

## **CHAPTER - 2**

### **HISTORICAL RETROSPECT**

**The Background**

**The genesis**

**First stage**

**Universal Declaration of Human Rights 1948**

**Second stage**

**Right to environment as an independent right**

**Certain treaties of Global application**

**National Constitutions**

**International Environmental Law Principles**

## CHAPTER 2

### HISTORICAL RETROSPECT

*“Nothing is more pure than the state of nature and nothing more unpolluted than man in the state of nature.”*

*Rousseau in his Discourse on Arts and Sciences. 1750*

Human society has been making continuous efforts to use natural resources and environment for achieving more and more comfort to life in order to make it more pleasant. Lust to luxuries led to abuse and exploitation of natural resources to the extent of threat to the very human existence resulting into mass awareness about the need of environmentally sound and sustainable development. The Earth Summit and the subsequent concern of the nations is a pointer to this effect. Today's goal of all socio-legal paradigms is environmentalism, eco-centrism and sustainable development. The resultant effect of over exploitation of resources beyond the capacity is changed in the physical constitution of the environment, disturbance in different links in the life chain, depletion of natural resources, and degradation of life support system due to pollution of air, water, noise, soil etc.

The problem of environmental pollution dates back to the evolution of Homo sapiens on this planet. The development of science and technology and the ever increasing world population, brought about tremendous changes in the earth's environment.<sup>1</sup> The idea of right to environment was found in the ancient Indian texts and the protection was available under moral codes. *Manusmriti* prescribed different punishments for causing injury to plants. *Kautilya* is said to have gone a step further and determined punishments on the basis of the importance

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1. C. M. Jariwala, changing dimensions of Indian Environmental Law, in P Leelakrishna et al (ed law and Environment 1992 at-2.

of a particular part of a tree. Some important trees were even elevated to a divine position. Thus, India has an ancient tradition of protecting the environment. Several writings exist which prove that in ancient India every individual had to practice the dharma to protect and worship nature.<sup>2</sup> Sacred Groves were kept unmolested and undisturbed since time immemorial. Causing harm to these groves was an offence to forest and deity. *Rishis* warned against deforestation and cutting of trees as it would result in poor rainfall. *Yagnas* were performed in Vedic societies to purify the surroundings. However, a systematic management of forest was envisaged by Kautilya whereby the quantum of punishment for felling trees was proportionate to the utility of the tree. This concept of management forest was conditioned by the need for promotion of forest based industries, craft, making household articles and security purpose.<sup>3</sup> Manu had advised people not to disrupt the quality of water and not to contaminate the same by urine, stool, and coughing, impious object, blood and poison.<sup>4</sup> Pandit Jawaharlal Nehru believed that Himalayas have always part of our history, tradition thinking and worship.<sup>5</sup> Life having dignity and well-being of people is the objective set for the national government and international community to achieve. The ambit of life of dignity is wide enough to include life and liberty higher standard of living, education, social security, quality of environment etc. Right to environment as we know today, is of recent origin and developed as a western concept. The need for protection of environment is the outcome of modern scientific and technological development and population growth. When we start discussion on the right to environment it becomes necessary to trace the origin and historical development in order to find

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2. *ibid at -3.C.*

3. P. Leelakrishna, "*Environmental Law in India*", Butterworth edition p-9 &10.

4. Dr. Priti Saxena, "*Crime against the mother earth leading to poisonous earth*" XXXI (3&4) Indian Bar Review 2000 .

5. 42 *JILI* 2000 p-160-170

out the gravity and magnitude of the problem of environment. In this context it is also equally desirable to attempt right to environment through international instruments. The above developments have been analysed in the following pages before discussing the Indian position in the constitution and other relevant laws.

### **The Background**

From historical perspective, protection and preservation of environment was deep rooted in the religion and culture of the communities. People worshiped nature-mountains, rivers, lakes, birds and animals in the past because they believed that nature emanated the spirit of God. Among Indian Hindus cow worship is still very common. Under old Hindu Jurisprudence, earth was considered, as "Mother and we are her children."<sup>6</sup> Every scripture in India preaches that human being is a part of nature and therefore, he should not or damage the nature. According to Islamic Jurisprudence, man inherited all the resources of life and nature and has certain religious duties to God in using them.<sup>7</sup> Under Judeo- Christian Tradition, God has given the earth to his people and their offspring as an everlasting possession to be cared for and passed on to generation.<sup>8</sup>

### **The genesis**

The idea of human right originated from the genesis individual tussle between the paramountcy of state and primacy of the individual. It has developed basically as a western concept and got international accreditation and recognition only in the late 18<sup>th</sup> century when the philosophy that "everyman has a right to dignity" was embodied he US

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6. *Athaarva Veda (Bhumi Shukta)*

7. *See Islamic principles for the conservation of the Natural Environment*, 13-14 (IUCN and Saudi Arabia 1983)

8. Y K Sabarwal "*Human Right and the Environment*" through internet.

declaration of independence in 1776.<sup>9</sup> The origin of human right in the modern jurisprudence, can be traced in the Hobbsian social contract theory of political and legal controversy. The concept of social contract is that men lived in a state of nature. They had neither any Government nor any law. Men entered into an agreement for the protection of their lives and property and thus society came into existence. Then they entered into a second agreement by which the people, who had united earlier, undertook to obey an authority and surrendered their whole or part of the freedoms and rights and the authority granted everyone the protection of life property and to a certain extent liberty. It was in this way that the Government or Sovereign came into being.<sup>10</sup> The individual transferred the whole of his natural rights to the ruler who became an absolute ruler and promised to obey unconditionally.<sup>11</sup> But John Locke was an individualist who maintains that men did not surrender all of his rights through social contract but some freedom was retained with them. John Locke championed this cause of tussle between individual and absolute ruler, which ultimately by passage of time resulted in to the conflict of human right between the state and individual in modern democratic society. The individual has a natural inborn right to life liberty and estate. Men had all the rights which nature could give them.<sup>12</sup>

The 1946 WHO Constitution states that 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition'. Article 25 of Universal Declaration of

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9 . Pattanaik, Pradeep Ranjan "*Human Right—A protein perspective*" 28(1) Indian Bar review 2001.

10 . Mahajan, V.D. "*Jurisprudence and Legal Theory*" Fifth ed. p-698

11 . *Ibid* at 700.

12 . *Ibid* at 704.

Human Rights; Article 12 of 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR); Article 16(2) of the African Charter on Human and People's Rights; Article XI of the American Declaration; Article 10 of the Protocol of San Salvador; Articles 22-24 of Draft Declaration on the Rights of Indigenous Peoples; Article 15 of Convention on Human Rights and Fundamental freedoms of the Commonwealth of Independent states; Article 17 (b) of Cairo Declaration on Human Rights in Islam; Article 24 (2) of United Nations Convention on the Rights of the Child; Articles 10, 12 and 14 of the Convention on the Elimination of all forms of discrimination against women; Article 5 of the Convention on the elimination of all form of racial discrimination and Articles 5, 8 and 9 of the 1994 draft Declaration of Principles on the Human Rights and Environment are few of the main International instruments to recognize Right to health. In international law debate regarding the right to health as obligation *erga omnes* on the state parties is still dominant,<sup>13</sup> The entire debate revolves around the Article 2 of ICESCR dealing with progressive realization of Socio-economic and cultural rights. The debate gains a multifaceted shape when the right to health goes into the sphere of Civil and political Rights field.<sup>14</sup>

### **First stage**

The principle of unfettered National sovereignty over natural resources and absolute freedom of the sea was the basis of international environmental law. In the beginning international environmental principles focused on the conservation of wild life fisheries, rivers, seas, birds and seals. To understand the effects of environment on the various aspects of environment, studies were undertaken. As a result, Bi-lateral

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13. See, ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July, 1996 ICJ Reps, Dissenting opinion of Judge Weramantry.

14 . See, *Henry and Douglas v Jamaica*, (1997) 4 IHRR 387, para 9.5; *D v UK* (1997) 24 EHRR 423; *Z v Finland*,(1997) 25 EHRR 371; *Mc Ginely and Egan v Uk* (1998) 27 EHRR 1.

conventions took place in mid nineteenth and early twentieth century.<sup>15</sup>

For conservation of Migratory birds Switzerland proposed an international Regulatory Commission in 1872, which resulted into formation of the International Ornithological Congress and creation of international Ornithological Committee in 1884. Ultimately in 1902, a convention to protect birds useful for agriculture took place in Paris.<sup>16</sup> The convention focused on absolute protection of certain birds, prohibition on their killing, taking of their nest egg etc.

The first prevention of pollution treaty was between the United States and Canada in the year 1909 namely Water Boundaries Treaty. In 1922, the International Committee for Bird protection was founded with the aim to encourage Transnational Co-Ordination. In 1933, another convention was adopted namely the Preservation of Fauna and Flora in Their Natural State to preserve natural flora and fauna by means of national parks and reserves. This convention did not create any institutional arrangement for monitoring compliances, ensuring implementation, and administering its provisions. The convention focused mainly on conservation of wild life in African Colonies of European States.

#### **Universal Declaration of Human Right 1948.**

Universal Declaration of Human Right 1948 provides that everyone has the right to life, liberty and security of person. Further, it provides that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including fooding, clothing, housing and medical care and necessary social services, and the right to

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15 . *Convention between French and Great Britain relating to fisheries, 11 November 1967, North Sea Fisheries (over fishing) convention 1882, Convention on the Regulation of whaling, Geneva, 24 September 1931) 19 March 1902*

16 . *In the case of Concesiones otorgadas por el Ministerio de Energía y minas a Empresas Petroleras (1999)*

security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. It also states that motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

### **Second stage**

The second stage of development of international environmental law began with the creation of the United Nations in 1945. This period was characterized by the addressing of international organizations on the issue of environment and a limited recognition of relationship between economic development and environment. It is to be noted that the United Nations Charter did not include any provision relating to environmental protection. It was only in 1948 the International Union for The Protection of Nature was set up. New environmental concerns were emerged in 1950s and 60s. To prevent pollution of the Sea by discharge of oil from ships, International Convention for the Preservation of Pollution of the Sea by oil was adopted. During this period Agreements governing Principle 22 of The Rio declaration on environment and development 1992, states that indigenous people and their communities and other local communities have a vital role on environmental management and development because of their knowledge and tradition. States should recognise and duly support their identity culture and interest and enable their effective participation in the achievement of sustainable development. The same principle was stressed in the Bio-diversity Convention 1992 also.

In Pre-British India, forests were managed by native villagers or forest dwellers. Their control on forests ensured a free of cost supply of local fruits, vegetables, oils, nuts, meat, fish, animal products, fuel wood,

fodder grass, medicinal herbs. In other words, they got everything they needed to sustain a comfortable living standard by managing the forests themselves. When British began to colonies India, they reserved large tracts of land for their personal use and for the overriding requirements of the British Empire. While doing so, they monopolized forests and made sure that the natives had no role in their management. Force was used to strip the locals of their traditional rights to use forest resources. It began with the reservation of Malabar Teak for the Royal Navy in 1806. Malabar Teak was assessed as the most durable material for making ships. Later on, forests were cleared for constructing roads, laying of railway sleepers, building bridges and so on. India was a major source of timber supply during the Second World War. Finally, forests were cleared to enhance revenue-earning land. In fact, the basic purpose behind creating the Department of Forest as well as the Forest Research Institute was not to manage forests but to expand revenue from exploiting forest resources.

These objectives could not be met unless the British government asserted its power over forests to the exclusion of traditional users. In other words, the State had to monopolies forest resources and curtail traditional rights. This was achieved through the various Indian Forest Acts. The first of these was passed in 1865 enabling the British to acquire, demarcate and reserve forest area specifically for use in the railways. This Act contained Section 8 that empowered the government to arrest without warrant anyone who encroached upon forest land demarcated for the purpose mentioned above. This Act was replaced by a new Act in 1878, which enabled the British to exercise absolute control over tracts demarcated as valuable. The British Government now argued that the rights enjoyed by villagers over forests were not rights. Rather they were privileges. Privileges may only be enjoyed at the mercy of the ruler. Since the British were now De Facto rulers of India, traditional

privileges over forests could only be enjoyed at their mercy.<sup>17</sup>

The 1878 forest Act was modified from time to time until a comprehensive Indian forest Act was passed in 1927. This Act categorized forests into different classes. Each class implied a different level of State control over forests. The government could simply issue a notification acquiring a particular piece of land and designate it as a reserved or protected forest. This meant that all traditional rights over such land were automatically extinguished. Reserved forests could be converted into village forests. This implied that the lion had finished its feast and the remaining tit bits of meat were being thrown to the scavenger animals. Therefore, the villagers could now take what was left. Finally, the Government could prohibit animal grazing, mining and charcoal burning, stone quarrying practised by locals as means of livelihood by the villagers for ages.

Indian **Forest** Act 1865 is the first Indian forest Act which amounted to the formalisation of the erosion of both forest and the rights of local people to forest produce. The Forest Act 1878 contained the general law relating to forest in British India. The Forest Act 1927 consolidated the pre-existing two enactments, which reflect the exploitative intention of colonial and feudal society rather than to preserve the forest for environmental and ecological interest. The preamble to the Act explicitly laid down that it was passed to "consolidate the existing law relating to forest, the transit of forest produce and the duty leviable on timber."

Over the reserved forest no right could be acquired except by succession or under a grant or pre-existing right. Sitting fire, hunting, trespassing, quarrying, fishing etc. was prohibited. The

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17. *Ibid.*

state govt. could assign any of the right in a reserved forest to village community.

The main objective of the African Convention of Nature and Natural Resources 1968 was to encourage conservation, utilization and development of soil, water, flora and fauna for the present and future welfare of mankind.

### **Right to environment as an independent right**

Although there were attempts to develop international environmental law in the nineteenth century, it was not until the Stockholm Conference in 1972 that the right to a healthy environment was explicitly recognized in an international environmental law document. The conference adopted what is known as the Stockholm Declaration, consisting of three non-binding instruments: a resolution on institutional and financial arrangements; a declaration containing 26 principles; and an action plan containing 109 recommendations.

During pre-Stockholm period, no noteworthy development concerning right to development has been made rather devoted to development of infrastructure. There was no precise environmental policy in India. The Stockholm Conference is considered an important starting point in developing environmental law at the global as well as national level. Principle 1 of the Stockholm Declaration linked environmental protection to human rights norms, stating, that man has the fundamental right to freedom, equality and adequate conditions of life, in an 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.

Due to worldwide movement and international endeavor, many countries included environmentalism in their constitutions. The

Stockholm Conference influenced legal and institutional development for the next two decades. One of its influences was the creation of the United Nations Environment Programme (UNEP). It also led to the development of the 1982 United Nations Conventions on the Law of the Sea (UNCLOS), a comprehensive framework for the establishment of global rules on the protection of the marine environment and marine living resources. The Stockholm Conference was also followed by important regional developments, including the adoption of new rules and regulations by the European Community, and the creation of an Environment Committee at the Organization for Economic Cooperation and Development (OECD).

In 1983, the UN General Assembly created the World Commission on Environment and Development (WCED), chaired by Norwegian Prime Minister Gro Harlem Brundtland. The WCED was established as an independent body linked to, but outside the control of, both governments and the UN system. In December 1987, the WCED published the Brundtland Report, which, among other things, created a new terminology-sustainable development-and placed economic development activities within the context of environmental limitations. The Brundtland Report also called for a second UN conference to address the question of environment and development.

Twenty years after Stockholm, in June 1992, the UN Conference on Environment and Development (UNCED) was held in Rio de Janeiro, Brazil. The purpose of the conference was to elaborate strategies and measures to halt and reverse the effects of environmental degradation and to strengthen national and international efforts to promote sustainable and environmentally sound development in all countries. The Rio Conference had unprecedented participation from thousands of non-governmental organizations (NGO) from around the world. The

declaration provides that human beings are at the center of concern for sustainable development and they are entitled to a healthy and productive life in harmony with nature. This seems a clear indication that development of men in relation to environment is placed on higher position.

UNCED adopted three nonbinding instruments, one of which was the Rio Declaration, which identifies 27 principles. Principle 1 of the Rio Declaration states that human beings are "at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." While it fell short of recognizing a healthy environment as a basic human right, Principle 1 points in that direction. The Rio Conference also adopted what is known as "Agenda 21"-a far-reaching program for sustainable development that constitutes the centerpiece of international cooperation within the United Nations system.

In 1977, the United Nations Water Conference passed unanimous resolution that 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.

**Treaties of potentially global application:**

In relation to environmental obligations, certain treaties of potentially global application which include The 1972 World Heritage Convention, whose purpose is to create a list of natural and cultural sites whose irreplaceable value should be preserved for future generations and to ensure the sites' protection through international co-operation. As of January 1996, there were 469 properties on the World Heritage List.

The 1985 Vienna Convention, whose purpose is to set up a framework within which countries can co-operate to tackle the problem of ozone

depletion. Signatory nations agreed to take "appropriate measures . . . to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer."

The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (UNEP), which aims to reduce and eventually eliminate the emissions of man-made ozone depleting substances. The Protocol has been amended four times since 1987. The amendments established mechanisms for transfer of technology and financing, and added chemicals to the list of those ozone-depleting substances that should be phased out.

The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (UNEP), which obligates parties to reduce to a minimum the transboundary movements of hazardous wastes; to ensure that such wastes are managed and disposed of in an environmentally sound manner, as close as possible to their source of generation; and to reduce to a minimum the generation of hazardous wastes at the source.

The 1992 Framework Convention on Climate Change (UNEP), which requires parties to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." It aims to protect the climate system and mitigate against the adverse effects of climate change, and recognizes that the parties "have a right to, and should, promote sustainable development." It also seeks to avoid placing a disproportionate burden on developing countries in the implementation of the convention, and encourages policies and procedures that take into account different socio-economic contexts.

The 1992 Convention on Biological Diversity (UNEP), whose objectives are to conserve biological diversity as well as encourage sustainable, fair and equitable use and benefits of genetic resources. It requires parties to create national strategies, plans and programs for conserving biodiversity and to integrate biodiversity conservation into national economic planning. The convention also requires that parties take specific measures, including creating a protected area system, establishing means of managing modified organisms, and preventing or controlling alien species. It recognizes the importance of indigenous and traditional peoples' lifestyles and knowledge with respect to biodiversity conservation.

### **National constitutions**

Many national constitutions and laws recognize the right to a healthy environment derived from the obligation of states to adopt the principles reflected in the Stockholm and Rio declarations. Some domestic courts have also referred to principles enshrined in these Declarations. Obviously, the legal status of a healthy environment as a human right varies among different systems. Many countries, such as South Africa, have developed constitutional provisions that guarantee the right to a healthy environment. South Africa's Constitution stipulates as follows:

Everyone has the right (a) to an environment that is not harmful to their health or well being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

South Korea's Constitution contains provisions recognizing that "all citizens have the right to a healthy and pleasant environment." Other countries that have devoted constitutional provisions to the right to a healthy environment include Ecuador, Hungary, Peru, Portugal and the Philippines.

Other countries, such as Mexico and Indonesia, recognize the right to a healthy environment in national legislation. The first objective of the Mexico General Act for the Protection of the Environment and Ecological Equilibrium, which was amended in 1996, is: "To guarantee the right of every person to live in an adequate environment, for the sake of his or her development, health and well being." Article 15/XII reiterates that right and mandates the competent authorities to take measures to guarantee its exercise. However, those provisions mean little because they cannot be enforced in the courts, which regard them as insufficient to provide legal standing to anyone who cannot give evidence of personal and direct environmental harm.

The Indonesia Environmental Management Act (EMA) also recognizes the right to a healthy environment. Article 5(1) stipulates, "Every person has the same right to an environment which is good and healthy." This provision is accompanied by provisions that guarantee "the right to environmental information" (public access to information) and "the right to participate in the environmental decision making process." To help affected people and NGOs fight for the right to a healthy environment, the EMA also guarantees various environmental procedural rights, such as the right of NGOs to bring lawsuits as class/representative actions. As a result of pressure from pro-democracy and pro-reform activists in Indonesia, the Special Session of the People's National Assembly that was held in October 1998 (after Soeharto's

resignation) promulgated the National Human Rights Charter, which also includes "every person's right to a good and healthy environment."

Guatemala too has seen the environmental ombudsman note in a 1999 case<sup>17</sup> that "lack of interest and irresponsibility on the part of authorities in charge of National Environmental Policy amounts to a violation of human rights, considering that it impairs the enjoyment of a healthy environment, the dignity of the person, the preservation of the cultural and natural heritage and socio-economic development.

The 1993 Vienna Declaration and Programme of Action states that right to development is "a universal and inalienable right and an integral part of fundamental human rights." The right to development has also been given prominence in the mandate of the High Commissioner for Human Rights, and the General Assembly required the High Commissioner to establish "a new branch whose primary responsibilities would include the promotion and protection of the right to development." The right is regularly mentioned in declarations of international conferences and summits and in the annual resolutions of the General Assembly and the Commission on Human Rights.

An American case namely *Munn vs. Illionis*<sup>18</sup> Justice Field explained the literal meaning of the word "life" in the following words: "by the term life as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which the life is enjoyed. The deprivation not only of life but of whatever God has given to everyone with life, for its growth is prohibited by the provision in question."

In Columbia, the right to the environment was incorporated in 1991. In the case of *Antonio Mauricio Monroy Cespedes*, in 1993, the

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18 . 1877 US 113

Court observed that side by side with fundamental rights such as liberty, equality and necessary conditions for people's life, there is the right to the environment. The right to a healthy environment cannot be separated from the right to life and health of human beings. In fact, factors that are deleterious to the environment cause irreparable harm to human beings. If this is so we can state that the right to the environment is a right fundamental to the existence of humanity.

In Argentina, the National Constitution recognizes since 1994 the right to a healthy and suitable environment. However, even before the law provided for such explicit recognition, courts had acknowledged the existence of the right to live in a healthy environment

In the same year, the Supreme Court of Costa Rica affirmed the right to a healthy environment in a case concerning the use of a cliff as a waste dump. In the case of *Carlos Roberto García Chacón*, the Supreme Court stated that life is only possible when it exists in solidarity with nature, which nourishes and sustains us – not only with regard to food, but also with physical well-being. It constitutes a right that all citizens possess to live in an environment free from contamination.

The Constitution of Bangladesh does not provide expressly for the right to a healthy environment neither in the directive principles nor in the fundamental right. Article 31 only states that every citizen has the right to protection from 'action detrimental to the life liberty, body, reputation, or property', unless these are taken in accordance with law. It added that the citizens and the residents of Bangladesh have the inalienable right to be treated in accordance with law. If these rights are taken away, compensation must be paid. In 1994, in *Dr. M. Farooque v. Secretary, Ministry of Communication, Government of the People's Republic of Bangladesh and 12 Others*<sup>19</sup> the Supreme Court agreed that the constitutional 'right to life' extends to include right to a safe and healthy

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19 . PLD 1994 SC 693.

environment. A few years later, the Appellate Division and the High Court Division of the Supreme Court dealt with this question in a positive manner, in the case of *Dr. M. Farooque v. Bangladesh*<sup>20</sup> reiterating Bangladesh's commitment in the 'context of engaging concern for the conservation of environment, irrespective of the locality where it is threatened.'

Article 9 of the Constitution of Pakistan states that no person shall be deprived of life or liberty except in accordance with the law. The Supreme Court in *Shehla Zia v. WAPDA*<sup>21</sup> held that Article 9 includes 'all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally'. The Court noted that under the Pakistan Constitution, Article 14 provides that the dignity of man, privacy of home shall be inviolable, subject to law. The fundamental right to preserve and protect the dignity of man and right to 'life' are guaranteed under Article 9. Article 19 and 9 read together, question arises whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment.

### **Indian position**

The framers of the constitution were silent on the issue of environmental protection. In the original constitution no specific provision was made on the protection of the environment except Article 47 and 49. Article 47 states that the state shall regard the raising of the level of nutrition and the standard of living of its people and the environment 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

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20. 1997 49 Dhaka Law Report (AD) P-1

21 . *ibid.*

purposes for intoxicating drinks and of drugs which are injurious to health.

For raising the level of nutrition and improving public health it is obligatory that the State should provide pollution free environment. Article 49 envisages the protection of historical monuments. It states that it shall be the obligation of the State to protect every monument or place or object of artistic or historical interest, declared by or under law made by Parliament to be national importance from spoliation, disfigurement, destruction, removal, disposal or export as the case may be.

This Article makes it obligatory on the part of State to control the environmental pollution affecting the durability of these historical monuments. The Constitution (Forty Second Amendment) Act 1976 explicitly incorporated environmental protection and improvement as part of State policy through the insertion of Article 48A. Article 51A (g) imposed a similar responsibility on every citizen to protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for all living creatures. In reality, the foundation of the jurisprudence of environment was laid down by the 42<sup>nd</sup> amendment and now the State and citizens are under a fundamental obligation to protect the environment. Thus, up to 25 years after independence, India did not have any specific legislation on any of the field of environment. In the fourth five-year plan an environmental approach was adopted and the Water (Prevention and Control of Pollution) Act 1974 was passed and again in 1977 the Water (Prevention and Control of Pollution) Cess Act was passed. Then in 1981 the Air (Prevention and Control of Pollution) Act was passed. The Acts provided for establishment of Pollution Control Boards at the Central and State Level by the Governments. The Boards were empowered to exercise various powers under the Acts including advice to the respective Governments on appropriate sites for new industries. But they do not have any power to give directions to the Governments rather they are bound by the directions of the

Governments.

In India initially the protection of environment was contained in the Indian Penal Code under the heading 'public Nuisance'. Sections 268–294 deal with public nuisance. There after, special enactments were passed to deal with public nuisance i.e. the Police Act 1861 dealing with noise, the Northern India Canal and drainage Act 1873 dealing with Water Pollution and then a series of Acts such as Fisheries Act, 1897, The Explosive Substances Act 1908, Poisons Act 1919, Indian Forest Act 1927 and Motor Vehicles Act 1939 to deal with various issues of pollution. The Indian Constitution Forty Second Amendment Act 1976 expressly incorporated right to environment as part of State policy through the insertion of Article 48A.

The obligation of the State to ensure the creation and the sustaining of conditions congenial to good health is cast by the Constitutional directives contained in Articles 39(e) (f), 42 and 47 in part IV of the Constitution of India. The has to direct its policy towards securing that health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength (Article 39(e)) and that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. (Article 39(f)). The State is required to make provision for just and humane conditions of work and for maternity benefit (Article 42). It is the primary duty of the State to endeavor the raising of the level of nutrition and standard of living of its people and improvement of public health and to bring about prohibition of the consumption, except for medicinal purposes of intoxicating drinks and of drugs, which are injurious to health. (Article 47). Protection and improvement of environment is also made one of the cardinal duties of

the State. (Article 48 A). The State legislature is under entry 6 of the State List contained in the Seventh Schedule to the Constitution, empowered to make laws with respect to public health and sanitation, hospitals and dispensaries. Both the Centre and the States have power to legislate in the matters of social security and social insurance, medical professions, and, prevention of the extension from one State to another of infections or contagious diseases or pests affecting man, animals or plants, by entries 23, 26 and 29 respectively contained in the concurrent list of the Seventh Schedule. Thereafter, the Indian parliament passed many specialized legislations dealing with the problem of environment. Among the important legislations, The Air (Prevention and control of pollution) Act, 1974, The wild Life (Protection) Act 1972, The Forest (Conservation) Act 1980, The Water (Prevention and Control of Pollution) Act 1984, The Environment (Protection) Act 1986, The National Environmental Tribunal Act 1995, The Public Liability Insurance Act 1991, etc. are noteworthy. The Central Government also various Rules and notifications in pursuance to the Environment Act 1986. Besides these the State Governments also enacted many legislations regulating the environmental issues.

One of the main objections to an independent right or rights to the environment lies in the difficulty of definition. It is in this regard that the Indian Supreme Court has made a significant contribution. When a claim is brought under a particular article of the Constitution, this allows an adjudicating body to find a breach of this article, without the need for a definition of an environmental right as such. All that the Court needs to do is what it must in any event do; namely, define the Constitutional right before it. Accordingly, a Court prepared to find a risk to life, or damage to health, on the facts before it, would set a standard of environmental quality in defining the right litigated. This is well illustrated by the cases that have come before the Supreme Court, in

particular in relation to the broad meaning given to the Right to Life under Article 21 of the Constitution. The right to life has been used in a diversified manner in India. It includes, *inter alias*, the right to survive as a species, quality of life, the right to live with dignity and the right to livelihood. However, it is a negative right, and not a positive, self-executory right, such as is available, for example, under the Constitution of the Philippines. Section 16, Article II of the 1987 Philippine Constitution states: 'The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature'. This right along with Right to Health (section 15) ascertains a balanced and healthful ecology.<sup>1</sup> In contrast, Article 21 of the Indian Constitution states: 'No person shall be deprived of his life or personal liberty except according to procedures established by law.' The Supreme Court expanded this negative right in two ways. *Firstly*, any law affecting personal liberty should be reasonable, fair and just. *Secondly*, the Court recognised several unarticulated liberties that were implied by Article 21. It is by this second method that the Supreme Court interpreted the right to life and personal liberty to include the right to the environment.

*Indian handicraft Emporium vs. Union of India*<sup>22</sup> the Apex Court held that a trade dangerous to ecology to be either regulated or totally prohibited. The fundamental Right to trade are to be balanced with the demand of social interest. This balance is reflected in Article 48A and 51 A (g) of the constitution. According to the Court prohibition of import of African ivory had a laudable object. Under the pretext of dealing in ivory, killing Indian elephant is to be stopped. The Court observed:

"Animals play a vital role in maintaining ecological balance. The amendment (1991 Wild Life Protection Act 1972) have been brought

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22. *Indian Council of Enviro-Legal Action vs. UOI*, 996 3 SCC 212.

for the purpose of saving the species from extinction as also for arresting depletion in their numbers caused by callous exploitation.” Some established norms of International Environmental Law which are already accepted by the world community including India are as follows:-

1. Nations have the *sovereign right* to exploit their natural resources in pursuant to their own environmental policy and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limit of national jurisdiction.
2. *Notification and consultation* by the State which want to undertake an operation likely to harm neighboring country’s environment. For example construction of power plant which may impair the quality of air or water of the States situated in the down stream.
3. Over and above the duty to notify and consult, a relative new norm has emerged whereby the States are expected to *monitor and assess* specific environmental condition domestically and disclose these conditions in a report to an international agency to collect and publicize such information.
4. Another emerging norm is the guarantee in the domestic constitutions, laws or executive pronouncements the *citizens right to a clean and healthful environment*. In the United State, this right has been guaranteed by few states but not by the Federal Government.
5. The *polluter pay principle* means the polluter should internalize the cost of their pollution, control it at its source, and pay for its effect, including the remedial and clean up cost rather than forcing other states or future generation to pay for it.
6. *Precautionary principle* is a new norm i.e. the duty to foresee and assess environmental risk, and to give warning to victims of such risk to behave in such a way that prevent or mitigate such risk.

7. *Environmental Impact Assessment* is another accepted norm, which maintains a balance between economic benefit and environmental cost. Before a project is undertaken its economic benefit and environmental cost must be compared, if economic benefit exceeds environmental cost the project can be taken, other wise not.
8. *To invite the input of NGOs* is another recent norm, which ensures that the people who are likely to be affected by environmental accords will have a major role in monitoring and implementing the accord.
9. *Sustainable Development* is a widely accepted international principle which means using natural resources in a manner which does not exceed their natural capacity for regeneration and using them in a manner which ensures the preservation of the species and ecosystem for the benefit of future generation.
10. *Intergenerational Equality* is one of the newest inter national norm. It is similar to sustainable development. If present generation continues to consume and deplete resources at unreasonable rate, future generation will suffer environmental and economic consequences. Therefore we must undertake to pass on to future generation.
11. *Common heritage of mankind* is yet another which must be share by all nations. United Nations Conference on the Law of Sea 1982 articulated this norm. Deep seabed is part of this principle.
12. *Common but differentiated responsibility* with regard to global environmental concern such as global climate change or ozone layer depletion, all nations have a shared responsibility but richer nations are better able to take the financial and technological measures necessary to shoulder the responsibility.

In the history, evolution, and development of the right to environment through judicial interpretation *Maneka Gandhi's*<sup>23</sup> case is a turning point in which it got a liberal expansion to cover all those areas which were not otherwise provided in the constitution but some how connected with the person, within the scope of fundamental right. Then *Francis Coralie case*<sup>24</sup> elaborated the concept of right to life to include the faculties of thinking and feeling. The *Ratlam Municipality case*<sup>25</sup> started deliberations on the human right in the polluted environment where the health of the people were put on risk because of the failure to perform the duty of the Municipal authorities on account of financial deficit. In the *Dehradun quarrying*<sup>26</sup> case, which was just a letter seeking appropriate relief for violation of ecological balance, The Supreme Court entertained the letter as a writ petition and exercised jurisdiction under Article 32 of the constitution which pre-supposes the violation of a fundamental right. Though, no direct observation has been given by the court but the trend of the court leaves no doubt that the right to ecological balance is a Fundamental Right.

It may be said that the *Kanpur Tennaries case*<sup>27</sup> is the first case where the Supreme Court categorically stated that the life, health and ecology has greater importance to the people. Further in *Chhetriya Pradushan Mukti Sangarsh Samiti case*,<sup>28</sup> the citizen's right to file a petition on account of deterioration of quality of life due to environmental

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23 . *Maneka Gandhi vs. Union of India*, AIR 1978 SC 597.

24 . *Francis Coralie Mullin vs. The Administrator, Union Territory of Delhi*, AIR 1981 SC 746.

25. *Municipal Council of Ratlam vs. Wardhichand* AIR 1980 SC 1622.

26. *Chetriya Pradushan Mukti Morcha Sangharsha Samity Vs State of Uttar Pradesh*, AIR, 1990, SCC 2060.

27. *M.C. Mehta vs. UOI* AIR 1988 SC 1037 *Subhash Kumar vs. State of Bihar* AIR 1991 SC 420

28. *Chetriya Pradushan Mukti Morcha Sangharsha Samity Vs State of Uttar Pradesh*, AIR, 1990, SCC 2060.

degradation. Then in the *Subhash Kumar*<sup>29</sup> case the Supreme Court explicitly observed that right to live is a fundamental right under Article 21 of and it includes the right to enjoyment of pollution free water and air for full enjoyment of life. In *Virendra Gaur Vs State of Haryana*,<sup>30</sup> the Supreme Court emphasized and enunciated the links between pollution free air, water and right to life under Article 21 of the constitution. The *Indian Council for Enviro-legal Action vs. Union of India*<sup>31</sup> the court observed that failure of the Central Govt., State Govt. and Pollution Control Board to carry out their statutory duty was seriously undermining the right to life of the people under Article 21 of the constitution.

The High Courts in India also decided many cases explaining the right guaranteed under Article 21. In *T. Damodara Rao*<sup>32</sup> AP High Court drew an inference that Article 21 can be extended to protect the citizen's life against the polluted environment. In *Kinkri Devi*,<sup>33</sup> the Himachal Pradesh High Court held that if a balance between the needs of development and protection of ecology is not maintained, it would result in the violation of citizen's fundamental right under the constitution. The Kerala High Court has not given preference to right to livelihood at the risk of environmental pollution in *Madhavi vs. Thilakan*.<sup>34</sup> In *Damodara Rao* case,<sup>35</sup> the AP High Court took into consideration an open plot of land, which was kept for recreational purpose. The court held that it is reasonable to hold that the enjoyment of life and its attainment and

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29. AIR 1996 SC 1446

30 . *Virendra Gaur vs. State of Haryana* 1995 2 SCC 577.

31. *Indian Council of Enviro-Legal Action vs. UOI*, 1996 3 SCC 212.

32 . *T Damodara Rao vs. the special officer, Municipal Corporation of Hyderabad* AIR 1987 AP 171.

33 . *Kinkri Devi -Vs- State of Himachal Pradesh*, AIR 1988 HP 4

34 . *Madhavi vs. Tilakan* 1988 (2) KER LT 730 V *Lakshmipathy vs. State*, AIR 1992 Kant 57.

35 . *Shyam A Divan "Constitution and Environment" (1990) Cochin University Law Review* 87.

fulfillment guaranteed by Article 21 of the constitution embraces the protection and preservation nature's gift without which life cannot be enjoyed. Depending on this decision, the Karnataka High Court in *V Lakshmi pati* case,<sup>36</sup> held that once a development plan had earmarked the area for residential purpose the land is bound to be put to such use only. The Court pointed out that entitlement to clean environment is one of the recognized basic human right and human right jurisprudence can not be permitted to be thwarted by status quoism on the basis of unfounded apprehensions. In *Attakoya Thangal's*<sup>37</sup> case also, the Kerala High Court established the right to clean water as included under Article 21 of the constitution. Justice Sankaran Nair observed that the right to life is much more than the right to animal existence and its attributes are manifold, as life itself. A prioritisation of human needs and a new value system has been recognized in this area. The right to sweet water and the right to free air are attributes of the right to life, for these are the basic elements, which sustain life itself. In relation to use of ground water, the right to quality of life and environment was also emphasized by the Rajasthan High Court in *L.K. Koolwal's* case.<sup>38</sup> Looking at the impact of Article 51 (A) (g) of the constitution the Court expressed the view that the maintenance of health, sanitation and environment falls within Article 21 of rendering the citizens the fundamental right to ask for affirmative action.

Thus, the High Courts were more active and direct in declaring the right to clean and human environment as a fundamental right included under Article 21 of the constitution.<sup>39</sup> Though the decisions of the High

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36. AIR 1990 SC 206.

37 . *Attakoya Thangal vs. Union of India* 1990 KLT 580.

38. *L.K.Koolwal vs. State of Rajasthan* AIR 1988 Raj 2.

39 . *Article 21 reads as follows " No person can be deprived of his life and personal liberty except according to procedure established by law"*

Courts were under the inspiration of the Supreme Court but The Supreme Court was more hesitant, in the beginning, to declare a clear right to environment. Only in 1990, first time the Supreme Court almost declared the right to environment as included under Article 21 in *Chetriya Pradushan Mukti Sangarsh Samiti vs. State of UP*<sup>40</sup> and *Subhash Kumar vs. State of Bihar*.<sup>41</sup> In the first case, Chief justice Sabhyasachi Mukherji, in clear terms observed that every citizen has a fundamental right to have the enjoyment of life and living as contemplated in Article 21 of the constitution of India. In the second case, Justice K. N. Singh observed that the right to live includes the right to enjoyment of pollution free water and air for full enjoyment of life.

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40 . AIR 1991 SC 420.

41. AIR 1991 SC 420.