not be weighed on international ninety[36]. Extensive, semi – intensive and intensive aquaculture was ordered to be dismantled to prevent possible disaster on costal eco-systems[37].

In *N.D. Jayal v. Union of India*[38] the Apex Court held that on the safety aspect of the dam, particularly, when the location of the dam is in a highly earthquake-prone zone in the valley of the Himalayas, all additional safeguards are required to be undertaken on the "precautionary principle" as contained in "the Rio Declaration on Environment and Development" taken in the United Nations Conference held in January 1992 to which India is a party. The precautionary principle in the Rio Declaration reads: The precautionary principle accepted by India being a party and signatory to international agreements and understandings in the field of environment has become part of domestic law i.e. the Environment (Protection) Act. The governmental authorities in India cannot be permitted to set up the plea of scientific uncertainty of 3-D non-linear analysis of the dam.

In *T.N. Godavarman Thirumalpad v. Union of India*[39]the Court held that duty is cast upon the Government under Article 21 of the Constitution of India to protect the environment and the two salutary principles which govern the law of environment are: (i) the principles of sustainable development, and (ii) the

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the question as to what is the non negligible risks". In such a situation, the burden of proof is to be placed on those attempting to alter the *status quo*. They are to discharge this burden by showing the absence of a reasonable ecological or medical concern. This is the required standard of proof. The result would be that if insufficient they to alleviate concern about the level of uncertainty present evidence, the n the presumption should operate in favour of environmental protection.

[36] People's Union for better living in Calcutta v State of WB AIR 1993 Cal 215 at 231

[37] Jagannath v Union of India (1997) SCC 87 at 145

[38](2004) 9 SCC 362, at page 415

[39](2002) 10 SCC 606, at page 631

precautionary principle. It needs to be highlighted that our country has acceded to the Convention on Biological Diversity and, therefore, it has to implement the same.

In *Research Foundation for Science Technology National Resource Policy v. Union of India*[40] the Supreme Court said that the ship-breaking operation referred to above cannot be permitted to be continued without strictly adhering to all precautionary principles, CPCB guidelines and taking the requisite safeguards which have been dealt with extensively in the report of HPC which include the aspect of the working conditions of the workmen.

In *M.C. Mehta*[41] *v. Union of India*[42] the Apex Court held that, The financial capacity of the tanneries should be considered as irrelevant while requiring them to establish primary treatment plants.[43]

9.4.5-The Polluter-Pays Principle

The PPP involves full recovery of the costs of treating or preventing environmental degradation from those who cause the degradation. All OECD member governments agreed in 1973 that: "The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called 'Polluter Pays Principle[44]' ".

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[40] (2005) 10 SCC 510, at page 532
[41] (Badkhal and Surajkund Lakes Matter)
[42] (1997) 3 SCC 715, at page 720
[43] The "Precautionary Principle" has been accepted as a part of the law of the land. Articles 21, 47, 48-A and 51-A(g) of the Constitution of India give a clear mandate to the State to protect and improve the environment and to safeguard the forests and wildlife of the country. It is the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures. The "Precautionary Principle" makes it mandatory for the State Government to anticipate, prevent and attack the causes of environment degradation.
[44] OECD 1975

This commitment was reiterated in a wider arena in Principle 16 of the 1992 Rio Declaration. The name of this rule is unnecessarily restrictive if taken literally. In this paper pollution therefore refers loosely to harm associated with any form of environmental degradation.[45]

9.4.6-Beneficiary-Pays Principle / The User-Pays Principle

With the PPP having been applied relatively rarely to agriculture, the cost-sharing rule typically used in its place has been the Beneficiary-Pays Principle (BPP). The BPP favours the costs of providing conservation goods (i.e., prevention or repair of environmental degradation) being allocated to those who benefit from those goods[46].

According to Marsden (1996), there are 'strict' and 'weak' versions of the BPP. The strict version requires that costs be fully distributed among beneficiaries pro rata to their shares of total benefits. MDBC called the strict form the User-Pays Principle (UPP). The weak version requires that all beneficiaries meet some portion of the costs and that together the beneficiaries cover full costs. MDBC called the weak form the Beneficiary-Compensates Principle[47] (BCP). Of the two versions of

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[45] The rule is also unspecific about who is the polluter. According to Pearce (1988), a polluter is a party emitting damaging wastes to the environment. This has often been broadened to any party who degrades the natural environment. Bromley (1996) argues, however, that emissions only constitute pollution when a victim is within the realm of the emission. In some circumstances the victim may be seen as causing pollution by 'coming to the nuisance' and should therefore, by Bromley's reasoning, be regarded as the polluter.

