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CHAPTER- 4

SCOPE OF THE RIGHT

"In any organised society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object. Right to live guarantee in any civilised society implies the right to food, water, decent environment, education, medical care, and shelter. These are basic human rights known to any civilised society."

The Supreme Court of India

Right is an interest recognized and protected by a rule of law. A particular interest must be recognized and protected by law in order to treat it as a right. Right to environment as a human right extends over all human being irrespective of cast, color and gender including prisoners, workers, disabled and mentally ill persons. About the right to environment of other creatures like animals flora and fauna aquatic life, a brief discussion has been made in this chapter. What are various components of rights that covered under the right to environment has also been discussed. Authorities which can violate the right to environment and the ways and means by which right to environment can be violated are also discussed.

Right also requires remedy which is for the enforcement of the right. For effective enforcement of a right it becomes necessary to provide for an effective remedy. Therefore, in case of violation of the right to environment what kinds of remedies are available, a brief reference thereof has been made in this chapter. Every right has to operate within certain limitation. An attempt has also been made to delineate and prescribe the limits within which the right to environment should

operate.

The African Charter on Human and People's Rights 1981 proclaims in Article 24(1) that a right to 'a general satisfactory environment favourable to their development.' In fact, the Final Report of the Special Reporter on Prevention of Discrimination and Protection of Minorities[1] listed more than 15 rights relative to environmental quality. Some of these include the right to freedom from pollution, environmental degradation and activities which threaten life, health or livelihood, protection and preservation of the air, soil, water, flora and fauna; Healthy food and water; a safe and healthy working environment.

In The Constitution of Bangladesh, there is no explicit provision for the right to 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. To enjoy the protection of the law, and to be treated in accordance with law, every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except 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, a public interest litigation[2] the Supreme Court agreed with the argument presented by the petitioner that the constitutional 'right to life' does extend to include right to a safe and healthy environment.

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1. *U.N. Doc. E/CN4/Sub.2/1994/9 (1994).*
2. *Dr. M. Farooque v. Secretary, Ministry of Communication, Government of the People's Republic of Bangladesh and 12 Others (Unreported). The case involved a petition against various ministries and other authorities for not fulfilling their statutory duties to mitigate air and noise pollution caused by motor vehicles in the city of Dhaka*

Article 9 of the Constitution of **Pakistan** states that "no person shall be deprived of life or liberty saves in accordance with the law." In *Shehla Zia vs. WAPDA*[3] the petitioner questioned whether, under article 9 of the Constitution, citizens were entitled to protection of law from being exposed to hazards of electro-magnetic field or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations. The Supreme Court decided that Article 9 included all such amenities and facilities, which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. 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.

Right to unpolluted environment and protection and preservation of nature's gift has been conceded under Article 21 of the constitution of India. This right includes a variety of many other rights such as protection of flora and fauna, unpolluted air, protection from noise, air and water pollution, and maintenance of ecological balance. At least 20 cases are decided in India which either directly or indirectly recognised that right to environment was included under Article 21of the constitution.[4]

I. Traditional Rights of Tribal People:-

The rights of traditional tribal communities have been at the centre of many struggles with the State. But it's another story when within the

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3. *PLD 1994 SC 693.*
4. *See, T. Damodara Rao, vs. S.O. Municipal Corporation, Hydrabad AIR 1987 AP 171, Narmada bachao AndolanVs. Union of India 2000 10 SCC 664, AP Pollution Control Board vs. M.V. Naydu AIR 1999 Sc 812, M.C. Mehta Vs. Union of India (1997) 3 SCC 388 & 715, (1997) 2 SCC 411, AIR 1997 Sc 811, (1996) 8 SCC 462, (1996) 4 SCC 750, RLEK Dehradoon vs. State of UP AiR 1990 SC 2060/2062, Subhash Kumar vs. State of Bihar AIR 1991 SC 420, Virendra Gaur vs. State of Haryana, (1995) 4SCC 750. Indian Council fpr enviro-legal action Vs. Union of India (1996) 3 SCC 212, 1996 5 SCC 281, Vellore Citizens Welfare Forum vs. Union of India (1996) 5 SCC 647, F. B Taraporawala vs. Bayer India Ltd. 1996 6 SCC 58, Jagannath vs. Union of India AIR 1997 SC 811, Animal and Environmental Legal Defence Fund vs. Union of India AIR 1997 SC 1071, TN Godavarman vs Union of India AIR 1997 SC 1228, MC Mehta vs. Kamal Nath 1997 1 SCC 388.*

State machinery itself there are disagreements on the issue how communities ought to control forest resources. The Government of India, Ministry of Tribal Affairs (MoTA) mooted a draft Scheduled Tribes (Recognition of Forest Rights) Bill 2005 that was cleared by the Law Ministry in April 2005. The bill has been stalled by opposition from the Ministry of Environment and Forests (MoEF) on the ground that it will be detrimental to safeguarding the forests and wildlife that thrives in them.

The aim of the Bill is to undo the legacy of discounting the time-honoured use and preservation of forest resources by tribals that has pervaded since colonial times. By recognising the rights of the forest-dwelling tribals, the bill seeks to protect them from being branded as "encroachers" and safeguard them against forced evictions. The Bill acknowledges 12 specific heritable but not alienable non-transferable "forest rights" of tribals in forest villages for "bonafide livelihood needs". The conditions for vesting such rights include a limit of up to 2.5 hectares of land per family which must have been in occupation prior to 25 October, 1980, the date on which the Forest (Conservation) Act came into force. The list of these rights include:

1. Right to live in the forest under the individual or common occupation for habitation or for self-cultivation for livelihood

2. Right to access, use or dispose of minor forest produce

3. Rights of entitlement such as grazing and traditional seasonal resource access

4. Rights for conversion of leases or grants issued by any local authority or any state government on forest lands to titles

5. Right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving.

Questions are being asked as to why only "scheduled" tribes are to be granted forest rights? The simple answer is that MoTA was established as an independent ministry in 1999 to deal specifically with scheduled tribes. The criteria for designating a tribe as "scheduled" include having 'primitive' traits, dwelling in geographical isolation, having a distinct culture, being shy of contact with the outside world and being economically 'backward'. There are more than 600 officially listed scheduled tribes in the country, comprising less than 10% of the country's total population and with little over 2% believed to be dwelling in forests. There is a view that once the Bill is passed, this itself would provide the basis for the extension of the rights to other forest dwellers.

There are also deep divisions between conservationists and tribal activists. The pro-tribals lobby argues that it is large developmental projects – such as large dams, power plants and mining activities – that need to be checked, rather than the forceful eviction of traditional forest-dependent communities to save the forests. Several groups contend that it is not tribals who are bringing in commercial activities into forests, but external commercial pressures that are degrading the forest resources and thereby eroding the traditional lifestyles of tribal communities. Meanwhile the more radical green groups warn against the land mafia misusing the provisions of the proposed law into conning unsuspecting tribals vested with land rights to part with their land in prime forest areas. They also fear that the proposed legal provision allowing for the "sale of forest-based products for their household needs", would translate into large-scale commercialisation of forest resources.

Apart from the practical problems in implementing the Bill and working out its relationship with other conservation laws, there are certain problems within the text that would need to be addressed. There are several measures built into the Bill for conservation, but there remains a lack of clarity on what prevails in the event of such "rights" causing loss of wildlife, forest or biodiversity. For instance, if the collection of a medicinal plant becomes threatened, would the law restrict it? There is a penalty for unsustainable use, but who and how determines what is "unsustainable"? And would such collections be permitted in national parks or sanctuaries?

The neglected issue of traditional knowledge warrants more attention. Amongst the "forest rights" that the Tribal Bill seeks to grant is the right to access to biodiversity and community rights to intellectual property and traditional knowledge related to forest biodiversity and cultural diversity. The approach to these rights appears to be in harmony with the Government of India's official pro-IPR policy, and is supported rather than contested by the various Ministries involved. The pro-IPR approach is clear in the draft National Tribal Policy 2 which is currently being revised. It states that the preservation and promotion of traditional wisdom is recommended through documentation of such traditional knowledge and its "transfer" to non-tribal areas. The policy encouraged documenting and patenting tribal traditional Medicine. In the context of health, the National Policy mandates:

1. Strengthening the allopathic system of medicine in tribal areas.

2. Validating identified tribal remedies (folk claims) used in different tribal areas

3. Encouraging, documenting and patenting tribals' traditional medicines

Biodiversity-based traditional knowledge can not exist without the resources on which it is based. Such systems of knowledge would not grow from a document but by a symbiosis of people and plants. What needs to be protected is the collective intellectual heritage of communities. This is different from advocating for a community to be made a legal entity for grant of a patent or other IPR, which implies the commodification of their knowledge. Conservation by the people can be made possible only if communities are given a stake in conserving. But in the context of traditional knowledge, IPR is not a helpful incentive to conserve knowledge.

There is doubt about the Bill being cleared in its present form. The Prime Minister's Office has asked the MoTA to reword its original Bill to reflect conservation concerns, while asking the MoEF not to push its rival "alternative draft". Hopefully in the end the tribals in the forest who are largely oblivious to these ongoing discussions will be more righted than wronged.

The government in making such a law would be fulfilling its electoral promise only if it facilitates the control of people rather than effecting controls. Self-governance is a critical issue for indigenous peoples whose systems of self-rule pre-date the modern state. The state must recognise this, and rights must not be dependent on the mere efficacy of a law drawn up today, often without the very people it proposes to right.

The issue of illegal felling of timber in forests in India, particularly in the North-East Region came up for consideration before the Supreme Court in *T. N. Godavarman Thirumulpad vs Union of India*[5] The Supreme Court has given interim directions from time to time on various issues,

5. *(1997) 2 SCC 267,/ (1997) 3 SCC 312.*

including for regulating the timber trade and pricing of timber, licensing of wood-based industries, forest protection, management of forests, action against erring officials, clarifying that minor forest produce is out of its purview etc. Gradually, but fortunately only for a while, illegal mining activity in forests was also included within the scope of the public interest litigation. Over a period of time more than 1000 interim applications have been filed in the case apart from a large number of contempt petitions and a massive number of interim directions have been issued. In December 1998, the Supreme Court lamented that many States have either not implemented its directions or breached them and in October 2002 it was observed that the tide of judicial considerations in environmental litigation in India symbolizes the anxiety of courts in finding out appropriate remedies for environmental maladies. If a balance sheet of this case is drawn up, the real benefit that has come out of this litigation over the last several years has been the setting up of a Central Empowered Committee, which has checked, to the extent possible, unlicensed sawmills and helped in regulating the trade of illegal timber. Apart from this, the Committee has also considerably assisted the Supreme Court in passing several orders on environment related issues from time to time.