[46] Siebert (1995) refers to the BPP as the Victim-Pays Principle

[47] In contrast to the UPP, the BCP has tended to be applied where conservation goods are supplied privately. An example is protection of remnant native vegetation, which provides private benefits to a farmer in the form of shelter for livestock and public benefits in the form of biodiversity preservation. MDBC provided a further example of "privately owned and managed wetlands that may increase climatic stability and bio-diversity..." Under the BCP, public beneficiaries wanting more of that good than would otherwise be provided voluntarily compensate those who are able to privately supply a conservation good. Thus beneficiaries pay private parties, in contrast to the UPP where they pay a collective provider (which has usually been government). The principle underlying the BCP is that the public should free-ride on private initiative as much as possible: "When we decide interfering with the market is justified on public

the BPP, the UPP has tended to be applied when conservation goods are supplied collectively, either by government or by community-based organisations. A district-level drainage scheme in an irrigation area is one such good. Marsden suggested that application of the UPP to cases where the benefits are essentially private and therefore valued in markets is straightforward. The solution typically has been to apportion costs among relatively homogenous user groups[48]. Failing to do so do so may inappropriately 'price out' some intra-marginal beneficiaries' use of the conservation good and may also, by effectively cross-subsidising the marginal conservation costs for other beneficiaries, result in greater conservation than is economically efficient[49].

The 'polluter pays' principle[50] means that absolute liability for harm to the environment extends not only to compensate the victims of pollution but also of the cost of restoring the environmental degradation. Remediation of the damaged environment of the damaged environment is a part of the process of Sustainable Development' and as such polluter is liable to pay the cost to the individual suffers as well as the cost of reversing the damaged ecology[51]. In 1972 the Stockholm Declaration accepted that the sustainable development between industrialisation and environment is inevitable for environment protection[52].

In the same way Article 10 of WCED also states polluter pays principle to the wrongdoer[53].

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benefit grounds, we only need to do just enough to change the behaviour of market participants in the manner desired ... Throughout the economy public benefits frequently free ride private investment. Good policy takes advantage of this..."

[48] This acceptance of apportioning costs to groups of beneficiaries contrasts markedly with a reluctance to apply the PPP unless it can be applied to individual polluters.

[49] Haynes, Geen and Wilks 1986

[50] See previous chapter for detail analysis of Liability

[51] Khan, Dr. I.A.-"Environmental Law"-1st Ed. 2000, C.L.A. at p. 209

[52] Rio Declaration Principle 7

[53] Sing Nagendra-"Right to Environment and Environment" JILI Vol. 29, 1987 at pp 307, 311

The Rio Declaration of 1992 supports 'polluter pays principle' as environmental protection. Principle 4 reads as under:

'In order to achieve sustainable development environmental protection shall constitute integral part of the development process and cannot be considered in isolation from it. "

The 'polluter pays principle' has been held to be a sound principle by the Supreme Court of India in Indian council for *Enviro- Legal Action's* case[54].

"..... we are of the opinions that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country."

The Supreme Court in *Vellore's case*[55] has further broad-based the compensatory jurisprudence vis-à-vis absolute liability, polluter pays principle within the constitutional conspectus of Article 21, 47, 48-A and 51A (g) and section 3,4,5,7 and 8 of the Environment Protection Act – justice Kuldip Singh observed.

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

In *M. C. Mehta's*[56] *cases* the *Supreme Court* again made a clear concept of development and protection of environment. The court observed:

".... The development of industry is essential for the economy of the country, but at the same time the environment and the eco-system have to be protected. The

[54] Indian Council for Enviro-Legal Action v Union of India AIR 1996 SC 1446 at p. 1465
[55] Vellore Citizens Welfare Forum v Union of India AIR 1996 SC 2715 at p. 2721
[56] M.C. Mehta v Union of India AIR 1997 SC 735 at para 25

pollution as a consequence of development must commensurate with the carrying capacity of our eco-systems."

In Nayudu'[57] case Supreme Court gave a new concept of onus of proof with polluter pays principle. The court observed:
'....the precautionary principle the 'polluter pays' principle and the special concept of onus of proof have now merged and govern the law in our country..... ."

In *Kamalnath*[58] case the Supreme Court said the widely acceptance of polluter pays principle. The Court observed.
'.....The court while awarding damages enforces the polluter pays principle which is widely accepted as a means of paying for the cost of pollution and central. To put in other words the Wrongdoer the polluter is under on obligation to make good the damage caused to the environment."

In *N.D. Jayal v. Union of India*[59] the Apex Court held that to ensure sustainable development is one of the goals of the Environment (Protection) Act, 1986 (for short "the Act") and this is quite necessary to guarantee the "right to life" under Article 21. In other words, sustainable development is one of the means to achieve the object and purpose of the Act as well as the protection of "life" under Article 21.

From the above discussion it is apparent that to meet with the future need of the resources conservation is utmost important. State has also the responsibility to conserve the same through the concept of Public Trust Doctrine.

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[57] A.P. Pollution Control Board v M.V. Nayudu AIR 1997 SC 812 at p. 829
[58] M.C. Mehta v Kamal Nath AIR 2000 SC 1997 at para 10
[59] (2004) 9 SCC 362, at page 383

9.5-PUBLIC TRUST DOCTRINE (PTD)

9.5.1-Historical Background

For the conservation of natural resources the state and its subject both should come forward. But under this doctrine only the state will come closer to conservation policy. The ancient Roman Empire developed a legal theory known as the 'Doctrine of Public Trust'.[1] Under the Roman law these resources were either owned by no one[2] or by every one in common[3]. Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation or fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public. Joseph L. Sax[4] has given the historical background of the Public Trust Doctrine as under:

But two points should be emphasized. First, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes was distinguished from general public property, which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties-such as the seashore, highways, and running water-'perpetual use was dedicated to the public', it has never been clear whether the public had an enforceable right to prevent infringement to those interests. Although the State apparently did protect public uses, no evidence is available that the public rights could be legally asserted against a recalcitrant government.

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[1] It was founded on the ideas that Government held certain common properties such as rivers, seashore, forests and the air in trusteeship for the free and unimpeded use of the general public. Our contemporary concerns about 'the environment' bear a very close conceptual relationship to this legal doctrine.

[2] res nullious

[3] res communious

[4] Professor of Law, University of Michigan-proponent of the Modern Public Trust Doctrine

9.5.2-Principle

The public trust doctrine primarily rests on the principle that certain resources like air, sea, waters and forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership.[5]

9.5.3-Mono Lake Case

The court reviewed a number of U.S Court decisions, particularly the judgement of Supreme Court of California in the *Mono Lake Case*[6]. Upholding the plaintiff's claim that the public trust doctrine could be used to supercede Los Angeles' water diversion, the California Supreme Court held:

"Thus, the public trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshland and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.[7] Just as the history of this State shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriate water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interest."

9.5.4-Indian Judiciary on Public Trust Doctrine

Kuldip Singh. J[8] stated that the forests lands, which have been given on lease to the motel by the State Government, are situated at the bank of River Beas. Beas is young

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[5] According to Professor Sax the Public Trust Doctrine imposes the following restrictions on governmental authority: "Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first the property subject to the trust must not only be used for a public purposes, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and the third property must be maintained for particular types of uses."

[6] National Audubon Society v Court of Alpine County, 33 Cal 3d 419

[7] The State has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust use whenever feasible.

[8] M.C. Mehta v Kamalnath AIR 2000 SC 1997

and Dynamic River. It runs through Kullu Valley between the mountains ranges of the Dhauladhar in the right bank and the Chandrakheni in the left. The river is fast flowing, carrying large boulders, at the times of flood.[9] The area being ecologically fragile and full and scenic beauty should not have been permitted to be converted into private ownership and for commercial gains.

In *M.C. Mehta v Kamalnath*[10] the Supreme Court Held that the ecological fragile area can not be given to private owner an if any degradation to the environment comes in the focus than the owner will have to pay the compensation through the principle of Polluter pays and that will be an exemplary damages.

In *State of W.B. v. Kesoram Industries Ltd*[11] the Supreme Court Held that some rights are capable of being granted by holders of the same or higher rights and some only by the State.[12] Further, even by reason of Section 25 of the Limitation Act, a person must exercise an easement right without interruption for a period of 30 years in relation to air, way or watercourse. Then only such exercise of right to airway, watercourse, use of water or other easement becomes absolute and indefeasible.

In *M.C. Mehta v. Kamal Nath,*[13] the Supreme Court observed that the ancient Roman Empire developed a legal theory known as the "Doctrine of the Public Trust".[14]Joseph

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[9] When water velocity is not sufficient to carry the boulder, those are deposited in the channel often blocking the flow of water. Under such circumstances the river stream changes its course, remaining within the valley but swinging from one bank to other.