In State of *Himachal Pradesh Vs Umed Ram*[6] upholding the right of the people in hill areas for a suitable approach the court held that right to life under Article 21 embraces not only physical existence of life but also the quality of life and for residents of hilly areas access to road is access to life.

In *Samatha vs. State of Andhra Pradesh*[7] justice Ramaswamy observed,

"The tribal have fundamental right to social and economic

6. *(1986) SCC 68./ AIR 1986 SC 847*

7. AIR1988 SC 1626

empowerment. As a part of right to development, democracy offered to them through the State regulates power of good Government that the lands in scheduled areas are preserved for social economic empowerment of the trials."

II. Right against soil pollution: - The acute problem of soil pollution due to dumping of waste and effluents of factories, use of pesticides and insecticides, gases, acid rains, etc. has resulted in the destruction of vegetation and change in the composition of soil that makes it unfit for cultivation. Vegetable, egg, meet, fish, grapes, oil and cereals contain DDT and BHC above permissible limit.

Bichri case[8] decided on soil pollution. The Chemical industries in Bichri village were discharging chemical wastes which rendered the soil unfit for cultivation. Iron-based and gypsum-based sludge if not properly treated, pose grave threat to Mother Earth. The court held that the industries are absolutely liable to compensate the harm caused by them to the villagers in the affected area, to the soil and to the underground water and hence they are bound to take all necessary measures to remove the sludge and other pollutant lying in the affected area and also to defray the cost of remedial measures required to restore the soil and underground water sources. Section 3 and 4 of the Environment Act 1986 confers the Central Government the power to give directions to the above effect. Levy of cost for remedial measures implicit in the two sections.

III. Right against tobacco smoking:- It has been reported that one million tobacco related death take place in India every year due to cancer, heart disease, chronic obstructive pulmonary disease, still birth, lung disease, asthma, ear and eye infection etc. In *K. Ramakrishna vs.*

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8 .*Indian Council of Enviro-legal Action vs. Union of India AIR 1996 SC 1446.*

State of Kerala[9] the court held that the tobacco smokers violate the fundamental right to life guaranteed under Article 21 of the constitution as the exposure to tobacco smoke was slow prior, causing death and passive smoking where the judges deemed it a punishable offence under section 278 of the Indian Penal Code.[10] The earliest specific law on smoke is the Bengal Smoke Nuisance Act 1905, the Bombay Smoke Nuisance Act 1912,

IV. Right to cultural heritage:- the legal principles for environmental protection and sustainable development adopted by the world community stipulates that each state has a duty to ensure that the environment and natural resources are conserved and used for the benefit of present and future generation. The purpose of the World Heritage Convention 1972 is to establish an effective system of collective protection of the cultural and natural heritage of outstanding universal value. In India, Article 49 and entry 67 of list I of seventh schedule of the constitution, conferred a corresponding legislative power to parliament. Under entry 12 of the list II also the state legislature got the power to legislate on ancient historical monuments. Under list III, entry 40 the states and the center can exercise legislative power on Archeological sites. Apart from this every citizen has a fundamental duty under Article 51 (A) (f), to cooperate with state and ensure that the rich and diverse heritage within the country is preserved. The central laws are Ancient Monuments and Archeological Sites and Remains Act 1958, and the Antiquities and Art Treasures Act 1972, which seeks to preservation

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9. AIR 1999 Ker 385.

10. *Padma Dr., "women empowerment towards safer environment and justice" Indian*

Bar Review 28 2&3, 2001.

monuments and sites of national importance and prevention of export and smuggling of art treasures respectively.

Taj Trapezium case[11] is a typical case where the Supreme Court recognized and that since the Taj is a World Heritage Site, the Supreme Court would itself monitor some issues such as air pollution, proper management of the Mathura refinery, construction of a hospital, a bypass to divert all traffic away from Agra etc. Subsequently, a governmental Agra Mission Management Board was constituted in 1997 followed by the Taj Trapezium Zone Pollution (Prevention & Control) Authority set up in 1999, to monitor progress of the implementation of various schemes for protection of the Taj. *In Rajiv Mankotia vs. Secretary to the President of India*[12] prevented the government of India from converting a part of Viceregal Lodge in Shimla constructed in 1888 in to a tourist hotel being a historical monument of national importance.

The issue of protection of monuments and religious shrines from environmental pollution came up for consideration before the Supreme Court in *Wasim Ahmed Sayeed vs. Union of India and Others*[13] To prevent damage to monuments, particularly the Dargah of Moinuddin Chisti in Ajmer and the heritage city of Fatehpur Sikri, the Supreme Court directed the removal of shops within a certain distance from the monuments so that no damage is caused to them. The Kerala High Court examined the importance of pre-historical monuments in *Niyamvedi vs. Government of India*[14] and held that pre-historical monuments needed to be preserved.

V. Right arising out of environmental damages, i.e. Right to

11. M.C.Mehta vs Union of India & others 1997 2 SCC 353.

12. (1997) 10 SCC 441.

13. 2002 9 SCC 472.

14. *Kerala High Court WA No. 1427/1994-B 6th Nov. 1995.*

monetary compensation:- Right to compensation due to environmental catastrophe i.e. For violation of any right under Article 21 of the constitution, right to claim compensation has been recognized in many cases.[15] Right to a healthy environment is included under Article 21 of the constitution and hence for violation of this right monetary compensation can be claimed as matter of right.[16]

VI. Right to traditional methods of environmental protection:- This right includes 1. Right to live in the forest under the individual or common occupation for habitation or for self-cultivation for livelihood. 2. Right to access, use or dispose of minor forest produce. Right of entitlement such as grazing and traditional seasonal resource access

Rights for conversion of leases or grants issued by any local authority or any state government on forest lands to titles. Right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving.

VII. Right against hazardous substances:- *In M. C. Mehta vs. Union of India*[17] popularly known as *Shri Ram Gas Leak Case* the Supreme Court Observed: "an enterprise which is engaged in a hazardous or inherently dangerous industry which posses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to community to ensure that harm results to any one on account of hazardous or inherently dangerous nature of activity which it has

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15. V. N. Shukla, "Constitution of India" tenth edition p-180.

16. M. C. Mehta vs. Union of India 1987 1 SCC 395

17. *M. C. Mehta vs. Union of India 1987 1 SCC 395*

undertaken

VIII. Right to ecological balance –Ecology is the science of intricate web of relationship between living organisms and their living and non-living surroundings. These inter–dependence of living and non-living parts make up ecosystems. The stability of a particular ecosystem depends on its diversity. Nature has immense potentials to maintain its perfect ecological balance. With the growth of unplanned industrial development, population growth with overdependence on nature coupled with lust for comfortable life, the equilibrium of ecology is imbalanced. In *Sachidananda Pandey vs. the State of West Bengal*[18] the Supreme Court reminded the citizen and the Government of their social obligation to preserve and maintain ecological balance.

Rural Litigation and Entitlement Kendra v. *State of U.P.*[19] was one of the earliest cases where the Supreme Court dealt with issues relating to environment and ecological balance. The expanded concept of the right to life under the Indian Constitution was further elaborated in *Francis Coralie Mullin* v. *Union Territory of Delhi*[20] where the Supreme Court set out a list of positive obligations on the State, as part of its duty correlative to the right to life.

IX. Right to pollution free water – Of all liquids known to man, none can take the importance of water in the great variety of life process. Many of the liquids appear similar to water but they do not have the combination of water that makes water unique. The relationship of water and man can be best explained in the constitution of human body. The

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18. *AIR 1987 SC 1109.*

19. *Rural Litigation & Entitlement Kendra, Dehradoon -Vs- State of U.P.* AIR, 1991 SC 2216.

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

major part of our body is water. Dehydration leads to death. A seventy Kg. man contains fifty Kg. of water. It is estimated that man can survive for 20 days without food but starts struggling for life in the absence of water only after one day.[21] On this earth we are fortunate enough because it contain more oceans, lakes, streams, and subterranean water than land masses.[22]

Fresh water is very essential for our life. Only a small portion of the earth's water supply i.e. only 0.3 percent is fresh water and consumable and the remaining is polluted. Under section 2 (c) of the Water Act, water pollution means such contamination of water or such alternative of the physical, chemical or biological properties of water or such discharge of any sewage or industrial effluents or of any other liquid, gaseous or solid substance into water (whether directly or indirectly)as may or is likely to create a nuisance or render such water harmful or injurious to public health or safety or to domestic or commercial, industrial, agriculture or other legitimate use or to the life and health to animals or plants or aquatic organism. The effect of water pollution on human health various water-borne diseases like cholera, typhoid, amoebiasis, viral hepatitis, diarrhea/dysentery, cardiomyopath, gastric ulcer, paralysis etc.[23] Time is perhaps not too far when good quality of water, particularly in thickly populated and industrialized areas may not be available, if not, inadequate for normal living. In 1977, the United Nations Water Conference passed the following unanimous Resolution:-

> "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."

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21. *Dr. S. A. K. Azad, "Water pollution and its Legal Control in India" AIR (Journal) 2001 at-310*

22. *See,* Sharifuddin and Z.M.Nomani, *"Water Pollution and Law"* Saloni Publication New Delhi 2004 p-1.

23. *Id.*

The Supreme Court relied upon this Resolution while observing that water is a basic need for the survival of human beings and is a part of the right to life and human rights as enshrined in Article 21 of the Constitution. A news item had appeared in a national daily pointing out that the river Yamuna, which flows through Delhi is highly polluted. *Narmada Bachao Andolan v. Union of India & ors*, [24]

The cause of pollution is two-fold: due to discharge of domestic waste and industrial effluents. The quality of water before the river enters Delhi is not unsatisfactory, but by the time the river leaves Delhi after traversing a distance of 22 km., the water quality undergoes steep and rapid deterioration. The Supreme Court passed an order to the effect that pollution of the river should be stopped with effect from 1st November 1999. However, a report given by the Central Pollution Control Board (CPCB), which the Supreme Court considered in January 2000, showed that the situation continued to be alarming. The Attorney General was then requested to take effective steps to achieve the 'desired result' and in the meanwhile, industries located in Delhi were restrained from discharging their effluents into the river. The Supreme Court later looked into the matter again and found that the parameters laid down by the Government in respect of water quality were not being adhered to. The Delhi Administration was directed to file an affidavit indicating what steps it proposes to take to reduce the pollution level so as to ensure that by March 2003 no untreated sewage enters river Yamuna. As recently as August 2004, the matter again came up for consideration before the Supreme Court and it was noted that although the Court had directed its attention to cleaning up the river almost a decade ago, there has been no improvement, but the water quality had in fact deteriorated

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24. *(2000) 10 SCC 664*

during the last about five years on a comparison of reports filed by the CPCB. The Supreme Court then set up a High Powered Committee chaired by the Secretary, Ministry of Urban Development and including several governmental authorities to monitor the situation. However, newspaper reports[25] have since indicated that despite an expenditure of Rs.87 corers on what is called the Yamuna Action Plans I and II, the river continues to remain as dirty as it was about a decade ago and most people believe it to be nothing more than a sewer. One of the chief reasons for this state of affairs is that there has been no effective monitoring, unlike in *Vehicular Pollution cases.*[26] The result is that orders passed by the Court are not implemented and deadlines set in the various orders are not met. The second reason is that the focus of the case seems to have got partially diverted. This is clear from at least three orders passed by the Supreme Court which go to show that apart from the question of cleaning up the river Yamuna and treating the matter as a purely environmental issue, the Supreme Court has drawn within its ambit the question of unauthorized construction in Delhi and the revision of the Unified Building Bye-laws for Delhi. It is because of such a lack of focus that undivided attention has not been paid to the grave environmental issue pending in the Court

Subhash Kumar vs. State of Bihar[27] is a landmark judgment in the history of evolution of the right to environment. In the instant case justice K.N Singh observed:

"Right to live is a fundamental right under Article 21 of the

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25. *Hindustan Times, The Tribune, The Times of india and The Hindu all dated 13th April 2005*

26 *(Vehicular Pollution Case)*

27 *Subhash Kumar -Vs- State of Bihar,* AIR 1991 SC 420.

constitution and it includes pollution free water."

In AP Pollution Control Board vs. M.V Naydu,[28] the Supreme Court Observed:

"The right to drinking water is fundamental to life and there is a duty on the State under Article 21 to provide clean drinking water"

In Surendra D Sinha vs. Union of India[29] The Apex Court emphasized that there can be no denying of the fact that right to life guaranteed under Article 21 of the Constitution surely include a right to clean water In *Narmada bachao Andolan vs Union of India*[30] justice B.N.Kripal observed:

"Water is the basic need of the human being and part of right to life and human right as enshrined in Article 21 of the Constitution of India"

In *D.K Joshi vs. State of U.P*[31] and *Dr. Ajay Singh Rawat vs. Union of India*[32] it was alleged that the water supplied for drinking was extremely polluted and unhealthy for human consumption. The writ petition was filed under Article32 of the constitution which only for enforcement of Fundamental Right. It is implied that right to water which is a component of environment is considered as Fundamental Right. Various High Courts also passed judgments on clean water.[33]

X. Right to Freedom of Trade and Occupation and environmental protection: - Freedom of trade and occupation may come into conflict with the right to protection of environment. In *Basudeva Yadab vs. state*

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28 *Andrapradesh State Board for Prevention and Control of Water Pollution- Vs- Andrapradesh Rayon Ltd.*, AIR 1989, SC. 611.

29 *Surendra D Sinha vs. Union of India* (2003) 3 SCALE 533.

30 *Narmada Bachao Andolan vs. UO I*, 2000 10 SCC 664

31 *D. K. Joshi vs. State of UP* (1997) SCALE 181.

32 Ajoy Singh Rawat -Vs- Union of India, (1995) 3 SCC 266.

33 *Hamid Khan vs. State of U.P AIR 1997 M.P. 191, F.K. Hussain vs. Union of India AIR 1990 KER 321, S.K Garg vs. State of U.P, AIR 1999 All 87, Attakoya thangal vs. Union of India, 1990 KLT 580.)*

of Bihar[34] question arose that saw mill industry may cause illegal and indiscriminate felling of trees which is a threat to the environment. The Patna High Court held that the fundamental right to trade and business must be read with Articles 14, 21, 48(A) and 19(A)(g) of the constitution to maintain a balance.

The Patna High Court dealt with a tyre retreading company, discharging carbon dioxide and polluting the environment in *Rajesh Singh Buddhpriya vs Patna Regional Development Authority*[35] The Court stressed the fundamental duty under Article 51 (A) of the constitution to say that the industry was wound up the better it would be.[36] To high light the duty of the State, the Supreme Court in[37] emphasized that Article 39 (e), 47 and 48(A) of the constitution cast a duty on the state to secure the health of the people, improve public health and protect and improve the environment.

Regarding regulatory power of the state, the question arose in *M.P. Rambabu vs. Divisional Forest Officer*[38] that the state, in absence of a statute other than Coastal Regulation Zone, could not regulate aqua cultures in the region. The Court held that under Article 162 of the constitution the state has jurisdiction to deal with all matters where it has legislative competence.

XI. Right to pollution free air: - Air is the most important component of biosphere without which no living organism can survive. Pollutants in biosphere cause serious problem for living organism. Air pollution is an international problem. In 1957 invited the attention of world community

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34 Basudev Yadav vs. State of Bihar AIR 2002 Pat 64.

35 *AIR 2002 Pat135*

36 *P Leelakrishna, "annual Survey of Indian Law" 2002 p310.*

37 *M.C. Mehta vs. Union of India AIR 2002 SC 1696*

38 AIR 2002 AP 256

and a Clean Air Conference was held in London. Subsequently a major step was taken under the Stockholm Declaration 1972, under the directives of which India Enacted the Air (Prevention and Control of Pollution) Act 1981. Under section 2 (b) of the Air Act, the term air pollution means the presence in the atmosphere of any air pollutant. In the light of section 2 (a) of the Act air pollutant refers to any solid, liquid or gaseous substance present in the atmosphere in such concentration as may be or tends to be injurious to human beings or other living creature or plant or property or environment. The effect of air pollution on human being is the diseases like bronchitis, asthma, and heart attach lung cancer, and various types of occupational diseases, mental abnormalities. Acid rain is the most noteworthy effect of air pollution on the atmosphere. When sulpher dioxide combined with nitrogen and water vapor, it results into acid rain resulting into destruction of vegetation and damage strong structures and buildings. Historical monuments world over are the likely victims of acid rains.

Vehicular pollution case[39] is really a great success that Government of India revealed that the vehicular pollution contributes 70% of the air pollution as compared to 20% in 1970. Information obtained by the Supreme Court during the pendency of the case shown that air pollution related diseases in India include acute respiratory disease causing 12% of deaths, chronic obstructive pulmonary disease, lung cancer, asthma, tuberculosis, prenatal deaths, and cardiovascular disease and blindness. There has been a considerable increase in respiratory diseases especially amongst children. There are nine other cities in India where the air quality is critical. These include Agra, Lucknow, Kanpur, Faridabad, Patna and Jodhpur. Taking all these factors into consideration, the Supreme Court relied on the Precautionary Principle and issued directions from time to time for controlling pollution to some

39 *M. C. Mehta vs. UOI* 1991 (2) SCC 137. (Vehicular Pollution Case

extent. Some of these directions include:

1. Lowering of sulphur content in diesel, first to 0.50% and then to 0.05%.

2. Ensuring supply of only lead-free petrol.

3. Requiring the fitting of catalytic converters in vehicles.

4. Directing the supply of pre-mix 2T oil for lubrication of engines of two-wheelers and three-wheelers.

5. Directing the phasing out of grossly polluting old vehicles.

6. Directing the lowering of benzene content in petrol.

7. Ensuring that new vehicles, petrol and diesel, meet Euro II standards.

As a result of various orders of this kind passed by the Supreme Court, an authority called the Environment Pollution (Prevention & Control) Authority has now been set up to monitor pollution levels in Delhi and other cities and takes remedial steps. Strict enforcement of orders passed by the Supreme Court has ensured that Compressed Natural Gas (CNG) is introduced in all forms of public transport in Delhi including buses, taxis and auto-rickshaws. All these vehicles have been converted to a single fuel mode on CNG, the time frame having expired on 31

March 2001. Authorities dealing with the production of CNG have also been directed to ensure that its supply is available and steady. The result of all this has been that the quality of air in Delhi has considerably and visibly improved over the years, as any frequent visitor to Delhi would certify. In so far as air pollution control is concerned, the *Vehicular Pollution cases*[40] have shown how to effectively monitor a clean up of the environment and thereby achieve success in the venture.

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40 *M. C. Mehta vs. UOI* 1991 (2) SCC 137. (Vehicular Pollution Case

The effect of air pollution in the biosphere is green house effect, acid rain, and reduced rainfall etc. Excess concentration of carbon dioxide increases the heat of atmosphere. Carbon dioxide is opaque for the thermal radiation and therefore, absorbs the heat of the earth. Hence the temperature of the earth is increasing. Carbon dioxide is transparent for solar radiation i.e. it helps ultraviolet and infrared radiations to reach the earth. Every source of energy contains sulpher and nitrogen, when burnt in presence of atmospheric oxygen, gets converted into their respective oxides. Sulpher dioxide and nitrogen dioxide are highly soluble in water. During rain these oxides react with water vapor and produce acids, sulphuric acid, nitric acid, and nitrous acid and then return to the earth surface with rain water which is very dangerous to living organisms as they can destroy life.

XII. Right against noise pollution: - Noise is the result of modern scientific development. Noise is unwanted or undesired sound, a mechanical energy from a vibrating surface transmitted by a cyclic series of compressions and rare fraction of molecules of the material through which it passes. Noise is excessive, offensive, persistent or startling sound.[41] Legally, noise pollution is the wrongful contamination of the atmosphere due to unreasonable use of sound that if materially and adversely injures the right of an individual to be let alone or interferes in his freedom to lead his life in a manner of his choice. But law does not favour absolute right, therefore, even the right to be let alone is subject to the right of others to exercise their right like the right of freedom of speech and expression.[42]

Article 9 of the Chicago convention 1944 forms the international legal basis for the regulation of aircraft noise. In England several legislations especially, the Noise Abatement Act, 1960, have been introduced to

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41 Encyclopedia Britannica, Vol-6 p- 558, (1968)

42 *Dr. Veena Madhav Tonapi, "Noise Pollution: Are the Laws Audible" AIR (Journal) 2005 p-152.*

control noise. In the United States, the Noise Pollution and Abatement Act 1970 controls noise.

In India noise is being doubled in every ten years. The noisiest cities are Delhi, Calcutta and Madras where noise level is 95 decibel where as the permissible limit of noise is 80 decibel. People working in the factories and construction sites and pilots are the most effected persons by noise. The hearing capacity is affected by noise resulting into deafness. Social behavior is also affected by noise. A significant association between noise and pregnancy complications and psychosomatic disorders has also been reported.[43]

The earliest law dealing with noise pollution is Madhya Pradesh Control of Music and Noise Act 1951 which prohibited loud music, use of loud speaker, or sound amplifier, by any person and makes such use punishable with imprisonment for one month or fine not exceeding Rs 100. Other state made laws on noise pollution are Bihar Control of the Use and Play of Loudspeaker Act of 1955, Orissa Fireworks and Loudspeaker Regulation 1958, Uttar Pradesh Nagar Mahapalika (Prohibition of Noise and Regulation of Loudspeaker Rules 1987, Noise Pollution (Regulation and Control Rules) 2000 under the environment (Protection) Act 1986. it is to be noted that the Bengal Motor Vehicle Rules 1940 though it is not specifically on noise but under section 114 of the Rules, it was provided that every motor vehicle shall be fitted with a horn or other device to give sufficient warning of the approach of the vehicle. It should not be fitted with a multitoned horn giving a succession of different notes or with other device giving unduly harsh shrill loud or alarming noise. Moreover, under section 100 of the Motor

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43 Cohen S and Weinstein N, "Non-auditory effect of noise on Behabiour and Health", Journal of Social Issues, 371 1981 p-36.

Vehicles Act 1988, the Central Government is empowered to frame rules for the up keeping of motor vehicles noise standard.

Noise pollution has an immense nuisance value. Therefore, the common concept of nuisance is extended to noise pollution. Provisions pertaining to nuisance can be traced in the Civil Procedure Code 1908, Indian Penal Code 1860, and Criminal Procedure Code 1973. In *Ivour Hyden vs. State of Andhra Pradesh* [44] the court observed that the playing of a radio at reasonably moderate velocity is tolerable but not at a high velocity which would be objected to by a man very busy with mental work and would amount to nuisance. It is also to be noted that the Court in *Krishna Panicker vs. Appukuttan Nair*[45] held that the special law on environment did not repeal the law on public nuisance.

XIII. Right to protection and conservation of forest:- Right to live in the forest under the individual or common occupation for habitation or for self-cultivation for livelihood. Indigenous people or aboriginal people in India have a relationship with their natural environment. The tribal people of India are analogous to those of Africa and Americas, particularly in the sense of their connection with their land, their religion is based on their relationship with their natural environment, and their economy involves a close dependence on the forest and a high degree of self sufficiency. [46]

XIV. Right of animals against hunting: - In our culture, tradition and religion animals occupy a very important place. Every god and goddess is somehow associated with animals. Conservation of plants and animals was a tradition in India. The Elephant Conservation Act 1879 and Wild Birds Protection Act 1887 were two earliest enactments in India to protect Animals. Under the Indian Constitution, wild life was a state subject, but it was shifted to concurrent list by the 42nd Amendment Act

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44 *Ivor Hyden vs. State of AP 1984 Cr.LJ 16 (NOC)*
45 *Krishna Paniker vs. Appukuttan Nair 1993 (1) KLJ 725.*
46 *Sardar Sarovar: report of the independent review : Narmada Bachao Andolan ,Bombay p-63.*

1976 with the object of protecting wild animals, birds and their habitats to ensure ecological and environmental security to the country. The Wild Life Protection Act 1972 was passed which was amended in 1991and 2002 to make it more effective and beneficial.

Under the Act animals specified in schedule-I cannot be hunted by any person. Animals specified in Schedule II, III, and IV can be hunted by a license. But hunting is prohibited by using vehicles, aircraft, chemicals, explosives, poison, poisoned weapons, nets, pitfalls without trapping license. No person shall hunt any animal by setting fire, or during nighttime, during closed time, or with the help of dog.

These provisions clearly establish two things- (1) inhuman killing of animals is prohibited which is violative of their right and (2) capture of wild animals and keeping away them from their natural environment as pets is also prohibited.

XV. Right to environmental health information:- While the Constitution guarantees the fundamental freedom of speech and expression,[47] no such guarantee exist for right to information. Right to access relevant and authentic information is very crucial over environmental issues. It enables one to know and understand about the kind of impact of any activity would have on his environment besides forewarning about mishap, helping in taking pre-cautionary measures, and felicitating participation in the process of environmental planning and decision making. In the absence of a clear articulation of such a right it was left to the Court to clearly carve out this right as an integral aspect of the freedom of speech and expression. A catena of case law exist that demonstrate judicial recognition of the right of the citizens to know as flowing from the fundamental freedom of speech and expression and the fundamental right to life and personal liberty. Following on the recognition of general right to information, the courts soon began getting

47 *Article 19 (a)*

in to the specifics of the right. In a case that involved rejection of the legality of certain of the actions of the Pune Cantonment Board,[48] the Bombay High Court held that the right to know was implicit in the right to free speech and expression. As such, disclosure of information as to the functioning of the Government should be the norm and secrecy an exception justified only where the strictest requirement of public interest so demand, if opined.[49]

No explicit definition of "environment and health information" or "information related to environment and health matters" exists. In some countries, mainly in the West, where a definition of "environmental information" has been developed, it does not always cover or only partly covers environment and health aspects. For example, the EU Directive 90/313/EEC does not explicitly cover health aspects, nor do the regulations that implement it in some countries. There are differing views on whether the EU directives definition of "information relating to environment" includes some of the environment and health aspects. In Germany, for example, the definition provided by the Federal Environmental Information Act (UIG, 1994), based on the EU directive, is considered to cover general information on environment. It covers environment and health matters in respect to water, soil, air, fauna, flora and their habitats; activities producing environmental impact including noise; and activities and programmers aimed at environmental protection.[18] At the same time, in the UK, Italy and Ireland, it has been considered unclear whether the EU directive adequately covers health aspects. The UK government felt the need to specify that the EU directive also addresses information related to human health: "The Regulations do not make explicit reference to information related to human health. Nevertheless, the environment clearly impacts on human health -

48 (Bombay Environment Action Group Vs. Pune Cantonment Board SLP No. 11291 /1986)

49 *M. K. Ramesh, "Environmental Justice: Courts and Beyond" IJEL 3 2002, p-29*

directly or through the food chain - and to this extent information affecting the state of human health should be covered. This would be achieved indirectly insofar as humans respond to physical, chemical and biological agents delivered via the environmental media of water, air, land, etc.[50] The definition of "information related to the environment" has not been extensively tested in courts, especially regarding how thoroughly it covers environment and health information.

The Italian Decree on Environmental Information (n. 39/97) includes a list of activities on which information can be requested under the category of "environmental information." These activities include the following: waste management in water or soil; air emission; consumption of water; traffic; production or consumption of energy; toxicological, epidemiological data; radioactive emissions; contaminated sites; building and road structures; and noise and vibrations.[51]

In Ireland, the Directive is implemented through the European Communities Act (1972) and Access to Information to the Environment Regulations (1998), which makes "information on the environment held by public authorities" available to any person. The legal position on the implementation of the EC directive through these regulations does not clearly define "environmental information." As the 1998 regulations do not provide statutory grounds for defining the subject matter, it may be necessary to interpret the 1998 regulations in the light of Directive 90/313. However, it is intended in principle that these regulations can be used to gain access to information on the environment whether or not

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50 Access to Information, Public Participation in Decision-making...," Country Report on Italy, p.202.

51 Access to Information, Public Participation in Decision-making...," Country Report on Italy, p.202.

environmental pollution has implications for human health. [52]Despite all the uncertainties, the reporters preparing country surveys for this overview are not aware of any particular difficulties in obtaining information related to environment and health matters on the ground that such information is not covered by the definition.

In most of the NIS and CEE countries examined in this report there is no definition of "environmental information," and most legislation does not contain references to environment and health related matters. However, the new access to environmental information laws in the Czech Republic and Slovakia, adopted in the summer of 1998, already include a definition of "environmental information" which has some environment and health aspects. In the other CEE and NIS countries, the definition of "environmental health" can be deduced either from the definition of environment and/or from different laws.

In many of the reported countries environmental protection laws or health laws define some of the components or factors having an impact on health and environment. For example, the Estonian Law on EIA defines environmental impact as the direct influence of a planned activity on the state of human health and the environment.[53] Similar links are established in the draft Environmental Protection Act of Poland and the Environmental Protection Laws of Montenegro, Hungary, Slovenia, Romania, Latvia, etc.

The NIS environmental laws usually tend to cover information on the elements and state of the environment, measures to protect them, and, unlike Western countries, include aspects of human health. On the other

52 Access to Information, Public Participation in Decision-making...," Country Report on Estonia by Maret Merisaar, p. 160

53 Access to Information, Public Participation in Decision-making...," Country Report on Estonia by Maret Merisaar, p. 160

hand, they do not cover important aspects such as information on policies, programmes, plans, legislation, or economic analyses used for environmental decision-making. They also fail to cover elements such as landscape, energy, noise, biological diversity, and GMOs.[54] Some of the CEE countries have a more flexible approach, and, in addition to the above, they cover information on policies, programmes, plans, legislation, economic analyses used for environmental decision-making, (especially Poland, Hungary and the Czech Republic). However, they also fail to cover some of the other elements. Recently, they were developing definitions similar to the EU directive.

Only a few NIS and CEE countries use the term "environmental health" in their health legislation, but they often establish a link between health and environment. The Act on the National Public Health and Medical Officer Service (XI, 1991) of Hungary is the only law which uses the term "environmental health" when defining one of the tasks of the service as "to examine the environment and health issues." Furthermore, this act also gives a detailed description of what areas this should cover.

Hungary's Act CLIV of 1997 on Health, subtitled "Environmental and Community Health," contains several articles dealing with different components of environment and health activities, health impairment caused by environmental factors, prevention of health impairment, investigation measures, etc. In Article. 45 it states: "The purpose of [activities pertaining to] environmental and community health is to examine effects injurious to health in the environment and reveal the opportunities of prevention." In the chapter "Prevention based on individual risk factors" it states: "In order to prevent health impairment

54 Doors to Democracy÷, Vol. 4 A Pan-European Assessment; Chapter 1, Access to Environmental Information, by Jeremy Wates, p. 18.

stemming from environmental risk created by any activity in communities, the goal of public health activities is to search for the causing factors, stop them, regularly control them and eliminate the consequences.[55]

The Law on Public Health of Estonia (1995) defines the living environment as the total of factors of natural, artificial and social environment, which influence or may influence people's health.

Among the Newly Independent States (NIS) countries, several health laws contain references to the information on the state of environment and the population health, on the epidemiological situation, on acting sanitary rules and regulations, on measures taken to provide sanitary-epidemiological safety and the results of these measures, on the quality of produced goods including meals, and quality of drinking water. For example, the Russian Federation Law on Sanitary-Epidemiology-cal Safety of the Population (Art. 5, part 3), states, "citizens have the right to request information from business and governmental bodies."[25] Similarly, the Ukrainian Law on the Fundamentals of Legislation of Ukraine on Health Care contains several references to health and environment: the protection of people from negative ecological influences, the security for sanitary well-being, the creation of favorable conditions for healthy working, living and rest conditions, etc. (1992, Art. 25-32). Also, the Law on Health Care and the Law on Sanitary-

55 *Access to Information, Public Participation in Decision-making...," Country Report on Hungary by Olga Kekesi, p. 182.*

Epidemiological Well-Being of the Population of Belarus contain elements related to environment and health. [56]

The definition of "environmental health" or "environment and health matters" is essential for the definition of "environment and health information." The "health and environment" notion encompasses the health consequences of interactions between human populations and a whole range of factors in their physical - man and non-man made - and social environment. [57]The scope of this definition may be understood differently from country to country and within countries themselves, as differing perspectives emerge from public authorities, the private sector and the public. This might often lead to confusion and numerous difficulties when individuals and NGOs need to have access to certain types or categories of information related to environment and health matters. The difficulty in defining "health and environment" might also cause problems in court cases. Similarly, there might occur problems of interpretation for public authorities, which have certain obligations or public responsibilities in the field of providing access to or disseminating information on environment and health matters to the public. Therefore, there is a need for a better and clearer focus in the meaning of "environment and health information" in the countries as part of their legal systems.[58]

In this respect, the Aarhus Convention, which is the most comprehensive international legal instrument on access to information and public participation in decision-making and access to justice in environmental matters, might give useful guidance. The convention

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56 *Access to Information, Public Participation in Decision-making...," Country Report on Belarus, p. 114.*

57 *WHO Program for the Promotion of Environmental Health (PEH)*

58 *See Box 1: "Focus Areas of Environmental Health" on page 14.*

contains a link between "environment and health" (in Art. 1, Objective) and it even covers several aspects of environment and health matters in its information pillar. The convention includes in the definition of "environmental information" a qualified but explicit reference to human health and safety, and conditions of human life. The definition of "environmental information" includes "any information, in written, visual, aural, electronic or any other material form, on:

a) The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and interaction among these elements;

b) Factors, such as substances, energy, noise and radiation and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programs, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.[59]

However, since the Aarhus Convention was not developed with a health focus, it is unclear what kind of "information related to environment and health" is exactly covered by this definition, and it would be useful to clarify the scope of such information. It would be also desirable to make clear that this scope includes at least the same

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understanding regarding information on environment and health as used in the definition of "environmental health" by the WHO Regional Office for Europe. This definition of "environmental health" which has been used by the WHO Regional Office for Europe underpinning the European Charter on Environment and Health adopted in Frankfurt in December 1989, includes the following factors: "both the direct and pathological effects of chemicals, radiation, and some biological agents, and the effects (often indirect) on health and well-being of the broad physical, psychological, social and aesthetic environment, which includes housing, urban development, land use and transport.[60]

There are countries, which use a broad approach to all information and make a distinction in definition of "data of public interest" or "personal data." In Hungary, for example, "data of public interest" means any information under processing of authorities performing functions of state or local self-government, except for personal data and information, which is subject to exceptions specified under the Act of Protection of Personal Data and Disclosure of Data of Public Interest (Act. No. LXIII of 1992, Art. 2, paragraph 3). "Personal Data" means any data relating to a specified natural person (hereafter called data subject) and any conclusion drawn from such data with respect to him or her. As long as the subject of the data can be identified by the data, the information in question falls under this category (Art. 2 paragraph 1). Here, everything is considered "data" or "information of public interest" if it is not protected as "personal data" or by other exemptions. "Environmental information" or "environment and health information" is considered to be information of public interest and therefore it belongs to the public

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60 *Convention on Access to Environmental Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Aarhus, June 25, 1998. Article 2, par. 3, on definitions*

domain. Such information should be publicly accessible unless covered by well-defined exemptions, but "personal data" should be always protected under Hungarian law. In most countries, the definition of "personal data" includes part of the health information regarding the individual's health.[61]

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

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61 *Convention on Access to Environmental Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention); Aarhus, June 25, 1998. Article 2, par. 3, on definitions, Annex E.)*

15) ascertains a balanced and healthful ecology. 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[62] 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 for the purpose of saving the species from extinction as also for arresting depletion in their numbers caused by callous exploitation thereof."

XVI. Right to environment of prisoners

Prisoners are sent to prison as punishment. The loss of an individual's right to liberty is enforced by putting in a closed environment. Keeping the individual in the custody of the state should not have a deleterious effect on him. Prisoners have unalienable rights conferred upon them by international treaties and covenants; they have a right to health care, and most certainly have a right not to contract diseases in prison.

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62 *AIR 2003 SC 3255*

Prisoners should not lose all their rights because of imprisonment. Yet, there is a loss of rights within custodial institutions, which continue to occur. Public health policies are meant to ensure the best possible living conditions for all members of society, so that everyone can be healthy. In India, over crowding in prison has aggravated the problem of hygiene. In many jails, conditions are appalling. Prisoners in India are not even tested for specific infectious diseases, although all prisoners undergo a medical examination when they begin serving their sentence.

The Supreme Court of India in its landmark judgment in *Parmanand Katara vs Union of India* (1989) and others ruled that the state has an obligation to preserve life whether he is an innocent person or a criminal liable to punishment under the law. With specific reference to health, the right to conditions, adequate for the health and well being of all was already recognized in the Universal Declaration of Human Rights. The International Covenant on Economic, Social and Cultural Rights (ICESR) furthermore states that prisoners have a right to the highest attainable standard of physical and mental health.

The minimum standard rules for prisoners regulate the provision of health care for them. Apart from the civil and political rights, the so-called second-generation economic and social human rights, as set down in the ICESCR, also apply to prisoners. The right to the highest attainable standard of health should also apply to prison health conditions and health care. This right to health care and a healthy environment is clearly linked, particularly in the case of HIV, to other first generation rights, such as non-discrimination, privacy and confidentiality. Prisoners cannot fend for themselves in their situation of detention, and it is the responsibility of the state to provide for health services and a healthy environment.

Human rights instruments call for prisoners to receive health care at least equivalent to that available for the outside population. On one hand, equivalence rather than equity has been called for because a prison is a closed institution with a custodial role that does not always allow for the same provision of care available outside. Prisoners are more likely to already be in a bad state of health when they enter prison, and the unfavorable conditions therein worsen the health situation. Hence the need for health care and treatments will often be greater in a prison than in an outside community. However, providing even basic health care to prisoners has proved extremely difficult in India, as the health system is chronically insufficient. In prisons, the human environment is often one of violence and high-risk lifestyles, either engaged in voluntarily by those prisoners with positions of power, or forced upon the weaker prisoners. Prisoners have a right to live in conditions where their individual safety is guaranteed. It is paramount for the prison administration to have a thorough knowledge of how HIV is likely to be transmitted in a given prison. If sexual coercion and/or violence are the main issue, better surveillance and timely intervention to protect targeted prisoners must be enforced. HIV-positive inmates should not be denied access to recreation, education or access to the outside world.

Both prison reform and penal reform are crucial elements if the many problems affecting the Indian prisons are to be resolved. Diminishing the overall prison population will allow improvements of the physical and working conditions of the prisons, and help to ensure the security of all individuals in custody. Obviously, financial resources will have to be allotted to the prison systems as well. One effective way to curb the rise in prison populations would be to offer alternatives to imprisonment for non-violent and civil offenders.[63]

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63 *Madhu Tyagi, "Health Care for Prisoners"*

XVII. Right to health of mentally ill persons.

The 1971 Declaration on the Rights of Mentally Retarded Persons adopted by the General Assembly on 20th December 1971, keeping in view the necessity of providing help to mentally retarded persons in order to enable them to develop their abilities and promoting their integration in the normal life. The Declaration provides a framework within which national and international actions should be initiated for the advancement of rights set forth in the Declaration

The Declaration lays down following principles:

1. The mentally retarded persons have to the maximum degrees of feasibility the same rights as other human beings.
2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.
3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.
4. The mentally retarded person, whenever possible should live with his own family, or with foster parents and participate in different forms of community life. The family with which he lives should be provided with assistance.
5. The mentally retarded person has a right to qualified guardian when this is required to protect his personal well being and interests.
6. Disabled persons are entitled to have their special need taken into consideration at all stage of economic and social planning.

7. Disabled persons have the right to live with their families or with foster parents an to participate in all social, creative or recreational activities.
8. Disabled persons shall be protected against all exploitation, and treatment of a discriminatory, abusive or degrading nature.
9. Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their person and property. If judicial proceeding is instituted against them, the legal procedure applied shall take their physical and mental condition fully into account.

Human Rights and Mental Health Act, 1987 under Chapter VIII contains a very noble and explicit provision of protection of human rights of mentally ill persons. Section 81 provides that-

1. No mentally ill persons shall be subjected during treatment to any indignity whether physical or mental or cruelty.
2. No mentally ill person under treatment hall be used for the purpose or research unless (i) such research is of direct benefit to him for the purpose of diagnosis or treatment, or (ii) such person being a voluntary patient has given his consent in writing or where such person is incompetent by reason of minority or otherwise to give valid consent, on his behalf, has given his consent in writing, for such research.

3. Subject to any rules made in this behalf under Section 94 for the purpose of preventing vexatious or defamatory. Communication or Communications pre-judicial to the treatment of mentally ill persons, no letter or other communications sent by or to a mentally ill persons under treatment shall be intercepted, detained or destroyed. The doctrine of informed consent is partially recognized under the Mental Health Act 1987, when a patient voluntarily admits himself in the hospital or accepts treatment without any admission.

When a mentally ill patient detained as an inpatient and does not have property to bear the cost of treatment, in such cases his expenses shall be borne by the Government of the State. (Sec. 78) If a mentally ill patient owns a property and he is not in a position to manage his property, the Court may entrust the management of such property to the Court of wards, Section 54(1). Under Section 97 of the Act when a mentally ill person is not represented by a legal practitioner in any proceedings under Mental Health Act 1987 before a District Court or a Magistrate and such a patient does not have sufficient mean to engage a legal practitioner then the District Court or Magistrate shall assign a legal practitioner to represent him at the expense of the State.

The above provisions clearly indicate that the Act does not spell out much on Human Rights, nor does it covers neglect or cruelty to mental patient sustained in families or alternate system of care like magicians, healers and quacks. The Mental Health Act 1987 also does not spell out any enforceable right of the mentally ill to minimum standard of care and treatment. The Good faith clause (Section 92) dispenses with accountability of the government or its servants for any negligence in the care and treatment of inmates of asylums. The provision for legal aid to the mentally ill (Section 91) restricts the facility to proceedings before a District Court or a Magistrate. The Act is silent on the right to legal aid and counseling at all stages including the facility of approaching the High Court or the Supreme Court.

The Mental Health Act also by its definition of mentally ill persons excludes from its regime the mentally retarded. It also does not differentiate between the various degrees of mental illness that requires specialized care and treatment. However, it permits the commitment to hospitals of the criminal mentally ill. It makes no special provision for their care, treatment and discharge. Beside the above, there is no

provision for compensating those wrongfully incarcerated or negligently treated or victimized in any manner by misuse of powers under the Act. Another important shortcoming in this context is that there is no right to rehabilitation of those mentally ill discharged after being found fit.

It is submitted that it is a matter of regret that judiciary in India was given opportunities in number of public interests litigations filed and which were relating to inmates of mentally ill patients, but unfortunately, it did not dare to enumerate the human rights of mentally ill patients. The Supreme Court had occasion to consider the matter concerning the management of mental hospitals in a number of cases[64]

The subject of health falls under the concurrent list in the Indian Constitution empowering both the centre and states to introduce measures including the authority to legislate. The Mental Health Act 1987 is civil rights legislation with a focus on regulating standards in mental health institutions. There are serious questions over the effectiveness of this Act in ensuring protection to person's property and management of persons covered.

A perusal of the above referred cases clearly revel that until recently many mentally ill persons were consigned to jails and those living in mental health institutions were no better off, as the conditions both in prisons and in mental institutions were far below the stipulated standards. *Sheela Barse v. Union of India*[65] concerned the detention of non-criminal mentally ill persons in the jails of West Bengal. The appalling conditions in which they were held, was noted by the Supreme

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64 *Supreme Court Legal Aid Committee v. State of MP , where the Supreme Court intervened to improve the working of the Gwalior Mental AsylumIn B.R. Kapoor v. Union of India and PUCL v. Union of India, [64] both relating to functioning of the hospitals for mental diseases, Shahdara, Delhi. R.C. Narayan v. State of Bihar and the order dated 11.11.97 the case concerning the Ranchi Mental Asylum*

65 *AIR 1988 SC 2211*

Court which observed that admission of non-criminal mentally ill persons to jails is illegal and unconstitutional.

Similarly in *Chandan Kumar v. State of West Bengal* the Supreme Court heard of the inhuman conditions in which mentally ill persons were held in mental hospital at mankaundi in the District of Hooghli. The Court denounced this practice and ordered the cessation of the practice of tying up the patients who wee unruly or not physically controllable with iron chains and ordered medical treatment for these patients. However on August 6th 2001 the indifference of state and private authorities resulted in the tragic death of 26 patients in Erwadi as they were tied to their beds when fire engulfed the building. Following this tragedy the National Human Rights Commission of India(NHRC) advised all the Chief Ministers to submit a certificate stating no person with mental illness are kept chained in either government and private institutions.

The NHRC is mandated under section 12 of the protection of Human Rights Act 1993 to visit government run mental hospital to study the living conditions of inmates and make recommendation thereon. In 1997 project quality assurance in Mental Health Institutions was initiated to analyze the conditions generally prevailing in 37 government run mental hospitals and departments. The findings of this study confirm that mental hospitals in India are still being managed and administered on a custodial mode of care. Characters sized by prison like structure with high walls, watch towers, fenced wards and locked cells. Mental Hospitals are like detention centers where persons with mental illness are kept caged in order to protect society from the danger their existence poses.

XVIII. Right to environment of disabled persons

The General Assembly on 16th December 1978, decided to observe the Year 1981 as International Year for Disabled persons with the following objective:

1. Helping disabled persons in their physical and psychological adjustment to society.

2. Promoting all national and international efforts to provide disabled persons with proper assistance, training, care and guidance, to make available to them opportunities for suitable work and to ensure their full integration in society.

3. Encouraging study and research projects designed to facilitate the practical participation of disabled persons in daily life, for example, for improving their access to public buildings and transportation systems.

4. Educating and informing the public of the rights of disabled persons to participate in and contribute to various aspect of economic, social and political life.

5. Promoting effective measures for the prevention of disability for the rehabilitation of disabled persons

XIV. Right to health of workers

In Consumer education and research center vs. Union of India[66] the supreme Court observed that the right to health to a worker is an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which worker would lead life of misery. Lack of health denudes his livelihood. Compelling

66 *AIR 1995 SC 922*

economic necessity to work in an industry exposed to health hazards due to indigence to bread-winning to himself and his dependants should not be at the cost of the health and vigour of the workman. Facilities and opportunities, as enjoined in Article 38, should be provided to protect the health of the workman. Provision for medical test and treatment invigorates the health of the worker for higher production or efficient service. Continued treatment, while in service or after retirement is a moral, legal and constitutional concomitant duty of the employer and the State. Therefore, it must be held that the right to health and medical care is a fundamental right under Article 21 read with Articles 39 (c), 41 and 43 of the Constitution and make the life of the workman meaningful and purposeful with dignity of person. Right to life includes protection of the health and strength of the worker is a minimum requirement to enable a person to live with human dignity. The State, be it Union or State Government or an industry, public or private, is enjoined to take all such action which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live the life with health and happiness. The health and strength of the worker is an integral facet of right to life. Denial there of denudes the workman the finer facets of life violating Art. 21. The right to human dignity, development of personality social protection, right to rest and leisure are fundamental human rights to a workman assured by the Charter of Human Rights, in the Preamble and Arts.38 and 39 of the Constitution. Facilities for medical care and health against sickness ensures stable manpower for economic development and would generate devotion to duty and dedication to give the workers 'best physically as well as mentally in production of goods or services. Health of the worker enables him to enjoy the fruit of his labour keeping him physically fit and mentally alert for leading a successful life, economically, socially and culturally. Medical facilities to protect the health of the workers are, therefore, the fundamental and human rights

to the workmen. 27. Therefore, we hold that right to health, medical aid to protect the health and vigour of a worker while in service or post retirement is a fundamental right under Article 21, read with Articles 39(e), 41, 43 48A and all related to Articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person. 33. ... All the industries are directed: (1)To maintain and keep maintaining the health record of every worker up to a minimum period of 40 years from the beginning of the employment or 15 years after retirement or cessation of the employment whichever is later; (2)The Membrane Filter test, to detect asbestos fibre should be adopted by all the factories or establishments at par with the Metalliferrous Mines Regulations, 1961; and Vienna Convention and Rules issued thereunder; (3)All the factories whether covered by the "Employees State Insurance Act or Workmen's Compensation Act or otherwise are directed to compulsorily insure health coverage to every worker; (4)The Union and the State Governments are directed to review the standards of permissible exposure limit value of fibre/cc in tune with the international standards reducing the permissible content as prayed in the writ petition referred to at the beginning. The review shall be continued after every 10 years and also as and when the ILO gives directions in this behalf consistent with its recommendations or any Conventions; (5) The Union and all the State Governments are directed to consider inclusion of such of those small scale factory or factories or industries to protect health hazards of the worker engaged in the manufacture of asbestos or its ancillary products.

The rights of traditional tribal communities have been at the centre of many a struggle with the State. But it's another story when within the State machinery itself there are disagreements on if and how communities ought to control forest resources. The Government of India, Ministry of Tribal Affairs (MoTA) mooted a draft Scheduled Tribes

(Recognition of Forest Rights) Bill 2005 that was cleared by the Law Ministry in April 2005. The bill has been stalled by opposition from the Ministry of Environment and Forests (MoEF) on the grounds that it will be detrimental to safeguarding the forests and wildlife that thrives in them.

The aim of the Bill is to undo the legacy of discounting the time-honoured use and preservation of forest resources by tribals that has pervaded since colonial times. By recognising the rights of the forest-dwelling tribals, the bill seeks to protect them from being branded as "encroachers" and safeguard them against forced evictions. The Bill acknowledges 12 specific heritable but not alienable non-transferable "forest rights" of tribals in forest villages for "bonafide livelihood needs". The conditions for vesting such rights include a limit of up to 2.5 hectares of land per family which must have been in occupation prior to 25 October, 1980, the date on which the Forest (Conservation) Act came into force.

The list of these rights include:

1. Right to live in the forest under the individual or common occupation for habitation or for self-cultivation for livelihood

2. Right to access, use or dispose of minor forest produce

3. Rights of entitlement such as grazing and traditional seasonal resource access

4. Rights for conversion of leases or grants issued by any local authority or any state government on forest lands to titles

5. Right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving.

Parliamentarians supporting the bill are being accused by some as pursuing vote-bank politics to appease tribals. Questions are also being asked as to why only "scheduled" tribes are to be granted forest rights? The simple answer is that MoTA was established as an independent ministry in 1999 to deal specifically with scheduled tribes. The criteria for designating a tribe as "scheduled" include having 'primitive' traits, dwelling in geographical isolation, having a distinct culture, being shy of contact with the outside world and being economically 'backward'. There are more than 600 officially listed scheduled tribes in the country, comprising less than 10% of the country's total population and with little over 2% believed to be dwelling in forests.

The issue has turned into a battle for control between the MoTA and MoEF. There are also deep divisions between conservationists and tribal activists. The pro-tribals lobby argues that it is large developmental projects – such as large dams, power plants and mining activities – that need to be checked, rather than the forceful eviction of traditional forest-dependent communities to save the forests. Several groups contend that it is not tribals who are bringing in commercial activities into forests, but external commercial pressures that are degrading the forest resources and thereby eroding the traditional lifestyles of tribal communities. Meanwhile the more radical green groups warn against the land mafia misusing the provisions of the proposed law into conning unsuspecting tribals vested with land rights to part with their land in prime forest areas. They also fear that the proposed legal provision allowing for the "sale of forest-based products

for their household needs", would translate into large-scale commercialisation of forest resources.

Apart from the practical problems in implementing the Bill and working out its relationship with other conservation laws, there are certain problems within the text that would need to be addressed. There are several measures built into the Bill for conservation, but there remains a lack of clarity on what prevails in the event of such "rights" causing loss of wildlife, forest or biodiversity. For instance, if the collection of a medicinal plant becomes threatened, would the law restrict it? There is a penalty for unsustainable use, but who and how determines what is "unsustainable"? And would such collections be permitted in national parks or sanctuaries?

The neglected issue of traditional knowledge warrants more attention. Amongst the "forest rights" that the Tribal Bill seeks to grant is the right to access to bio-diversity and community rights to intellectual property and traditional knowledge related to forest biodiversity and cultural diversity. The approach to these rights appears to be in harmony with the Government of India's official pro-IPR policy, and is supported rather than contested by the various Ministries involved. The pro-IPR approach is clear in the draft National Tribal Policy 2 which is currently being revised. It states that the preservation and promotion of traditional wisdom is recommended through documentation of such traditional knowledge and its "transfer" to non-tribal areas. In the context of health, the National Policy mandates:

1. Strengthening the allopathic system of medicine in tribal areas.

2. Validating identified tribal remedies (folk claims) used in different tribal areas

3. Encouraging, documenting and patenting tribals' traditional medicines

Biodiversity-based traditional knowledge cannot exist without the resources on which it is based. Such systems of knowledge would not grow from a document but by a symbiosis of people and plants. What needs to be protected is the collective intellectual heritage of communities. This is different from advocating for a community to be made a legal entity for grant of a patent or other IPR, which implies the commodification of their knowledge. Conservation by the people can be made possible only if communities are given a stake in conserving. But in the context of traditional knowledge, IPR is not a helpful incentive to conserve knowledge.

There is doubt about the Bill being cleared in its present form. The Prime Minister's Office has asked the MoTA to reword its original Bill to reflect conservation concerns, while asking the MoEF not to push its rival "alternative draft". Hopefully in the end the tribals in the forest who are largely oblivious to these ongoing discussions will be more righted than wronged.

The government in making such a law would be fulfilling its electoral promise only if it facilitates the control of people rather than effecting controls. Self-governance is a critical issue for indigenous peoples whose systems of self-rule pre-date the modern state. The state must recognise this, and rights must not be dependent on the mere efficacy of a law drawn up today, often without the very people it proposes to right.

Right to Environment of other species.

The gradual development of an independent right to environment in India is based on judicial interpretations of Article 21 of the constitution. The other Articles dealing with the environment imposed a constitutional mandate for protecting and improving the environment. It seems that the right to environment is not confined to human beings, environment is a combination of many things and the word 'person' in Article 21 may include every entity having legal personality. In an American case namely, *Sierra Club vs. Morton*[67] Justice Douglas had stated:

"Inanimate objects may also be considered as invisible parties in environmental litigation."

The Supreme Court of India in *Indian Council for Enviro-legal Action vs. Union of India*[68] expressed a similar view. Justice B.P. Jeevan Reddy considered the effect of pollution on village Bichri and Quoted:

"yet the consequence of their action – remain the sludge, the long-lasting damage to earth, to underground water, to human being, to cattle, and the village economy"

The judgement speaks about the sufferings of animate as well as inanimate objects caused by accumulation of poisonous and noxious pollutants remained behind years after stoppage of the industry.

Limitations:-

The right to environment is a relative concept. The proper bounds of the right depends on the place and time where and when it is being exercised. In a developing country like India, economic development is more important. Therefore, right to environment does not prohibit

67 405 US 727

68 *Indian Council of Enviro-Legal Action Vs UOI,* 996 3 SCC 212.

reasonable and planned interference by developmental activities in the 'interest of the general public'. In *Municipal Corporation vs. Jan Mohd. Usmanbhai*[69] the Court held that the term 'in the interest of the general public' is of wide import comprehending public order, public health, morals, economic welfare, of the community, and the objects mentioned in part IV of the constitution.

The neglected issue of traditional knowledge warrants more attention. Amongst the "forest rights" that the Tribal Bill seeks to grant is the right to access to biodiversity and community rights to intellectual property and traditional knowledge related to forest biodiversity and cultural diversity. The approach to these rights appears to be in harmony with the Government of India's official pro-IPR policy, and is supported rather than contested by the various Ministries involved. The pro-IPR approach is clear in the draft National Tribal Policy 2005 which is currently being revised. It states that the preservation and promotion of traditional wisdom is recommended through documentation of such traditional knowledge and its "transfer" to non-tribal areas. In the context of health, the National Policy mandates:

1. Strengthening the allopathic system of medicine in tribal areas.

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3. Encouraging, documenting and patenting tribals' traditional medicines

4. Rights for conversion of leases or grants issued by any local authority or any state government on forest lands to titles

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69 (1986) 3 SCC 1988

5. Right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving.

Right to environment should recognize and respect the customary rights of the people. The tool of Public Interest Litigation may be used to raise the status of a customary right into a fundamental right. In *Nabipur Gram Panchayat vs. State of Gujrat*[70] the diversion of a common grassing land.

There is a growing perception among some intellectuals that forest laws infringe on the right of the rural people, especially the tribal communities as these laws come in the way of catering to their basic needs. It s perceived by some people that such laws and policies neither would be environmentally successful nor socially just. It is argued that forest conservation is possible only if people's right are recognized and established within a larger programme of tribal development. Another angle to this is that all laws without any exception infringe on the freedom of people in one way or the other and such legislations are enacted keeping the common good of the people and the country. The declaration of Protected Areas and the imposition of regulations under Wild Life Protection Act was almost always done without consulting with these communities and resulted in their right being terminated or abridged, or access to basic resources being cut off without adequate provision of alternative. Several protected areas are curved out of previously Reserve Forests. During the declaration, many of these Reserved Forests, especially during colonial times, the rights and needs of forest people were dismissed by official diktat, even though actual

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70 *AIR 1995 GUJ 52*

dependence on the forest continued. In many cases, villagers were brought from into forest and settled by Forest Department to provide labour in forestry operations. These developed in to full fledged villages who were largely dependent on forest resources and who were never moves back out after operation stopped. In both these cases the resource use were considered illegal or improper.

The most common impact of creating the parks and sanctuaries has been the curtailment or extinguishing of local community land and forest rights or access to natural resources inside protected areas. This has had a direct impact on their survival and livelihood base for even basic inputs like cooking energy, and fodder for livestock has become hard to obtain.[71] Therefore, forest conservation and wild life protection and above all the exercise of the right to environment should also take into consideration the need of the common tribal people. An unbalanced exercise of right to environment may result in to deprivation of other fundamental right like right to livelihood.[71]

The observation of the Chief Justice of India, B.N. Kripal is more useful in this regard. In *Namada Bachao Andolan,*[72] Justice Kripal observed that the displacement of the tribals and other persons would not per se result in the violation of their fundamental or other rights. The effect is to see that on their rehabilitation at new locations they are better off than what they were. At the rehabilitation site they will have more and better amenities than which they enjoyed in the hamlet. The existence of forest communities depends on a close and ecologically sustainable relationship with the forest they inhabit.

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71 *see*, Dr. Ashish Kothari, "Understanding Bio-diversity, Life, Sustainability and equity" (1997) Orient Longman Ltd. New Delhi.

72 *AIR 2000 SC 37510*

Animal and Environmental Legal Defence Fund vs. Union of India[73] is also a typical case in which the Supreme Court emphasized a balanced approach between right to environment and livelihood of forest dwellers. The Court observed:

> "while every attempt must be made to preserve the fragile ecology of the Forest areas and protect the tiger Reserve, the right of the tribals formally living in the area to keep body and soul together must receive proper attention. Undoubtedly, every effort should be made to ensure that the tribals, when resettled, are in a position to earn their livelihood."

This does not indicate that the forest dwellers have unrestrained right to access to all forests. If they are given right over standing trees, the right will definitely be subject to conditions imposed by regulations irrespective of whether they are framed by an old princely state or a new state.[74] *In Banawasi Sewa Ashram vs. State of Uttar Pradesh*[75] *and Karanjan Jalasay YASAS Samiti vs. State of Gujrat*[76] the Supreme Court considered the protection of the right of tribal forest dwellers who were being ousted from their forest land for the sake of a project. Similarly the court recognized the right to livelihood of the pavement dwellers in *Ogla Tellis vs. Bombay Municipality.*[77]

The right to environment should be exercised subject to the right to other generation and the international community as a whole. The main objective behind the principle of sustainable development and

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73 *Animal and Environmental Legal Defence Fund vs. Union of India AIR 1997 SC 1071.*
74 *Salehbhai Mulla Muhammadali vs. State of Gujrat AIR 1993 SC 335*

75 *AIR 1987 SC 374*

76 AIR 1987 SC 532

77 *Ogla Tellis -Vs- Bombay Munipality.* AIR 1986 SC 180

inter-generational equality is to stress this aspect of right to environment.

Remedy for violation of right to environment:-

I. Constitutional Remedies

1. Writ jurisdiction: - The regulatory mechanism provided in the constitution for prevention of environmental degradation is Article 32 and 226, which empower the Supreme Court and High Courts wide latitude to issue orders and directions and writs. A writ of mandamus may be issued to command any action by any authority vested with power and wrongfully refuses to exercise it. Against any duty created by the constitution or a statute or some rule of common law which is mandatory, a writ of mandamus may be issued.[81] For instance against Pollution Control Boards for not taking action against any polluting industry, Municipalities not constructing sewers and drains or not cleaning streets and clearing garbage, a writ of mandamus may be issued. The writ of certiorari and prohibition may issued in case of exercising excess jurisdiction, violation of the rules of natural justice, unconstitutional acts error apparent on the face of the record, facts not supported by evidence. For example granting permission by the Municipality for construction against development rules, may be challenged by the writ of certiorari.

The writ jurisdiction of the Courts is though wide but not unlimited. The Courts imposed restrictions on their own jurisdiction. These restrictions relate to locus standi, resjudicata and limitation. Traditionally, an aggrieved person i.e. directly affected person only can move the court.[78] But during 1980s, The Supreme Court recognized that

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78 *(1905) 9 CWN 612*

where a public wrong or public injury is caused by the State, any member of the public acting in good faith can maintain an action for redress.[82] Relaxation in the doctrine of *locus standi* rapidly increased the number of Public Interest Litigations providing easy access to higher courts which yield good result particularly in the development of modern environmental jurisprudence in India. Most important judgments in relation to environmental pollution in India are the outcome of Public Interest Litigations. It became the source of speedy and effective solution of public grievances.

2. Public Interest Litigation: Public Interest Litigation popularly known as PIL can be broadly defined as litigation in the interest of the public in general. Prior to 1980s, only the aggrieved party could personally knock the doors of justice and seek remedy for his grievance and any other person who was not personally affected could not knock the doors of justice as a proxy for the victim or the aggrieved party. In other words, only the affected parties had the locus standi to file a case and continue the litigation and the non-affected persons had no locus standi to do so. And as a result, there was hardly any link between the rights guaranteed by the Constitution of Indian Union and the laws made by the legislature on the one hand and the vast majority of illiterate citizens on the other.

However, this entire scenario gradually changed when the post emergency Supreme Court tackled the problem of access to justice by people through radical changes and alterations made in the requirements of locus standi and of party aggrieved. The splendid efforts of Justice P N Bhagwati and Justice V R Krishna Iyer were instrumental of this juristic revolution of eighties to convert the apex court of India into a Supreme Court for all Indians. As a result any citizen of India or any consumer groups or social action groups can approach the apex

court of the country seeking legal remedies in all cases where the interests of general public or a section of public are at stake. Further, public interest cases could be filed without investment of heavy court fees as required in private civil litigation.

The Public Interest Litigations (PIL) in India initiated by the Hon'ble Supreme Court emerged through human rights jurisprudence and environmental jurisprudence. The Hon'ble judges have introduced PIL in Indian Law. The traditional concept of *Locus Standii* is no longer a bar for the community oriented Public Interest Litigations. Though not an aggrieved party, environmentally conscious individuals, groups or NGOs may have access to the Supreme Court/High Courts by way of PIL. The Hon'ble Supreme Court while taking cognizance on the petitions has further relaxed the requirement of a formal writ to seek redressal before the Court. Any citizen can invoke the jurisdiction of the Court, especially in human rights and environmental matters even by writing a simple postcard.

According to Hon'ble Mr. Justice Kuldip Singh, Former Judge, Supreme Court of India - the Constitution of India is a living tree and is not a static document. The Courts have to interpret the Constitution keeping in view the needs of the present generation. Some of the leading public interest litigations are Taj Mahal case, Hazardous industries matter in Delhi, Vellore Citizen's Welfare Forum case and Rural litigation and Entitlement Kendra case relating to lime stone queries in Dehradun.

Various Authorities have been constituted under the Environment (Protection) Act, 1986 in compliance with the directions of the Hon'ble Supreme Court during the pendency of the public interest litigations. These Authorities have been constituted for specific assignments, which are:

1. *The Dahanu Taluka Environment Protection Authority* – In the District of Thane, Maharashtra, to protect the ecologically fragile areas in Dahanu Taluka and to control pollution in the area
2. *The Central Ground Water Authority* - For the purpose of regulation and control of Ground Water Management and Development
3. *Aqua Culture Authority* – To deal with the situation created by the shrimp culture industry in the Coastal States and Union Territories
4. *The Water Quality Assessment Authority* - To direct the agencies (Govt./local bodies/non-Governmental) for taking action in accordance with the powers and functions of the Authority
5. *The Environment Pollution (Prevention and Control) Authority* for NCR of Delhi - for protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution

6. *The loss of Ecology (Prevention and Payments of Compensation) Authority* for the State of Tamil Nadu; To assess the loss to the ecology and environment in the effected areas and also identify the individuals and families who have suffered because of the pollution and assess the compensation to be paid to the said individuals and families[98] and

7. *The Taj Trapezium Zone Pollution (Prevention and Control) Authority- The* Authority should within the geographical limits of Agra Division in the Taj Trapezium Zone in the State of Uttar Pradesh, to monitor progress of the implementation of various schemes for protection of the Taj Mahal and programmes for protection and improvement of the environment in the said area

2. **Compensatory Remedy**: - The oldest legal remedy under law of tort is an action for nuisance, negligence and strict liability. The Supreme Court of India has added a new principle i.e. the principle of absolute

liability. Law of tort is a contribution of British rule in India. The Britishers first introduced law of torts within the three presidency towns of Calcutta, Madras and Bombay. Consequently the Indian courts followed the English common law principles in deciding cases. By virtue of Article 372 (1) of the constitution it continued to apply unlees it has been modified or changed by legislature in India. In Vellore Citizens Welfare Forum vs. Union of India traced the source of law, which protects the environment to the 'inalienable common law right' of every person to a clean environment. The Court held that since the Indian legal system was based on English Common Law, the right to a pollution free environment was a part of the basic jurisprudence of the land.

Compensation under the PLI Act 1991or NET Act 1995:- In addition to the remedies under the law of torts and the writ jurisdictions, the Public Liability Insurance Act 1991 and the National Environmental Tribunal Act 1995 provided statutory remedy to the victims of industrial accidents. Abolishing the defenses, no fault liability was adopted by both the enactments and speedy claim-disposal machinery was created a claim up to Rs. 25,000 may be filed to the District Collector and a National Tribunal, constituted under the Act have jurisdiction to award a larger amount. The National Environmental Appellate Authority Act 1997 envisaged an appellate forum where affected citizen may challenge the environmental approval granted for sitting an environmental project. The decision of the Environment Impact Assessment Authority created under the Regulation 1994 may be examined by the Appellate Authority.

II. Civil Remedies:

1. Action under the Law of Torts:

Nuisance :- Modern environmental law has its roots in common law relating to nuisance. Nuisance means unreasonable interference,

annoyance, hurt or offend. There are two kinds of nuisance – Public Nuisance or Private Nuisance. A public Nuisance is injury, annoyance or interference with the quality of life of a class of persons who come within its neighborhood. A private nuisance is a substantial and unreasonable interference with the use and enjoyment of land. Reasonable interference is not nuisance.

Strict Liability and absolute liability:-The rule in *Rylands vs. Fletcher* is that when a person accumulates on his land something likely to cause harm if escapes, and really escapes and causes damages arising out of natural consequence, the person is liable. But the rule of strict liability is subject to a number of exceptions which reduce the scope of the rule. These exceptions are act of God, act of third party, contributory negligence, consent, natural use of land, and statutory authority.

The expansion of chemical industries in India and increasing number of enterprises storing hazardous substances necessitated the Supreme Court to think about absolute liability principle under which the rule of strict liability without any exception is applied so that the scope of avoiding the liability is reduced to bring more and more rigor in the rule. The doctrine allows the growth of industries with the assurance that such industries will bear the burden of damage they cause when a hazardous substance escapes. *Shri Ram Gas Leak Case* 1987 is the genesis of the rule of absolute liability.

Trespass:- Trespass means illegal interference. It is of two kinds – trespass to person and trespass to land. Trespass to land is concerned with environmental violations. The examples of trespass as an environmental violation are emission of smokes from industries causing damage to nearby buildings and vegetables, residential houses, wrong

smelling etc. *J. C. Galstaun vs. Dunia Lal Seal*[79] is the oldest case in which the Calcutta High Court considered trespass to land as an environmental violation and awarded Rs. 1000 as damages which was a very big amount at that time.

The fact of the case was that the plaintiff had a garden house and the defendant had a shellac factory situated at about 200 yards from the garden house of the plaintiff. The defendant discharged refused-liquids of is factory in to a Municipal drain which passed along the plaintiff's garden. The plaintiff alleged that the liquids foul smelled and noxious to the health of the people and damaged him in comfort, health and the market value of the property. The judge granted perpetual injunction and awarded the plaintiff one thousand rupees as damages.

Negligence:- in the law of tort, negligence has two meanings – negligence as a mode of committing certain tort and negligence as a separate tort. The first category is covered under trespass and nuisance. The second category refers to the conducts which creates a risk of causing damage which consist neglecting ordinary care or skill towards a person to whom a duty to take care lies on behalf of the defendant. To prevent environmental pollution a common law action for negligence may be brought. The plaintiff has to prove that the defendant was under a duty to take reasonable care to avoid the damage, there was a breach of such duty, and the plaintiff suffered damage. In *Mukesh Textile Mills (P) Ltd. Vs. H. R. Subramanaya Sastry,*[80] the appellant/defendant Mukesh Textile Mills had a sugar factory and the respondent/plaintiff owned several extent of land nearby the factory which were irrigate by channel of reservoir in between the factory. The appellant stored by-product of

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79 *AIR 1987 kant 87*

80 *Mukesh Textiles vs HR Subramanya Sastry AIR 1987 KANT87*

sugar in three tanks close to the respondent land. One of the tanks collapsed and a large quantity of by-product overflowed in to the water channel. The respondent brought a suit for damages contending that paddy and sugarcane were damaged. The court held that the appellant was negligent and therefore, liable to pay damages of Rs. 12,200 to the respondent.

Damages and injunction:- Under law of tort the remedy may be either damages or injunction or both. Damages means monetary compensation for committing tort. Substantial damages are meant for restitution of the plaintiff to the position he would have been if the tort have not been committed. Exemplary damages are intended to punish the wrongdoer for his conduct. An injunction is a judicial process whereby a person is prevented from infringing a right. Injunction is of two kinds – temporary and perpetual. The purpose of temporary injunction is to maintain the state of thing at a given date until trial on merit is done. It is regulated by section 94, 95 and order 39 of the CPC. A perpetual injunction permanently restrains the wrongdoer from doing a wrong. It is regulated by section 37 – 42 of the specific relief Act 1963. *B Venkatappa vs. B. Lovis* [81] is a typical case where the Andhra Pradesh High Court upheld the mandatory injunction granted by the lower court directing the defendant to close the whole in a chimney facing the plaintiff's property.

III. Compensation under the PLI Act 1991or NET Act 1995:- In addition to the remedies under the law of torts and the writ jurisdictions, the Public Liability Insurance Act 1991 and the National Environmental Tribunal Act 1995 provided statutory remedy to the victims of industrial accidents. Abolishing the defenses, no fault liability was adopted by both the enactments and speedy claim-disposal machinery was created a claim up to Rs. 25,000 may be filed to the District Collector and a

81 *B. Venkatappa vs. B Lovis AIR 1986 AP 582.*

National Tribunal, constituted under the Act have jurisdiction to award a larger amount. The National Environmental Appellate Authority Act 1997 envisaged an appellate forum where affected citizen may challenge the environmental approval granted for sitting an environmental project. The decision of the Environment Impact Assessment Authority created under the Regulation 1994 may be examined by the Appellate Authority.

The statutory recognition of liability has already been established by judicial decisions. (M.C. Mehta vs. UOI 1987 SC 1086 and PLI ACT 1991) But the Public Liability Insurance Act 1991 is not exhaustive as it provides only Ad-hoc relief to the victims. It says nothing about State's responsibility as the ultimate responsibility lies upon the State to ensure that the victim is assured their constitutional and legal rights. The principle of strict and absolute liability is applicable only to particular situations. It does not abolish other principles of tortuous liability. The decisions of the Supreme Court in various cases also justify the conclusion that there are some industries which are not hazardous or inherently dangerous. That cannot attract the application of new principle. The courts in India should follow the absolute liability principle and make necessary discrimination regarding the enterprise. Of course, when the rule is applied, the liability indeed will be absolute. In cases where the defendant is not a private enterprise but the State, the compensation claims may be covered under Article 21 and 32 of the constitution. In such cases, while awarding the compensation to the victims, the same principle of absolute liability should be followed. (B. P. Dwivedi, "An Industrial Disaster: A Judicial Response" 25 1&2 The Banarass Law Journal 1989 at 105 & 106

III. Criminal Remedies

I. **Criminal Procedure Code 1973:-** Section 133 of the Code of Criminal Procedure proved as a successful tool and potent instrument to

prevent environmental pollution by way of public nuisance. *Ratlam Municipality case*[82] is pointer to this effect. Under this section a magistrate can *suo motu* or on a complaint, take cognizance of any kind of pollution by way of public nuisance and pass appropriate orders. After the Ratlam Municipality decision many High Courts extended the scope and ambit of the section.[83] It is to be noted that the jurisdiction under any specialized law on environment such as the Air Act or Water Act does not repeal the jurisdiction under section 133 of the Cr.PC. The Supreme Court in *State of MP vs. Kedia Leather Industry*[84] held that in spite of the provisions in the Water and Air Act, section 133 of the Cr.PC can be called in aid to remove public nuisance and thus avoid hardship to the general public.

II. A Complain under the Environment (Protection) Act 1986:- The scope of section 19 of the Environment Act is very limited. The section lays down that a court shall take cognizance of any offence under the Act only on a complaint filed by any authorized officer of the Central Government or any person who has given notice of not less than 60 days in the prescribed manner of the alleged offence or of his intention to make a complaint to the Central Government or any authorized officer.

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82 *Municipal Council of Ratlam Vs Wardhichand AIR 1980 SC 1622.*

83 AIR 1980 SC 1622

84 *(2003)* 7 SCC 389