[10] AIR 2002 SC 1515 AT 1518, 1519

[11] (2004) 10 SCC 201, at page 386

12 Even the State, having regard to the doctrine of "public trust", may not have any power to grant any right in relation to certain matters e.g. deep underground water.Deep underground water belongs to the State in the sense that the doctrine of public trust extends thereto. Holder of a land may have only a right of user and cannot take any action or do any deeds as a result whereof the right of others is affected. Even the right of user is confined to the purpose for which the land is held by him and not for any other purpose. Even in relation to such matters, no prescriptive right under Section 25 of the Limitation Act would be attracted.

[13] (1997) 1 SCC 388, at page 407

L. Sax, Professor of Law, University of Michigan — proponent of the Modern Public Trust Doctrine — in an erudite article "Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention. Although the State apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government."[15]

"Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public;[16] second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses."[17]

When a State holds a resource, which is available for the free use of the general public, a court will look with considerable scepticism upon any governmental conduct, which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.[18]

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[14] It was founded on the ideas that Government held certain common properties such as rivers, seashore, forests and the air in trusteeship for the free and unimpeded use of the general public. Our contemporary concerns about "the environment" bear a very close conceptual relationship to this legal doctrine. Under the Roman law these resources were either owned by no one (res nullious) or by every one in common (res communious). Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation or fishing.

[15] Michigan Law Review, Vol. 68, Part 1 p. 473, has given the historical background of the Public Trust Doctrine.

[16] The American law on the subject is primarily based on the decision of the United States Supreme Court in Illinois Central Railroad Co. v. People of the State of Illinois1. In the year 1869 the Illinois Legislature made a substantial grant of submerged lands — a mile strip along the shores of Lake Michigan extending one mile out from the shoreline — to the Illinois Central Railroad. In 1873, the Legislature changed its mind and repealed the 1869 grant. The State of Illinois sued to quit title. The Court while accepting the stand of the State of Illinois held that the title of the State in the land in dispute was a title different in character from that which the State held in lands intended for sale.

[17] Ibid at page 407

[18] Ibid at page 408

Professor Sax stated the scope of the public trust doctrine in the following words[19]:
"If any of the analysis in this Article makes sense, it is clear that the judicial techniques developed in public trust cases need not be limited either to these few conventional interests or to questions of disposition of public properties. Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffused public interests need protection against tightly organized groups with clear and immediate goals."

The Court explained the purpose of the public trust as under:[20]
"The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways. There is a growing public recognition that one of the important public uses of the tidelands — a use encompassed within the tidelands trust — is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favourably affect the scenery and climate of the area.'

The Court summed up the powers of the State as trustee in the following words:[21]
"Thus, the public trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust...."

We see no reason why the public trust doctrine should not be expanded to include all ecosystems operating in our natural resources.[22] The second lease granted in the year

[19] Ibid at page 410
[20] Ibid at page 411
[21] Ibid.
[22] Ibid at page 412

1994 was virtually of the land, which is a part of the riverbed.[23] Even the Board in its report has recommended de-leasing of the said area.[24]

In *Common Cause, A Registered Society v. Union of India,*[25] the Court invoked the "Doctrine of Public Trust" which is a doctrine of environmental law under which the natural resources such as air, water, forest, lakes, rivers and wildlife are public properties "entrusted" to the Government for their safe and proper use and proper protection. Public Trust Law recognises that the Government for the benefit of the public holds some types of natural resources in trust. The "Doctrine of Public Trust" has been evolved so as to prevent unfair dealing with or dissipation of all natural resources.

In *M.I. Builders (P) Ltd. v. Radhey Shyam Sahu*[26] the apex Court said that in America public trust doctrine was applied to public properties, such as shore lands and parks.[27]

From the above analysis the PTD can be established as means for conservation of natural resources. The state can take every action supporting conservation. Moreover, the concept of PTD has been accepted as law of the land for conservation of natural resources.

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[23] Coming to the facts of the present case, large area of the bank of River Beas which is part of protected forest has been given on a lease purely for commercial purposes to the Motels. We have no hesitation in holding that the Himachal Pradesh Government committed patent breach of public trust by leasing the ecologically fragile land to the Motel management. Both the lease transactions are in patent breach of the trust held by the State Government.

[24] Ibid at page 413

[25] (1999) 6 SCC 667, at page 744

[26] (1999) 6 SCC 464, at page 517

[27] The scattered evidence, taken together, suggests that the idea of a public trusteeship rests upon three related principles. First, that certain interests 'like the air and the sea' have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is the principal purpose of a Government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit.