CHAPTER - III

CONSTITUTIONAL AND LEGISLATIVE MEASURES OF ENVIRONMENTAL PROTECTION

The Indian Constitution is amongst the few in the world that contains specific provisions on environmental protection. It is manifest in a Right to ‘Life’ of a Person under Article 21 of the Indian Constitution which is in Part III of the Fundamental Rights. The word ‘life’ in Article 21 is a key to the judiciary to interpret and is also a key to an individual to protect environment. The Directive Principles of State Policy and the Fundamental Duties Chapter explicitly enunciate the national commitment to protect and improve the environment. Ever since the adoption in 1972 of the Stockholm Declaration on the Human Environment, there has been a growing awareness at both national and international levels; of the environmental crisis which the world is facing today. A host of official and non-official international bodies are currently engaged in devising global strategies on how to ensure that the biological community interacts healthily within itself and with the physical environment around it. So are the States at national level.

In order to protecting the ecosystem and preserving the natural resources, India has enacted a number of concerning legislations, such as water pollution, air pollution, environment protection, protection of wild life, conservation of forests, preservation of antiquities and monuments, regulation of urban

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1. Article 21: Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to the procedure established.
5. See Air (Prevention and Control of Pollution) Act, 1981.
6. See Environment Protection Act, 1986
land\textsuperscript{10}, use of insecticide\textsuperscript{11} and radiation\textsuperscript{12}. Even the Constitution was amended to add an environmental perspective to it. It is proposed to discuss in this Chapter the Indian Constitutional Conspectus on Environment and also the Legislative provisions. The researcher emphasized two important aspects through which entire Indian environmental control mechanism revolves. One aspect is the Constitutional imperatives and the other could be the Legislative measures in preservation of ecology. Environment can be protected by invoking the Constitutional Provisions and the other related provisions of various statutes on environment enacted by the Parliament or the State Legislatures in India in case of need. Various Constitutional binding provisions and the Statutes which are related to the environmental protection have been discussed in this chapter mainly on two heads i.e., Constitutional Measures and Legislative Measures.

3.1. Constitutional Measures in Protection of Environment

A number of Articles and provisions of the Indian Constitution are meant for protection of the environment. First of all, the fundamental right under Article 21 of the Constitution of India guarantees Right to Life. The term ‘Right to Life’ interpreted in a number of cases by the Supreme Court and the High Courts in India to mean that life with healthy environment. The other fundamental right which is also deals with the protection of the environment is Article 14 of the Constitution. Protective and preservative measures to the Ecology conferred in the Constitution under ‘Directive Principles of the State Policy’ in Part IV of the Constitution. According to the Directive Principles of the State Policy, it is the duty of the State to rise the level of nutrition and the standard of living and to improve public health under Article 47, it is the duty of the State to strive to organize agriculture and animal husbandry under Article 48, it is the duty of the State to endeavor to protect and improvement of environment and to safeguard the forests and wild life of the country under Article 48-A and it is duty of the State to

\textsuperscript{9} See Antiquities and Treasures Act, 1972; Ancient Monuments and Archaeological Sites and Remains Act, 1958.
\textsuperscript{10} Urban Land (Ceiling and Regulation) Act, 1976.
\textsuperscript{11} Insecticides Act, 1968,
\textsuperscript{12} Atomic Energy Act, 1962; Radiation Protection Rules, 1971.
protect the historical monuments and places under Article 49. Citizen’s duty to protect the ecology has been laid down in new Article 51A(g) of the Constitution by amending it through 42nd Constitutional Amendment Act. Further, the Indian Constitution provides judicial remedies under Article 32 or under Article 226 in case of environmental destruction. Article 142 deals with the enforcement of the decrees or orders of the Supreme Court. The Indian Constitution also considers the Policy matters in protecting the environment under Article 162.

3.1(a) Environmental Protection under Right to Life

Principle 1 of the Stockholm Declaration finds reflection in Articles 14, 19 and 21 of the Constitution of India dealing with the right to equality, freedom of expression and right to life and personal liberty respectively. The Permanent Peoples' Tribunal regards the "anti-humanitarian effects of industrial and environmental hazards not as an unavoidable part of the existing industrial system, but rather as a pervasive and organized violation of the most fundamental rights of humanity. Foremost among these are the rights to life, health, expression, association and access to justice." All these rights are secured to the people of India under the Constitution of India particularly in Part III dealing with fundamental rights. A constitutional provision is never static; it is ever evolving and ever changing and, therefore, does not admit of a narrow, pedantic or syllogistic approach. Constitutional provisions in general and fundamental rights in particular must be broadly construed unless the context otherwise requires. The scope and ambit of such provisions, in particular the fundamental rights, should not be cut down by too astute or restricted approach. These fundamental rights are intended to serve generation after generation. They had to be stated in broad terms leaving scope for expansion by Courts ensuring that the honour, dignity and self-respect of the people is protected.

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13 Principle 1 of the Stockholm Declaration provided that man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

14 Asia’ 92 Permanent Peoples' Tribunal, Findings and judgments—Third Session on Industrial and Environmental Hazards and Human Rights : 19 to 24 October, Bhopal to Bombay (India) at 14 (1992).

There is no provision in the Indian Constitution which guarantees expressly the right to environment, much less, hygienic environment. The only provision which can be considered to subsume this right is Article 21, which guarantees life and personal liberty to all persons by declaring that *No person shall be deprived his life or personal liberty except by the procedure established by law.* In *A.K. Gogaln v. State of Madras*\(^\text{16}\), the Supreme Court has given a narrow interpretation to the terms ‘life’ and ‘Personal Liberty’ in Article 21. It is stated that it is appropriate to say that for about almost three decades after the commencement of the Constitution until the Meneka Gandhi’s case, this provision was considered to be innocuous one as it was held to embody only the English common law rule in the area of personal liberty. ....... In *Meneka Gandhi v. Union of India*, the Supreme Court of India approached an innovative method of interpretation to widen the meaning of ‘life’ and ‘Personal Liberty’ for inclusion of a variety of facets of life by observing as:

*The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of contraction.*\(^\text{17}\)

In memorable case of Francis Caroline Mullin v. Delhi Administration in which The Supreme Court has given a wider meaning to the right to life. It is manifest in the observation of Justice Bhagwati made in this case as:

*“The Right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something more than just physical survival... The inhibition against it deprivation extends to all those limbs and facilities by which life is enjoyed.... this would include the faculties of thinking and feeling.....But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that*

\(^{16}\) AIR 1950 SC 27.

the right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of oneself.”

Thus, the right to life has been given an expansive reach to encompass the right to live with human dignity which, in turn, would include the basic needs of life such as food, clothing and shelter, etc. Further, the right to life seems to be the main right form which many more basic human rights emanate. The right to quality of life, the right to unpolluted environment, the right to the preservation of nature’s gifts, the right to one’s own tradition, culture and heritage and the right to education have all been held to be integral parts of the right to life.

On the basis of the wider interpretation to the right to life in Article 21 of the Constitution of India, the Supreme Court and the High Courts have held in several cases that the right to pollution-free environment is part of the life. The first case where the Supreme Court recognised the right to clean environment, as an aspect of the right to life, in Rural Litigation and Entitlement Kendra v. State of U.P.\textsuperscript{18}, in this case, the relevant issue for the purpose of our discussion was whether limestone-mining activities in the Mussoorie-Dehradun region caused ecological disturbance and, thus violated the right to life of the people of in that region. The Supreme Court declared that these activities polluted the environment and, thus, violated the right to life of the people. While ordering the closure of some of the limestone quarries, the Supreme Court implicitly read the right to clean environment in the right to life. Without referring to Article 21 of the Constitution, the Supreme Court observed:

\textsuperscript{18} AIR 1985 SC 652.
“This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affection of air, water and environment.”

In another notable case is Charan Lal Sahu v. Union of India, in his concurring opinion Justice K.N. Singh observed:

In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by Constitution under Articles, 21, 48A, and 51(g), it is the duty of the State to take effective steps to protect the guaranteed constitutional rights.

In M.C. Mehta v. Union of India,\(^{19}\) (popularly known as Oleum Gas Leakage case), the Supreme Court once again impliedly treated the right to live in pollution free environment as a part of fundamental right to life under Article 21 of the Constitution.\(^{20}\)

In another case on Article 21 is Subhash Kumar v. State of Bihar\(^{21}\), Justice K.N. Singh stated:

“Right to life is a fundamental right under Article 21 of the Constitution and it includes the right to enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life is derogative of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.”

The Supreme Court reiterating the above view on right to life in Virender Gaur v. State of Haryana\(^{22}\), as:

\(^{19}\) A.I.R. 1987 S.C. 1086.
\(^{20}\) Id., at 1089.
\(^{21}\) AIR 1990 SC 420.
\(^{22}\) (1995) 2 SCC 577.
“Article 21 protects Right to Life as fundamental right. Enjoyment of life and its attainment including the right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral part of right of healthy life and it would be impossible in live with human dignity without a human and healthy environment.....Therefore, there is a constitutional imperative on the State Government,... not only to ensue and safeguard proper environment but also an imperative duty to take adequate measures to promote, preserve and improve both man-made and the natural environment. ”

In another significant decision of the Supreme Court on right to life is A.P. Pollution Control Board v Prof. M.V. Nayudu. In this case, the court has clarified the contours of the right to hygienic environment in the light of Article 48-A, 51-A(g) read with Article 21 of the Constitution. Delivering the judgment on behalf of the entire bench, Justice Jagannatha Rao stated that the environmental concerns were as important as the human rights concerns as both were founded on Article 21 which guaranteed the fundamental right to life and personal liberty. According to his Lordship, “While environmental aspects concern ‘Life’ human rights aspects concern ‘Liberty’.” His Lordship further declared that, in the context of the emerging environmental jurisprudence, it was the duty of the Court to render justice by taking all aspects into consideration.

A clarion call was given by the Andhra Pradesh High Court when in monumental judgment of T. Damodhar Rao v. S.O. Municipal Corporation, Hyderabad, it is observed:

“It would be reasonable to hold that the enjoyment of life and its attainment and fulfillment guaranteed by Article 21 of the Constitution embraces

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23 AIR 1999 SC 812.
the protection and preservation of nature's gifts without (which) life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Article 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should also be regarded as amounting to violation of Article 21 of the Constitution".  

Thus, right to live in healthy environment was specifically declared to be a part of Article 21 of the Constitution. In this case, the petitioners prayed that the land kept for recreational park under the developmental plan ought not to be allowed to be used by the Life Insurance Corporation or Income Tax Department for constructing residential houses.

In Charan Lai Sahu v. Union of India, the Supreme Court of India while upholding the validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, held:

“In the context of our national dimensions of human rights, right to life, liberty, pollution free air and water is guaranteed by the Constitution under Articles 21, 48-A, and 51-A(g). It is the duty of the State to take effective steps to protect the guaranteed constitutional rights”.

The above observations of the Supreme Court put it beyond doubt that right to live in healthy environment is our fundamental right under Article 21 and has to be read with Articles 48-A and 51-A(g) thereby putting obligation on the State as well as citizens to protect and improve it.

In F.K. Hussain v. Union of India, the Kerala High Court pointed out that the right to sweet water and the right to free air, are attributes of the right of life,
for, those are the basic elements which sustain the life itself. In Subhash Kumar v. State of Bihar, the Supreme Court observed:

“Right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, 'a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life”.

In Rajiv Ranjan Singh v. State of Bihar, it was held by the Patna High Court that failure to protect the inhabitants of the locality from the poisonous and highly injurious effects of the distillery's effluents and fumes amounted to an infringement of the inhabitants' rights guaranteed under Arts. 14, 21 read with Articles 47 and 48-A of the Constitution of India. The Court further directed in this case that in case it comes to light that any person has contacted any ailment the cause of which can be directly related to the effluent discharged by the distillery, the company shall have to bear all expenses of his treatment and the question of awarding suitable compensation to the victim may also be considered.

In M.C. Mehta v. Union of India, the Supreme Court took note of environmental pollution due to stone crushing activities in and around Delhi, Faridabad and Ballabgarh complexes. The Court was conscious that environmental changes are the inevitable consequences of industrial development in our country, but at the same time the quality of environment cannot be permitted to be damaged by polluting the air, water and land to such an extent that it becomes a health hazard for the residents of the area. Showing deep concern to the environment, the Court reiterated that "every citizen has a right to fresh air and

29 (1991) 1 SCC 598.
30 A.I.R. 1992 Pat. 86.
31 Ibid., at 87.
32 Ibid, at 92-93.
33 (1992) 3 SCC 256.
34 Ibid., at 257.
to live in pollution free environment." Thus, the Supreme Court once again treated it as violation of Article 21 of the Constitution and passed the order in absolute terms under Article 32 directing the stone crushing units to stop their activities in Delhi, Faridabad and Ballabgarh complexes. The Court further ordered the government to rehabilitate these stone crushers in "crushing zone" within the period of six months.  

The directions by the Supreme Court to stop mining activities have been again reviewed by the Supreme Court in *M.C. Mehta v. Union of India*. The Supreme Court further observed that where the regulatory authorities either connive or act negligently by not taking prompt action to prevent, avoid or control the damage to the environment, natural resources and people's life, health and property, then the principles of accountability for restoration and compensation have to be applied. Compensation can be awarded against the errant or negligent public officials. Natural resources of air, water and solid cannot be utilized if the utilization results in irreversible damage to the environment. Life, public health and ecology have priority over unemployment and loss of revenue.

In *Obayya Pujari v. Member Secretary, KSPCB, Bangalore*, the stone crushing business was carried out by the units holding proper licenses and necessary permissions. They were causing environmental pollution and affecting health of the human beings, animals and vegetation. The Court held that the right to life is most fundamental right as enshrined in Article 21 of the Constitution of India and such right includes all attributes of life. Accordingly, the Court directed the State Government, *inter alia*, to immediately formulate a policy regulating carrying on stone crushing business and directed the State to identify safer zones for stone crushing within one year. The Court relying on Article 21 further directed that citizens of the area who have suffered due to pollution caused by the stone crushing business are authorized to prefer a claim for compensation and the

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36 *(2004) 12 SCC 118.*
37 A.I.R. 1999 Kant. 157
State was directed to appoint an authority to entertain and adjudicate these claims. Crusher units found liable, were directed to pay the claims of the citizens within two months.

The ecology must be maintained at all costs. The Andhra Pradesh High Court applied the "precautionary principle" in Bheemagiri Bhaskar v. Revenue Divisional Officer, Bhongir, and observed that grant of quarry permits, for lifting of sand, which is a minor mineral may be granted in terms of the provisions of Mines and Minerals (Regulation and Development) Act, 1957 but, no permit can be granted if the same attracts the wrath of Article 21 of the Constitution of India. If the indiscriminate quarrying and lifting of sand from the river beds, streams is allowed to continue, the fertile lands will become sterile for scarcity of water and thereby the very survival of the persons depending entirely on cultivation will be at stake and their right to live guaranteed under Article 21 of the Constitution will thus be infringed.

In P.A. Jacob v. Superintendent of Police, Kottayam, the Kerala High Court observed:

“Compulsory exposure of unwilling persons to dangerous and disastrous levels of noise, would amount to a clear infringement of their constitutional guarantee of right to life under Article 21, Right to life, comprehends right to a safe environment, including safe air quality, safe from noise. Indian judicial opinion has been uniform in recognizing the right to live in freedom from noise pollution as a fundamental right protected by article 21 of the constitution. Noise pollution beyond reasonable limit is considered as violation of Article 21 of the Constitution.”

40 Ibid., at 9.
41 Noise Pollution (V) In Re, (2005) 5 SCC 733 at 766.
In Noise Pollution (V), In Re,\textsuperscript{42} it was observed that it is well settled by repeated pronouncements of the Supreme Court as also the High Courts that the right to life enshrined in Article 21 is not of mere survival or existence. It guarantees a right of persons to life with human dignity. Therein are included, all the aspects of life which go to make a person's life meaningful, complete and worth living. Human life has its charm and there is no reason why life should not be enjoyed along with all permissible pleasures. Anyone who wishes to live in peace, comfort and quiet within his house has a right to prevent noise as pollutant reaching him. None can claim a right to create noise even in his own premises which could travel beyond his precincts and cause nuisance to neighbours or others.

In K.C. Malhotra v. State,\textsuperscript{43} it was held that right to live with human dignity is the fundamental right of every Indian citizen and, therefore, in the discharge of its responsibilities to people, State has to provide at least minimum conditions ensuring human dignity. Accordingly, the Court directed that there must be separate sewage line from which the filthy water may flow out. The drainage must be covered and there should be proper lavatories for public convenience which should be regularly cleaned. Public health and safety cannot suffer on any count and all steps to be taken as Article 47 makes it a paramount principle of government for the improvement of public health as its primary duties.

In Law Society of India v. Fertilizers and Chemicals Travancore Ltd.,\textsuperscript{44} the Kerala High Court held that deprivation of life under Article 21 of the Constitution of India comprehends certainly deprivations other than total deprivation. The guarantee to life is certainly more than immunity from annihilation of life. Right to healthy environment is part of the right to life.

\textsuperscript{42} (2005) 5 SCC 733 at 745.
\textsuperscript{43} A.I.R. 1994 M.P. 48.
\textsuperscript{44} A.I.R. 1994 Ker. 308.
In *Kholamuhana Primary Fishermen Co-op. Society v. State*\(^45\) the Orissa High Court held that the right to life conferred by Article 21 of the Constitution includes the right of enjoyment of pollution free atmosphere.

The Supreme Court in the case of *Virender Gaur v. State Haryana*\(^46\) observed:

“Enjoyment of life and its attainment including their right to live with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which the life cannot be enjoyed....Environmental, ecological, air, water pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a human and healthy environment’.\(^47\)

In *Indian Council For Enviro-Legal Action v. Union of India,*\(^48\) (popularly known as *H-Acid Case*) a public interest litigation was filed by an environmentalist organization, not for issuance of writ, order or direction against the industrial units polluting the environment, but against the Union of India, State Government and State Pollution Board concerned to compel them to perform their statutory duties on the ground that their failure to carry on such duties violated rights guaranteed under Article 21 of the residents of the affected area.\(^49\)

The Supreme Court further pointed out that if it finds that the government/authorities concerned have not taken the action required of them by law and that their inaction is jeopardizing the right to life of the citizens of this country or of any section thereof, it is the duty of the Supreme Court to intervene. The Court also rightly rejected the contention that the respondents being private

\(^{45}\) A.I.R. 1994 Ori. 191 at 207.

\(^{46}\) (1995) 2 SCC 577.

\(^{47}\) Ibid., at 581.

\(^{48}\) (1996) 3 SCC 212.

\(^{49}\) Ibid, at 238.
corporate bodies and not "State" within the meaning of Article 12, a writ petition under Article 32 would not lie against them. If the industry is continued to be run in blatant disregard of law to the detriment of life and liberty of the citizens living in the vicinity, the Supreme Court has power to intervene and protect the fundamental right to life and liberty of the citizens of this country.\textsuperscript{50}

In \textit{Indian Council For Enviro-Legal Action v. Union of India}\textsuperscript{51} (popularly known as \textit{Coastal Protection Case}), the Supreme Court issued orders and directions for the enforcement and implementation of the laws to protect the fundamental right to life of the people. The Court pointed out that even though, it is not the function of the Court to see the day to day enforcement of the law, that being the function of the executive, but because of the non-functioning of the enforcement agencies, the courts as of necessary have had to pass orders directing the enforcement agencies to implement the law for the protection of the fundamental rights of the people.

In \textit{Vellore Citizens' Welfare Forum v. Union of India},\textsuperscript{52} (popularly known as \textit{T.N. Tanneries Case}), the Supreme Court held that in view of the constitutional provisions contained in Articles 21, 47, 48-A, 51-A(g) and other statutory provisions contained in the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981, and the Environment (Protection) Act, 1986, the "precautionary principles" and the "polluter pays principle" are part of the environmental law of the country. In other words, two basic principles of sustainable development can be derived from various provisions including the right to life under Article 21 of the Constitution.

In \textit{Dr. Ashok v. Union of India},\textsuperscript{53} the Supreme Court held that by giving an extended meaning to the expression "life" in Article 21 of the Constitution, the

\textsuperscript{50} Id.
\textsuperscript{51} (1996) 5 SCC 281.
\textsuperscript{52} (1996) 5 SCC 647.
\textsuperscript{53} (1997) 5 SCC 10. See also \textit{Hamid Khan v. State}, A.I.R. 1997 MP. 191 where a public interest litigation was filed to protect the right to life of the villagers from the supply of polluted drinking
Court had brought health hazard due to pollution within it and so also the health hazards from use of harmful drugs.

In *M.C. Mehta v. Union of India*,\(^{54}\) the court observed that it need hardly be added that the duty cast on the State under Articles 47 and 48-A in particular of Part IV of the Constitution is to be read as conferring a corresponding right on the citizens and, therefore, the right under Article 21 at least must be read to include the same within its ambit. The Supreme Court in various cases has pointed out that chronic exposure to the polluted air due to vehicular emissions results in the violation of right to life, which includes right to good health.

In *M.C. Mehta v. Union of India*\(^ {55}\), "consequent upon the direction of the Supreme Court to shift the hazardous industries from Delhi, a company decided to shift to Himachal Pradesh and acquiescing to Supreme Court order directed workers wishing to join at new location to report there. But the company did not make adequate arrangements for accommodation as it had put up only the tents. The husband of the applicant reported for duty in January, 1999 but died due to exposure to cold. The court held that the respondent company was liable to pay compensation, which was quantified in this case as Rs. 2 lacs.

In *Narmada Bachao Andolan v. Union of India*\(^ {56}\) the court held that right to water is a fundamental right under Article 21 of the Constitution. Water is the water containing excessive fluoride contents. Thousands of villagers were suffering from bone diseases due to consumption of such polluted water. The Court held that failure of the State to take proper precaution to provide proper drinking water to citizens amounts to failure of the State in discharging its responsibility under Article 47 of the Constitution. The M.P. High Court further directed the State government to give free medical treatment to such affected persons including free surgical treatment along with compensation as specified by the Court.

\(^{54}\) (1998) 9 SCC 589.  
\(^{55}\) (2000) 8 SCC 535.  
\(^{56}\) (2000) 10 SCC 664. See also *Hinchlal Tiwari v. Kamala Devi*, (2001) 6 SCC 496 wherein it was held that enjoyment of a quality life is the essence of the right guaranteed under Article 21 of the Constitution. See also *Kamal Nagar Welfare Assn. v. Government of A.P.*, A.I.R. 2000 A.P. 132. In this case the project of beautification and clearing of river bed area, which was aimed in larger interest of public and displacing a microscopic population, held to be valid and not violative of their right under Article 21, as the Government had already identified persons to be effected by implementation of the project and alternative arrangements had already been made to
basic need for the survival of human beings and is part of right of life and human rights as enshrined in Article 21 of the Constitution of India and can be served only by providing source of water where there is none. In this case the Water Disputes Tribunal had in its award come to the conclusion that the height of the dam should be 455 feet. The Court held that once the award becomes binding on the State, it would not be opened to the third party like the petitioners to challenge the correctness thereof. The displacement of tribals on account of construction of Sardar Sarovar Dam up to the height of 455 feet was held valid and not violative of Article 21 of the Constitution in view of the relief and rehabilitation measures provided in the Water Dispute Tribunal award.

In A.P. Pollution Control Board (II) v. Prof. M.V. Nayadu, the Supreme Court once again reiterated that there is building up, in various countries, a concept that right to healthy environment and to sustainable development are fundamental human rights implicit in the right to life. Our Supreme Court was one of the first courts to develop the concept of "healthy environment" as part of right to "life" under Article 21 of the Constitution. In today's emerging jurisprudence, environmental rights, which encompass a group of collective rights, are described as "Third Generation Rights". Thus, the concept of a healthy environment as a part of fundamental right to life, developed by our Supreme Court is finding acceptance side by side with the right to development.

In M.C. Mehta v. Union of India, the Supreme Court held that right to have a living atmosphere congenial to human existence is a part of right to life. The State has a duty in that behalf and to shed its extravagant unbridled sovereign power and to forge its policy to maintain ecological balance and hygienic environment. The hazard to health and environment of not only the persons residing in illegal colonization area but of the entire town has to be taken into consideration.


In *N.D. Jayal v. Union of India*,\(^{59}\) the Supreme Court has once again reiterated that right to clean environment and right to development are integral parts of human right covered under Article 21 of the Constitution. Therefore, the concept of "sustainable development" is to be treated as an integral part of "life" under Article 21. The weighty concepts like intergenerational equity, public trust doctrine and precautionary principle, which have been declared as inseparable ingredients of our environmental jurisprudence, could only be nurtured by ensuring sustainable development.

In *Intellectual Forum v. State of A.P.*,\(^{60}\) the Supreme Court held that the environment protection and conservation of natural resources has been given a status of a fundamental right and brought under Article 21 of the Constitution. The court also pointed out that Articles 48-A and 51-A are not only fundamental in the governance of the country but also it shall be the duty of the State to apply these principles in making laws and further these two Articles are to be kept in mind in understanding the scope and purport of the fundamental rights guaranteed by the Constitution.

Realizing the gravity of situation and considering the adverse effects of smoking on smokers and passive smokers, the Supreme Court of India in *Murli S. Deora v. Union of India*,\(^{61}\) has directed the Union of India, State Governments as well as Union Territories to take steps to ensure prohibiting smoking in public places.\(^{62}\)

\(^{59}\) (2004) 9 SCC 362 (Tehri Dam Project case).
\(^{60}\) (2006) 3 SCC 549 at 576-577.
\(^{61}\) (2001) 8 SCC 765.
\(^{62}\) *Ibid.*, at 768. The court has prohibited the smoking at public places such as: (1) Auditoriums; (2) Hospital buildings; (3) Health institutions; (4) Educational institutions; (5) Libraries; (6) Court buildings; (7) Public offices; and (8) Public conveyances, including railways. See also *K. Ramakrishnan v. State of Kerala*, A.I.R. 1999 Ker. 385 wherein it was held that smoking of tobacco in any form in public places is illegal, unconstitutional and violative of Article 21 of the Constitution.
Thus, from the perusal of the trend of all above mentioned cases it is evident that there has been a new development in India and right to live in a healthy and pollution free environment is considered as the fundamental right under Article 21, as without this, right to life and livelihood would become meaningless.

No doubt, the judiciary in India has done a great service by declaring the right to pollution free air, water and clean environment as fundamental right, but the question remains to be determined is how to find out the quality of air and water or for that matter level of noise which would infringe the fundamental right of the persons. Can the Court by any method control the "quality of the environment" and ensure to citizens safe environment". These are the questions of great complexities which cannot be solved by the judiciary alone. In this regard the co-operative efforts by the administrative wing of the State and realization of the duties of the citizens regarding the safety of environment are required. However, from the perusal of the various judgments mentioned above, it is evident that the judiciary has certainly prevented the flagrant violation of the right to safe environment. In some cases it has relied even on the laboratory studies. For example, in P.A. Jacob’s case, the Kerala High Court took into consideration the laboratory studies made by monitoring electroencephalographic (EEG) responses and changes in neurovegetative reactions during sleep, which shows that disturbance of sleep becomes increasingly apparent as ambient noise levels exceed about 35 dB(A) Kg. The Court also while declaring right to safe environment, including safe air quality and safe from noise, as a part of Article 21, made reference to WHO criteria 12 and Indian Standards l-S-4954 indicating tolerance levels. The Court further referred to the Textbook of Preventive and Social Medicines by J.E. Park and K. Park, specifying the tolerance limits of noise. 63

3.1.(b) Environmental Protection Vs. Freedom to Carry on Trade or Business

Article 19(l)(g) guarantees all citizens the right "to practice any profession, or to carry on any occupation, trade or business". However, this right of the citizens is also not absolute. It is subject to Article 19(6) under which "reasonable restrictions" in the "interest of the general public" can be imposed. Thus, environmental interests from the hazards of any trade or business can be protected.

In *Abhilash Textile v. Rajkot Municipal Corporation*, the petitioners were discharging dirty water from the factory on public road and in public drainage without purifying the same, thereby causing damage to the public health.

The Court held that one cannot carry on the business in the manner by which the business activity becomes a health hazard to the entire society. By discharge of effluent water on public road and/or in the public drainage system the entire environment of the locality gets polluted. No citizen can assert his right to carry on business without any regard to the fundamental duty under Article 51-A(g) to protect and improve the natural environment. The Court further directed that if the petitioners wish to carry on the business then they must provide for purification plant before discharging the effluents on public roads or in public drainage system. They cannot be allowed to reap the profit at the cost of the public health.

In *M.C. Mehta v. Union of India*, where the tanneries were discharging effluents from their factories in the holy river Ganga resulting in water pollution and not setting up a primary treatment plant in spite of being asked to do for several years, nor even caring to express their willingness to take appropriate steps to establish primary treatment plant, it was held that so far as they are concerned, an order directing them to stop working their tanneries should be passed as effluent discharged from tanneries is ten times noxious when compared with the

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65 A.I.R. 1988 S.C. 1037
domestic sewage water which flows into the river. Accordingly, the Court passed the following order:

“We are, therefore, issuing the directions for the closure of those tanneries which have failed to take minimum steps required for the primary treatment of industrial effluent. We are conscious that closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people”. 66

The Court also rejected the plea of financial incapability to set up the treatment plant. In this regard the Court observed:

“The financial capacity of the tanneries should be considered as irrelevant while, requiring them to establish primary treatment plants. Just like an industry which cannot pay minimum wages to its workers cannot be allowed to exist, a tannery which cannot set up a primary treatment plant cannot be permitted to continue to be in existence, for, the adverse effect on the public at large which is likely to ensue by the discharging of the trade effluents from the tannery to the river Ganga would be immense and it will outweigh any inconvenience that may be caused to the management and the labour employed by it on account of its closure”. 67

From the above decision it is evident that the Court has considered the protection and improvement of environment as a matter of general public interest and employed this tool in putting reasonable restrictions on the citizen's right to carry on any trade occupation and business.

The Supreme Court did not stop just after passing the order directing for installing the treatment plant by the tanneries. Subsequently, on March 29, 1990, the Supreme Court appointed a Committee of Experts to visit Kanpur, where the tanneries were situated, and inspect the tanneries plants alleged to have been set

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66 Ibid., at 1047-1048 (emphasis supplied)
67 Ibid., at 1045.
up by the tanneries. The Committee reported that some of the tanneries had not set up primary treatment plants and they were continuing to discharge the industrial effluents without treating the same. The Committee further reported that some of the tanneries had no doubt installed primary treatment plants but they were not operating and maintaining the same properly. While in others primary treatment plants were found to be not in working order. The Committee divided all the tanneries into five categories and made recommendations for taking suitable steps including imposition of heavy fines on the tanneries.

The Court after hearing the Counsel for the parties postponed the punitive action and granted one more opportunity to the tanneries for compliance of the Court orders and directed that all the tanneries must have primary treatment plants within the period of six weeks. They were also directed to remove all the defects in the plants and keep them in regular effective operation within six weeks. And finally, they were required to obtain within a period of six weeks, a certificate from the Pollution Board failing which the District Magistrate was to ensure the closure of such tanneries.

Thus, the Court has also been taking follow-up action to see that its orders are not flouted. It is interesting to note that in none of the orders of the Court in tanneries cases, it referred to Article 19(l)(g). However, it is implied that the Court while passing the orders under Article 32, had in its mind Article 19(l)(g) read with Articles 19(6) and 21 of the Constitution.

In *M.C. Mehta v. Union of India*, the Supreme Court directed that certain industries which were not showing any progress regarding the installation of air pollution control system in compliance with the Supreme Court's earlier order, should be closed. In this case also though the Supreme Court didn't refer to Article 19(l)(g), however it is implied that while passing the order under Article 32 of the Constitution it had in its mind Article 19(l)(g) read with Articles 19(6) and 21 of the Constitution.

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In *Sushila Saw Mills* v. *State of Orissa*,\(^69\) it was held that imposing total ban on saw mills business or sawing operation within the prohibited area of reserved or protected forest was not violative *inter alia* of Articles 19(l)(g) and 301 of the Constitution. It is a settled law that in the public interest restriction under Article 19(l)(g) may in certain cases include total prohibition. In the present case the public interest litigation was filed for the protection of forest wealth and maintenance of ecology.

In the *State of H.P.* v. *Ganesh Wood Products*,\(^70\) the question involved was regarding the establishing of *Katha industry*—which is a forest based industry, in the State of Himachal Pradesh and its adverse effect upon the environment and ecology of the State. The Supreme Court held that the obligation of sustainable development requires that a proper assessment should be made of the forest wealth and the establishment of industries based on forest produce should not only be restricted accordingly but their working should also be monitored closely to ensure that the required balance is not disturbed.\(^71\)

Therefore, in so far as forest based industries are concerned, there is no absolute or unrestricted right to establish industries notwithstanding the policy of liberalization announced by the Government of India. The Court also pointed out that it is meaningless to prescribe merely that the Government need not supply the raw material and that the industrial units will have to get their *Khair* trees/raw material from private lands/forests. No distinction can be made between government forests and private forests in the matter of forest wealth of the nation and in the matter of environment and ecology. It is just not possible or permissible.\(^72\)

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\(^{69}\) (1995) 5 SCC 615 at 618.
\(^{71}\) *Ibid.*, at 389.
\(^{72}\) *Id.*.
In *S. Jagannath v. Union of India*, the Supreme Court held that sea beaches and sea coasts are gifts of nature and any activity polluting the same cannot be permitted. The intensified shrimp (prawn) farming culture industry by modern method in coastal areas was causing degradation of mangrove ecosystem, depletion of plantation, discharge of highly polluting effluents and pollution of portable as well as ground water. Therefore, it was held that the said activities of the industries are violative of constitutional provisions and various other environmental legislations.

It is submitted that in this case though the Supreme Court did not directly refer to Article 19(l)(g) of the Constitution but it had its scope and content in mind when it observed that before any shrimp industry is permitted to be installed in the ecologically fragile coastal area, it must pass through a strict environmental test. In other words, 'reasonable restrictions' can be put to regulate the right under Article 19(l)(g) of the Constitution. Accordingly, the Supreme Court suggested that there must be an environmental impact assessment (EIA) before permission is granted to install commercial shrimp farms. It must take into consideration the inter-generational equity and compensation for those who are affected and prejudiced.

In *State of Tripura v. Sudhir Ranjan Nath*, the validity of (Tripura) Transit Rules was in question which provided that the quantity of timber and firewood to be exported from the State shall be determined on the basis of availability of forest produce after catering to the needs of the local people of the State and the requirements of the people of the State. It was held that it falls within the power of the State Government to regulate the transit of the timber and other forest produce. The power "to regulate" includes the power to prohibit also. The Court pointed out that even though the word "restrictions" in Article 302 of the Constitution is not qualified by the word "reasonable", but even proceeding for

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74 Ibid., at 146.
75 Id.
the present purposes that restrictions ought to be reasonable, since Article 302 has a close parallel with clauses (2) to (6) of Article 19 of the Constitution.

In *Ivory Traders & Mfg. Association v. Union of India*, the Delhi High Court held that no citizen has a fundamental right to trade in ivory or ivory articles, whether indigenous or imported. Assuming trade in ivory to be a fundamental right guaranteed under Article 19(l)(g), the prohibition imposed thereon by the impugned Act [Wild Life (Protection) Act] is in the public interest and in consonance with the moral claims embodied in Article 48-A of the Constitution.

In *Burrabazar Fire Works Dealers Association v. Commr. of Police, Calcutta*, the Court held that Article 19(l)(g) of the Constitution of India does not guarantee the fundamental right to carry on trade or business which creates pollution or which takes away that community's safety, health and peace. The Court was of the view that there is no inherent or fundamental right in a citizen to manufacture, sell and deal with fireworks which will create sound beyond permissible limit and which will generate pollution which would endanger the health and the public order. A citizen or people cannot be made a captive listener to hear the tremendous sounds caused by bursting out from a noisy fireworks.

In *Ved Kaur Chandel v. State of H.P.*, a public interest litigation was filed in which the petitioner apprehended that there was likelihood of air, water and noise pollution from the establishment of a tyre-retreading unit by the respondent adjacent to the State highway. In this case the production of the industry had not started and no objection certificate (NOC) was given by the Pollution Control Board subject to certain conditions but the final consent was not granted. The Pollution Control Board and the respondent filed their affidavits showing that the respondent had undertaken to follow cold retreading process with electricity.

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78 A.I.R. 1998 Cal. 121 at 134.
instead of boiler and water at the processing stage and there was no apprehension of any air, water and noise pollution.

The Court after examining the facts and circumstances of the case came to the conclusion that there was no apprehension of any air, water and noise pollution but heavy responsibility was there on the State Pollution Control Board to ensure that the respondent commences the production after fulfilling all the conditions applicable to it as laid down in the consent letter and strictly observed all the laws pertaining to environment.

In *Ashwin Jajal v. Municipal Corporation of Greater Mumbai*\(^{80}\) a public interest litigation was filed by a resident against the Municipal Corporation seeking direction to prohibit the display of illuminated advertisements by use of neon lights in residential areas and also to revoke the permission granted to the respondents for display of advertisements on the buildings. It was argued that the neon light signboards created environmental and health hazards and were of nuisance value as the bright light is deterrent to peaceful sleep. On the other hand, the respondents said that they have fundamental right under Article 19(l)(g) to have free trade. The Court held that keeping in view the environmental and health hazard and nuisance value it is always open to the authorities to regulate the advertisement in a reasonable manner to the extent permissible and this does not result in the violation of fundamental right of free trade.

In *Wing Commander Utpal Barbara v. State of Assam*,\(^{81}\) the Additional District Magistrate in exercise of his power under section 144 of Cr.P.C. had banned the use of polythene bags in a district. The Court held that the rights of the suppliers and manufacturers under Article 19(l)(g) of the Constitution to carry on commercial activities had been clouded under the ban order. However, the Court pointed out that the remedy available to the District Administration is to regulate the use and disposal of polythene bags and not to impose the total ban and this

\(^{80}\) A.I.R. 1999 Bom. 35.
\(^{81}\) A.I.R. 1999 Gau. 78.
regulation can be done by enacting an appropriate legislation to obviate the possibility of any danger to public health and hygiene.

In *Baleshwar Singh v. State of U.P.*, the U.P. State Rule prohibited the operation of a saw mill within eighty kilometres of any reserved or protected forest. This was challenged by the owners of the saw mill on the ground that it violates the fundamental freedom under Article 19(1)(g) of the Constitution. The Allahabad High Court dismissed the petition and held that this is a reasonable restriction imposed to stop uncontrolled cutting of green trees resulting in disturbing ecological balance. The existence of saw mill in, near or around any forest is prohibited for the maintenance of the forest wealth and ecological balance and for the social and national interests.

Similarly, in the case of *Obayya Pujari v. Member Secretary, KSPCB, Bangalore*, the Court held that a licence in favour of stone crushing units does not confer on them absolute rights to carry on commercial activities of trade or occupation without limitation. The rights are subject to reasonable restrictions and can be regulated by court directions as are necessary for controlling pollution from such units.

In *A.P. Gunbies Merchants Association, Hyderabad v. Government of AP.*, the Andhra Pradesh High Court held that right to carry on business in old and used gunny bags is not absolute. The trade carried on involving activity of dusting and cleaning of gunny bags creates air and environmental pollution. Hence, the direction given by the State Government to shift the business from the thickly populated area to environmentally safer place are valid and not violative of Article 19(1)(g) of the Constitution.

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82 A.I.R. 1999 All. 84.
83 A.I.R. 1999 Kant. 157 at 164.
84 A.I.R 2001 A.P. 453.
In *Wasim Ahmed Saeed v. Union of India*85 the Supreme Court, in order to protect monuments and religious shrines, directed the shifting of shops to a distance of 750 metres away from religious shrines (Dargah of Salim Chisti in Agra).

Thus, from the perusal of the above cases it is evident that the judiciary has treated the condition of protection and preservation of environment and wildlife as a reasonable restriction in the public interest on the fundamental freedom under Article 19(1)(g) of the Constitution.

3.1.(c) Environmental Protection under Right to Equality

Article 14 of the Constitution provides the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India. The right to equality enshrined in Article 14, *inter alia*, strikes at "arbitrariness" of any governmental action "because an action that is arbitrary must necessarily involve a negation of equality."86 In fact, "equality and arbitrariness are sworn enemies". The principle of "non-arbitrariness" pervades Article 14 like a "brooding omnipresence." Whenever there is arbitrariness in State action, whether of the legislative or of the executive or of an authority under Article 12, Article 14 immediately springs into action and strikes down such action.

In fact, the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based.87 In a system governed by rule of law, discretion when conferred upon execution authorities, must be confined within defined limits. The rule of law from this point of view means that decisions should be made by application of known principles and rules and, in general, such decisions should be predictable and the citizen should know

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where he is.\textsuperscript{88} Non-arbitrariness is a necessary concomitant of rule of law and is in substance fair play in action.\textsuperscript{89} Thus, it is well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law.

In view of the above broadened interpretation of right to equality, article 14 is generally resorted to in urban development where permission for construction is granted by the authorities arbitrarily under its discretionary powers without evaluating public interest and without application of mind and considering the environmental impact. One such example is found in \textit{Bangalore Medical Trust v. B.S. Muddappa},\textsuperscript{90} where the Supreme Court thwarted the attempt to convert a public park site into a nursing home. The brief facts of this case were that the City Improvement Board of Bangalore had prepared the development scheme for the extension of the city of Bangalore. Under the scheme an area was kept for being developed as a low level park. Subsequently, under the direction of the Chief Minister of the State, the area kept for laying a park was converted to a civic amenity site where the hospital was to be constructed by the appellant. When the construction activity was noticed, the residents of the area approached the High Court which allowed the petition. The appellant came in appeal before the Supreme Court contending, \textit{inter alia}, that the decision to allot a site for a hospital rather than a park is a matter within the discretion of the development authority and thus the diversion of the user of the land for that purpose is justified under the Act. It was also contended that even if the conversion of the site suffered from any infirmity procedural or substantive, the High Court should have refrained from exercising its extraordinary jurisdiction under Article 226 of the Constitution.

The Supreme Court dismissed the appeal with costs and highlighted the importance of public parks and open space in urban development in the following words:

\textsuperscript{88} Id.,
\textsuperscript{90} (1991) 4 SCC 54.
“Protection of the environment, open spaces for recreation and fresh air, playgrounds for children, promenade for the residents, and other conveniences or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme....The public interest in the reservation and preservation of open spaces for parks and playgrounds cannot be sacrificed by leasing or selling such sites to private persons for conversion to some other user....it would be in direct conflict with the constitutional mandate”.  

R.M. Sahia, J., in his concurring judgment, observed:

“Public park as a place reserved for beauty and recreation...is associated with growth of the concept of equality and recognition of importance of common man....It is a, ‘gift from people to themselves’. Its importance has multiplied with emphasis on environment and pollution”.  

Rejecting the plea of discretion of the authority to convert the site of public park into the hospital site, the Court observed:

“The executive or the administrative authority must not be oblivious that in a democratic set-up the people or community being sovereign the exercise of discretion must be guided by the inherent philosophy that the exerciser of discretion is accountable for his action. It is to be tested on anvil of rule of law and fairness or justice particularly if competing interest of members of society is involved”.

The Court further pointed that—"discretion is an effective tool of Administration". When affecting public interests, it should be exercised objectively, rationally, intelligibly, fairly and authority cannot act whimsically or arbitrarily. It should also not to be exercised in undue haste disregarding the procedure.

Accordingly, it was held that the decision taken at the instance of the Chief Minister of the State to convert an open space reserved under the scheme for

91 Ibid., at 75-76.
92 Ibid., at 80.
93 Ibid., at 89.
94 Id.
public park into a site for constructing hospital and to allot the site to a private person or body of persons for this purpose was vitiated by non-application of mind and was arbitrary and hence *ultra vires* and violative of Article 14 of the Constitution.

In *D.D. Vyas v. Ghaziabad Development Authority*, the grievance of the petitioner was that the respondents had not taken any steps to develop the area reserved for park. On the other hand, respondents were marking time to carve out plots on such open space dedicated for public park in the plan and alienate the same with a view to earning huge profits.

The Allahabad High Court followed the dictum of the Supreme Court in *Bangalore Medical Trust* and held that the authority or the State cannot amend the plan in such a way so as to destroy its basic feature allowing the conversion of open spaces meant for public park. The Court issued the writ of mandamus and directed for the development of the park within the reasonable period of time not exceeding one year. The Court was of the view the respondents having failed to develop the park, have remained grossly negligent in discharging their fundamental duty under Articles 51-A(g) and 51-A(j) and they have believed all the cherished hopes of the State and citizens under Article 48-A of the Constitution.

In *Dr. G.N. Khajuria v. Delhi Development Authority*, land reserved for park in the residential area was allotted by DDA for the construction of a nursery school. The Court held that the allotment amounted to misuse of power and being illegal and hence liable to be cancelled. The Court also ordered that construction raised pursuant to illegal order be demolished and officer of the statutory body responsible for the illegal action must be punished in accordance with law.

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95 A.I.R. 1993 All. 57.
In *Sushila Saw Mill v. State of Orissa*, the Supreme Court held that imposing total ban on saw mill business or sawing operation within the prohibited area of reserved or protected forest is not violative of, *inter alia*, Article 14 being neither arbitrary nor unreasonable nor discriminatory. The Court further held that it was a class legislation as entire area within the prohibited zone was treated as a class against other areas. Therefore, the operation of the ban on a saw mill situated in the district which fell within the prohibited area cannot be said to be discriminatory on the ground of geographical contiguity of the district.

The Court has also used Article 14 to justify the government policy in certain cases. For example, in *Kholamuhana Primary Fishermen Co-op. Society v. State*, the government had framed a policy regarding fishing in Chilka lake so as to protect the traditional rights of fishermen. The Court held that the said policy was neither arbitrary nor ambiguous and hence not violative of Article 14 of the Constitution. However, the Court pointed out that adoption of extensive and intensive prawn culture to earn "prawn dollars" in disregard to ecology was not proper.

The Court has also struck down the action of the authorities if it was taken arbitrarily. For example, in *Mandu Distilleries Pvt. Ltd. v. M.P.* the Pollution Control Board issued direction for stoppage of production by the industry on the ground that it was causing water pollution. However, the Court found that there was serious flaw in "decision making process". The said decision was taken on extraneous consideration and arbitrarily. Grounds stated in show cause notices and basis for orders were not the same. There was also denial of principles of natural justice and consequent violation of inbuilt procedural safeguards. The Court quashed the order passed by the Board as violative of Article 14 of the Constitution.

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100 (1995) 3 SCC 363.  
In *Ivory Traders & Mfg. Assn. v. Union of India*¹⁰³ the Delhi High Court justified the ban on business in animal species on verge of extinction. The Court held that the ban on trade in imported ivory and articles made therefrom is not violative of article 14 of the Constitution and does not suffer from any of the mala fides, namely, unreasonableness, unfairness and arbitrariness.

In *Moulana Mufti Syed Md. Noorur Rehman Barkati v. State of West Bengal*,¹⁰⁴ the Court held that where it had imposed restrictions on the use of microphone, the Central Pollution Control Board and the State Pollution Control Board had to carry them out. Simply because no such former restriction had been imposed in other parts of India and the fundamental right under Article 19(l)(a)(g) was enforced strictly in the State of West Bengal and it was not enforced in other parts of India that does not amount to any case of any discrimination under Article 14 of the Constitution. Article 14 can also be invoked to challenge the government action where the permission for mining and other activities with high environmental impact is granted arbitrarily.¹⁰⁵

### 3.1.(d). Environmental Protection under the Directive Principles & Fundamental Duties

Environmental protection has been implicit in the Directive Principles of State Policy under Article 47 which states that State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health. Later, in pursuance of the United Nations Conference on Human Environment convened at Stockholm in 1972, the nations of the world decided to take appropriate steps to protect and improve human environment. As a part of it, the 42nd Constitutional

¹⁰³ *A.I.R. 1997 Del. 267 (F.B.).*  
¹⁰⁴ *A.I.R. 1999 Cal. 15 at 29.*  
Amendment Act of 1976 made to insert Article 48A in Directive Principles of State Policy to protect and improve the environment in the Constitution. Besides it, a new Part IV-A has been added to the Constitution which deals with the Fundamental duties. Article 51A (g) is the one of the fundamental duties which is exclusively emphasis the environmental protection. This article 51A (g) directs every citizen of India that it is the duty to protect and improve the natural environment including forests, lakes, rives and wild life, and to have compassion for living creatures. Thus, the Directive Principles of State Policy are cost duty on the State to implement them. Whereas the fundamental duties are directed to every citizen of India first discharge the duty while exercising the right.

The legal utility of fundamental Duties is similar to that of the Directives as they stood in the Constitution of 1949; while the Directives were addressed to the State, without any sanction, so are the Duties addressed to the citizen, without any legal sanction. Thus, the Constitution of India declares about the Directive Principles of State Policy under Article 37 that the Provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making law.

Hence, fundamental rights provided by Part-III of Indian Constitution are enforceable through Courts and writ can be issued by the High Court or the Supreme Court in proper cases of violation of fundamental right. The Article 48A added to Directive Principles of State Policy and Article 51A (g) of Fundamental Duties are termed fundamental, yet they are not enforceable. But the judiciary on considering dire necessity of protection of ecology, a paramount importance has been given to the Article 48-A and 51A (g) by applying harmonious interpretation to Fundamental Rights, Directive Principles of State Policy and Fundamental Duties.

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Part IV of the Constitution deals with directive principles of State policy. These directive principles represent the socio-economic goals which the nation is expected to achieve. The directive principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles. These directive principles are designed to guide the destiny of the nation by obligating three wings of the State, *i.e.*, legislature, judicature and executive to implement these principles.

Article 47 of the Constitution is one of the directive principles of State policy and it provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its *primary duties*. The improvement of public health will also include the protection and improvement of environment without which public health cannot be assured.

The Constitution (Forty-second Amendment) Act, 1976, added a new directive principle in Article 48-A dealing specifically with protection and improvement of environment. It provides:

The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

Thus, Indian Constitution became one of the rare constitutions of the world where specific provisions were incorporated in the *Suprema Lex* putting obligations on the "State" as well as "citizens" to "protect and improve" the environment. This certainly is a positive development of Indian law.

The State cannot treat the obligations of protecting and improving the environment as mere pious obligation. The directive principles are not mere show-pieces in the window-dressing. They are "fundamental in the governance

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108 Inserted by the Constitution (Forty-second Amendment) Act, 1976, section 10 (w.e.f. 3-1-1997).
of the country" and they, being part of the Supreme Law of the land, have to be implemented.

Article 37 of the Constitution provides: The provisions contained in this Part (Part IV) shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

In view of Article 37 of the Constitution, the Court may not be able to actively enforce the directive principles by compelling the State to apply them in the making of law. The Court can, if the State commits a breach of its duty by acting contrary to these directive principles, prevent it from doing so.

Also the non-enforceable nature of the directive principles does not preclude the judiciary from declaring any law unconstitutional which is in violation of the directive principles. The non-enforceable nature of the directives also does not preclude the right of the citizens to move to the Court to see that other organs of the State, i.e., the legislature and executive perform their duties faithfully and in accordance with the law of the land. Judicial process is also State action under Article 37 and the judiciary is bound to apply the directive principles in making judgment. The statutory interpretation, in the creative Indian context, may look for light of the load-star of Part IV of the Constitution. Where two judicial choices are available, the construction in conformity with the social philosophy of Part IV has preference.

Thus, the directive principles serve the Courts as a code of interpretation. Fundamental rights should be interpreted in the light of the directive principles

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11 Kesavanand Bharti v. State of Kerala, A.I.R. 1973 S.C. 1461 at 1952 (per Mathew, J.). Further Article 141 of the Constitution provides: 'The law declared by the Supreme Court shall be binding on all Courts within the territory of India." Thus, the judges of the Supreme Court also have law making function under the Constitution of India.
and the later should, whenever and wherever possible, be read into the former.\textsuperscript{113}

In other words, Part III dealing with fundamental rights and Part IV dealing with
directive principles are complementary and supplementary to each other.\textsuperscript{114}

The directive principles now stand elevated to inalienable fundamental human rights. Even they are justiciable by themselves.\textsuperscript{115} In India the judicial attitude in protecting and improving the environment provides a testimony of the fact that directive principles are not mere "guiding principles" of policy but they have to be given effect to.

In \textit{Shri Sachidanand Pandey v. State of W.B.},\textsuperscript{116} the Supreme Court pointed out that whenever a problem of ecology is brought before the Court, the Court is bound to bear in mind Articles 48-A and 51-A(g) of the Constitution. The Court further observed:

"When the Court is called upon to give effect to the Directive Principles and the fundamental duty, (Articles 48-A and 51-A(g) in this case), the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy making authority. The least the Court may do is to examine whether appropriate considerations are borne in mind and irrelevancies excluded. In appropriate cases, the Court may go further, but how much further must depend on the circumstances of the case. The Court may always give necessary directions. However, the Court will not attempt to nicely balance relevant considerations. When the question involves the nice balancing of relevant considerations, the Court may feel justified in resigning itself to acceptance of the decision of the concerned authority".\textsuperscript{117}

From the above observations of the Supreme Court it is evident that in certain cases the judges can take affirmative action commanding the other organs


\textsuperscript{115} Air India Statutory Corporation v. United India Labour Union, (1997) 9 SCC 377 at 416.

\textsuperscript{116} A.I.R. 1987 S.C. 1109.

\textsuperscript{117} Ibid., at 1115 (emphasis supplied).
of the State, *i.e.*, legislature and executive, to comply with the statutory obligation of protecting and improving the environment. However, if the government is alive to the various considerations requiring thought and deliberation and has arrived at a cautious decision after taking them into account, it may not be proper for the court to interfere in the absence of mala fides.\(^{118}\)

In *T. Damodhar Rao v. S.O. Municipal Corporation, Hyderabad*,\(^{119}\) the Court pointed out that in view of Articles 48-A and 51-A(g), it is clear that protection of environment is not only the "duty" of every citizen but it is also the "obligation" of the State and all other State organs including Courts.\(^{120}\)

In *Kinkri Devi v. State*,\(^{121}\) the Himachal Pradesh High Court reiterated that in Articles 48-A and 51-A(g) there is both a constitutional pointer to the State and a constitutional duty of the citizens not only to protect but also to improve the environment and to preserve and safeguard the forests, the flora and fauna, the rivers and lakes and all other water resources of the country. The neglect or failure to abide by the pointer or to perform the duty is nothing short of a betrayal of the fundamental law which the State and, indeed, every Indian, high or low, is bound to uphold and maintain. Otherwise, the Court cannot remain a silent spectator. To ensure the attainment of the constitutional goal of the protection and improvement of environment, the Court can intervene effectively by issuing appropriate writs, orders and directions.\(^{122}\)

In *M.C. Mehta v. Union of India*,\(^{123}\) (popularly known as *CNG case*) the Court observed that Articles 39(e), 47 and 48-A by themselves and collectively

\(^{118}\) See also *Dahiti Taluka Environment Protection Group v. Bombay Suburban Electricity Supply Co. Ltd.*, (1991) 2 SCC 539 at 541 where the Court again emphasized that its role is restricted to examine whether the government has taken into account all relevant aspects and has neither ignored nor overlooked any material consideration nor has been influenced by extraneous or immaterial considerations in arriving at final decision. See, also *Goa Foundation v. Konkan Railway Corporation*, A.L.R. 1992 Bom. 471; *B.S.E.S. Ltd. v. Union of India*, A.L.R. 2001 Bom. 128.


\(^{120}\) Ibid, at 181.

\(^{121}\) A.I.R 1988 H.P. 4.

\(^{122}\) Id., at 8-9.

cast a duty on the State to secure the health of the people, improve public health and protect and improve the environment.

3.1.(e). Empowering the Center and the States for the Protection of Environment

Under India's Federal System, governmental power is shared between the Union and the State Governments. Part XI of the Constitution governs the legislative and administrative relations between the Union and the States. Parliament has power to legislate for the whole country, while the State Legislatures are empowered to make laws for their respective States. Article 24 of the Constitution divides the subject areas of legislation between the Union and the States. On the Union List (List-I) contains various subjects which include defence, atomic energy, shipping, major ports, regulation of air traffic, inter-state transportation, regulation and development of oil fields, mines and mineral development and inter-state rivers. On the State List (list-II) the State Legislatures have exclusive power to legislate with respect to public health and sanitation, agriculture, water supplies, irrigation, drainage and fisheries. Under the Concurrent List (List-III) both the Parliament and the State Legislatures have overlapping and shared jurisdiction over the areas such as, forests, the protection of wild life, mines and minerals development not covered in the List-I, population control and family planning, minor ports and factories. Under Article249 Parliament has residual power to legislate on subjects not covered by the three lists. When a Central Law conflicts with the State Law on Concurrent subject, the Central Law prevails. A State Law subsequent to the Central Law will prevail, however it has received presidential assent.\footnote{Article 254 of the Indian Constitution.} \footnote{Article 249 of the Indian Constitution.} Parliament is also empowered to legislate in the national interest on the matters enumerated in the State List.\footnote{Article 254 of the Indian Constitution.} Parliament in addition may enact laws on State subjects, for States whose legislatures have consented to Central legislation.
The 42nd Amendment to the Indian Constitution made certain changes in the VII Schedule to the Constitution. Originally forests were a subject included in List-II, Entry 19. Since no uniform policy followed by the State in respect of protection of forests, now this subject was transferred to List-III and hence, now the Parliament and State Legislature both may pass legislations.

Protection of wild animals and birds was also transferred from List-II, Entry 20 to List-III, Entry 17B. 42nd Amendment Act for the first time inserted Entry 20-A in List-III which deals with population control and family planning because enormous increase in population is main cause for environmental problems.

Neither the Constituent Assembly nor the Constitution power gives specific place to either the environment or environmental pollution in distribution of legislative powers under the Seventh Schedule. Parliament realising its inability and different approaches of States requested some States to move under Article 252. Article 252 says that If it appears to the legislature of two or more States to be desirable that Parliament may pass law on the subject and if the State Legislature pass resolution to the effect then parliament may pass law on the subject. This Article further allows other states by resolution to adopt Parliamentary legislation.

The 42nd Amendment also expanded the List of Concurrent powers in the Constitution. The Amendment introduced a new entry "population control and Family Planning", while Forests and Protection of "Wild Animals and Birds" were moved from the State List to the Concurrent List. It empowers the parliament to make laws implementing India's international obligations as well as any decision made at international conference, association or other body. Article 253 states that notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference,
association or other body. In view of the broad range of issues addressed by international conventions, conferences, treaties and agreements, Article 253 apparently gives Parliament the power to enact laws on virtually any entry contained in the State List. Parliament has used its power under Article 253 to enact Air (Prevention & Control of Pollution) Act, 1981; and the Environment (Protection) Act, 1986. The Preambles to both laws state that these Acts were enacted to implement the decisions reached at the United Nations Conference on Human Environment held at Stockholm in 1972. The broad language of Article 253 suggests that in the wake of Stockholm Conference in 1972, Parliament has power to legislate on all matters linked to the preservation of natural resources.

3.1.(f). Judicial Remedies in the Protection of Environment

One of the most innovative parts of the Constitution is that right to enforce the fundamental rights by moving the Supreme Court is itself a fundamental right under Article 32 of the Constitution. Writ jurisdiction is conferred on the Supreme Court under Article 32 and on the High Courts under article 226 of the Constitution of India. Under these provisions the Supreme Court and High Courts have the power to issue any direction or orders or writs, including writs in the nature of Habeas Corpus, Mandamus, Prohibition, quo Warranto and Certiorari, whichever is appropriate. The only difference between the writ jurisdictions of the Supreme Court and High Courts is that one can move the Supreme Court only for the enforcement of fundamental rights whereas in High Courts; it may be for the enforcement of fundamental rights or for any other purpose. Form this point, the writ jurisdiction of the High Courts is wider in scope. However, one must remember that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. Also the Supreme Court in exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it.

3.2. Legislative Measures on Environmental Protection

Legislative strategies for environmental protection are not a new and sudden happening in India. It has been developed gradually from the state of
appearance of some environmental related provisions in different kind of statutes to special statutes exclusively dealing with environmental protection. This gradual development can be divided to two stages—Pre-Constitutional and Post-Constitutional. Pre-Constitutional legislations relating to the environment are: Indian Penal Code, 1860; the Criminal procedure Code, 1898; the Indian Motor Vehicle Act; the Factories Act, 1948; the Indian Forest Act, 1927 and the Indian Easements Act, 1882 etc. Post-Constitutional laws are: the Wildlife (Protection) Act, 1972; the Water (Prevention and Control of Pollution) Act, 1974; the Air (Prevention and Control of Pollution) Act, 1981; the Forest (Conservation) Act, 1980; Wildlife (Protection) Amendment Act, 1986 and the Environment (Protection) Act, 1986; and the Water (Prevention and Control of Pollution) Cess Act, 1977. etc. Objectives of some important statutes are discussed below.

3.2.(a). Forest Conservation Act, 1980

The forest legislations make a remarkable shift from the old ones to a new environment oriented approach towards forest. It looks upon forests as a national asset to be protected and enhanced for the well being of the people and the nation.

The Forest Conservation Act, 1980 does not seem to be free from effects. The committee to advise the Central Government for granting prior approval does not give any guidelines. The constitution and structure of the committee is subject to the exercise of the discretion of the Central Government. There is no mandate for an open objective Environment Impact Assessment before the committee makes the recommendations. It is also not mandatory on the part of the Central Government to accept the recommendation that prior approval should not be given. The National Forest Policy is quite clear on these aspects. Prior approval should be subject to the objective study by specialists and the law should contain adequate infrastructural mechanism.\footnote{Forest Conservation Dawn of Awareness (P. Leelakrishnan), Law & Environment, 1992, Lucknow, Chapter 3, p. 61.} The Forest Conservation Act, 1980 (1988 Amendment) brought some changes. But the pertinent question is that why the
amendment does not treat as ‘non-forest purpose, construction of a dam’ which according to the policy should be consistent with the needs for conservation of trees and forests.

It is pertinent to note here that India’s National Forest Policy declared in 1985 paid due attention to the problems of tribal people and intended to associate them in forest conservation and development.

It is a fact that Indian forest policy recognised the tribal people customary rights and concessions and declared to protect and maintain these traditional rights. The policy statement also expressed that “the holders of customary rights and concessions in forest should be motivated to identify themselves with the development and protection for forests from which they derive benefit.” But in practice, the forest department philosophy has varied from time to time from absolute protectionism to a callous attitude towards the tribal settlements as a necessary evil to be contained within strict limits. Similarly almost virtual disregard to our forest policy the Sardar Sarovar Dam, Tehri Dam etc., projects had been launched by the Government. The Tehri the Narmada Bachao Andolan, other environmentalist groups and even the Report of the Independent commission by the World Bank have exposed the exaggerated claims of the vested interests supporting that environmental project. The former UNDP Director, Bradford Morse after a thorough study with all the concerned parties of the project found that “measures to anticipate and mitigate environmental impact were not properly considered in the design of the projects because of lack of basic data and consultation with the affected people.” The Report also noted that “Gujarat is unlikely to be able to resettle a large proportion of oustees from Maharashtra and

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127 Id.,
128 Id.,
130 (1985) CULR p. 163
Madhya Pradesh.\textsuperscript{133} It was further commented that “record of resettlement and rehabilitation in India has been unsatisfactory virtually in every project with a large resettlement component.\textsuperscript{134}

The judiciary protected the rights of people of forests through their epoch making judgements. Further the court in number of cases directed some measures to rehabilitate the evictees who were in actual position of the lands or houses to be taken by the corporations in collaboration with the concerned State Governments.\textsuperscript{135}

Despite all the draw backs our present policy has been realised and our traditional attitude to tribal forest people really being reflected. The role played by WWF for successfully implementation of forest policy is laudable.

Unless our basic human nature transcends from narrow limitations there will be no end and of exploitation and oppression of the poor tribal forest people. Pragmatic approach to the needs of the tribal habitat should be the other basis supporting law reform.

\textbf{3.2.(b). Wild Life Protection Act, 1972}

From time immemorial wild animals and other living beings in the forest together with forest flora had played a vital role in maintaining the eco-balance. Right from ancient times different strategies have been evolved for protection of wild life. We had various sources relating to restrictions of hunting from \textit{Manusmriti}\textsuperscript{136} and \textit{Arthasastra}.\textsuperscript{137} Plethora of legislations\textsuperscript{138} was enacted even during British time for the protection of wild life. Some of the provisions were incorporated in Indian Forest Act, 1972.\textsuperscript{139} Separate legislations for protection of

\begin{flushleft}
\textsuperscript{133} Ibid. at p. 353  \\
\textsuperscript{134} \textit{Id.}  \\
\textsuperscript{135} AIR 1992 SC 920 at p. 922  \\
\textsuperscript{136} See for details Arthur Coke Burnell, ‘Hindu Polity (The Ordinances of Manu)’ , (1972), p. 218  \\
\textsuperscript{138} The Government Forest Act, 1933, The Indian Forest Act, 1878  \\
\textsuperscript{139} Indian Forest Act, 1927
\end{flushleft}
wild life was enacted by different States.\textsuperscript{140} It is pertinent to mention the laws passed by the Central Government i.e., Wild Elephants Preservation Act, 1879.\textsuperscript{141} The most significant legislation for the protection of wild life in the country is the Wild Life (Protection) Act, 1972.\textsuperscript{142} The Act with the significant amendments made in 1986 and 1991 forms a comprehensive legislation for the protection and management of Wild Life in the country.

The Wild Life (Protection) Act, 1972 imposed prohibitions and restrictions on hunting wild life. Under this Act wild life is classified into different categories. However, in 1991 prohibition of hunting was uniformly extended to all animals mentioned in Schedules I to IV.\textsuperscript{143}

Regulation of hunting alone cannot protect wild life. There are certain animals and birds that have reached the verge of extinction. Steps are to be taken to increase the number so as to save such species from extinction. The legal provisions, if properly and effectively implemented, are effective in protecting wild life.

The penal provisions originally in the Wild Life (Protection) Act, 1972 was inadequate to have any deterrent effect on the offender. In 1991 significant improvements were made in this regard by enhancing the punishment for contravention of the Act from 2 years imprisonment to 3 years imprisonment and the fine from Rs.2,000/- to Rs.25,000/-. However, this amount is also inadequate when compared to the value of the goods smuggled.

Another drawback in the Wild Life (Protection) Act, 1972 is the retention of the provisions for compounding of offences. Compounding provision which enables a smuggler to release the property on payment of a maximum amount of Rs.2,000/- is no better device control illegal hunting and smuggling of wild

\textsuperscript{140} Madras Elephants Preservation Act, 1873
\textsuperscript{141} Wild Elephants Preservation Act, 1879
\textsuperscript{142} The wild Life (Protection Act, 1972).
\textsuperscript{143} Schedule—IV by 1991 Amendment to wild Life (Protection) Act, 1972
animals and animal articles. So it is suggested that the compounding provision be deleted from the Act. The major provisions of the Act are Constitution of a Wild Life Advisory Board for each State, regulating the hunting of wild animals and birds, specifying the procedures for declaring area as sanctuaries and national parks and regulating the possession, acquisition, and trade in wild animals, animal products, trophies and taxidermy. Although the law is comprehensive in its coverage and provisions, implementation through the Forest Department of each State has not been effective. In particular, the hunting of rare animals and trade in wild life products has both continued. ‘Protection of wild life should be taken as a goal. Framing of a law and its implementation alone is not sufficient to achieve this object. Much depends on the will of the people’.

3.2.(c). Water (Prevention & Control of Pollution) Act, 1974

The water legislation so far enacted clearly confirm the legislators ambition to consider water as a source for the economy, an element in the population’s life style, a living environment and a part of country’s natural heritage. The procedural requirement of a regular civil court made relief very difficult. Very often cases were lost on account of mere procedural and technical irregularities. It was only in the year 1974 that the Water (Prevention and Control of Pollution) Act, 1974 was enacted. Then the Water (Prevention and Control of Pollution) Cess Act, 1977 was passed. The procedure of legal action is such, more often than not, it takes a very long time for disposal. Further if punished in a lower court, the defendant has right to appeal to a higher court. This delays administration of law and in the process pollution continues. The Supreme Court of India in catena of cases advised for speedy disposal in pollution control cases.

It is again realised that in many cases, the lack of technical knowledge in the trying of such cases judges are unable to appreciate fully the scientific and technical evidences on pollution of environment and related matters. In India only a few cities have full-fledged sewage treatment facilities. Actually, in practice they are not properly operated most of the time. Thus, large volumes of untreated domestic sewage ultimately find refuge in rivers and other water bodies. It is
almost an established fact that in a large number of cases, this is the only cause of river water pollution in India. The urban local bodies, whose responsibility is to discharge domestic sewage after treatment, have not shaken off their inaction and indifference. They are incapacitated by financial insolvency (Ratlam’s case).

The sweeping powers given to the Pollution Control Boards and the Central/ State Governments to order closure or stoppage or regulating of electricity, water supply etc. under Sec. 33-A of the Act this power is vested with Central Government, but has been delegated to some State Governments are infact difficult to implement. It is not practicable to close down industries that employed several thousands of persons due to pollution. Such closure orders have no relevance in case of urban local bodies, who are the greatest water polluters.

The non-point sources of pollution of streams and lakes like run-offs from agricultural fields contained fertilizers; pesticides etc. bathing and defecting on river banks are very significant in India. The Water Act, or in that matter, any other law, cannot address this problem unless the various practices and cultural habits of people change. Since the present provisions in the Municipality Acts are inadequate for the purpose, necessary amendments should be made empowering the authorities to take stringent action against the polluters irrespective of their status.

3.2.(d). Air (Prevention & Control of Pollution) Act, 1981

The presence of cloud served notice to millions of people that air pollution had reached a dangerous level. It is true that the crisis has not yet arrived in every part of the world since air pollution is not equally severe in every region. Across India, the quality of air continues to deteriorate and if the present trend is not controlled a time may come when no town or city will have immunity and “the garbage will fill the nation’s skies from sea to shining sea. Elaborate research and intensive study has revealed over million tonnes of pollutants are poured into the air each year in India.
Today’s industrial and urban society with its components like speedy transport, modern food craving for miracle drugs, mechanized and desire for material prosperity and contribute to pollution either directly or in directly. Air pollution affects health, materials, vegetation and climate.

This Act however been put to severe criticism as seeking protection of environment through force and the discarded theory of penal deterrence by prescribing higher levels or sanctions.

This is said to be inconsistent and outdated, lacking explicit policy objectives and adequate provisions for helping the pollution control mechanism. The implementing machinery is said to be a failure in actual litigation because they already over burdened and over loaded courts adhere as usual more to legal and procedural technicalities than to sensitive environmental issues and show general reluctance towards pollution prevention by not allowing or directing closure of defaulting industries. From the economic point of view the legal control method may provide the industries scope for indulging in corrupt practices. Most of these laws are said not have reached viable working levels due to inadequacies in the official implementation.

The Air Act may not be very effective to enforce pollution control is the dust pollution in mining areas. The Mines and Mineral (Development & Regulation) Act, 1957, for which the enforcing authorities are the state and Central Governments, will be very effective to prevent and control environmental degradation, including air and water pollution in a mining industry. Sections 4a (1), 4a (2), 18 (1) and 18(2) of the Act empowers the Central and the State

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145 Ibid. at p. 27.
146 Ibid. at pp. 29-30.
147 Armen Rosencranz “Environmental cases, Materials Pvt. Ltd., (1991 observed that countries would Shyam Diwan, Marthal Noble, Law and Policy in India, and Statutes”, N.M. Tripathi at p. 73 where it has been most of the developing be prepared to tolerate through their national policies some industrial pollution to clean intolerable pollution of poverty.
Governments respectively to cancel the mining licence where serious environmental degradation occurs.

The vehicular pollution is recognised as the main cause of air pollution in many urban metropolitan cities. India has the distinction of having three of the ten worst polluted cities of the world. The Air Act not only provides for the fixation of standards for vehicular emission by the Pollution Control Boards. Most of the State Boards have already done so and the standards have been notified. The various Motor Vehicles Acts have by now incorporated provisions for enforcement of the standards. The Central and State Governments, and not the pollution Control Boards, are the authorities for enforcement of provisions of the Motor Vehicles Acts. This is carried out through the officers of the Transport Departments. However apart from fixing the standards, the Pollution Control Boards extend helping hands to transport authorities by way of monitoring vehicular pollutions, providing necessary training to officials etc.

Another two important defects in the Air (Prevention and Control of Pollution) Act, 1981 are that mobile sources are not covered and the responsibility for implementation was assigned to the Water Pollution Control Boards, thereby exacerbating their problems of inadequate finances and expertise in addition, the Act does not provide for performance standards for pollution generating equipment.

From the above analysis it is clear that the Air (Prevention & Control of Pollution ) Act, 1981 is not effective to prevent and control all types of pollutions. Provisions of other Acts are most effective in specific types of pollutions.

3.2.(e). Environment (Protection) Act, 1986

Under the Environment Protection Act, 1986 the Central Government has power to issue directions to close, regulate or prohibit any industry or process or stop or regulate the supply of water, electricity or other services. This is an
extremely important power. Under the earlier Acts, none of the authorities had such a power.

The weakness in the Pollution Acts continued in the Environment Protection Act, 1986 also. Under the Pollution Acts there was no machinery to ensure their implementations. Workers and citizens were neither given access to information nor the right to monitor or use any industry without the permission of the Board.

Industries under the Pollution Acts are accountable only if the Pollution Control Boards officials decide to book them. Lack of infrastructure, political pressure and corruption have resulted in the Boards allowing the industries to go Scot free. The Environment Protection Act does not solve any of these problems.

The individual does not stand on a better footing. If during the 60 days notice period the government files a complaint against the industry or communicates to the individual its decision not to file a complaint, the individual cannot proceed with his complaint. Thus, individuals are virtually given no rights to launch proceedings against defaulting industries. Under the environment Protection Act, 1986, citizens, workers and environmental groups are neither given access to any data nor any right to commence independent action. This is a major flaw in the Act.

Another shortcoming is that in cases of offences committed by a company, a director, manager or other officer is liable to proceed against only if it is proved that the offence is committed with the consent or connivance of such person or is attributable to any neglect on the part of such an officer. This gives an easy way out by shifting the blame to an employee rung.

The Environment (Protection) Act, 1986 nonetheless has various problems. Although the Act was passed in 1986, the rules for hazardous substances were not formulated until 1989, these rules require the State Pollution
Control Boards to identify disposal sites for hazardous wastes which has not yet occurred due to lack of expertise and the absence of criteria for site identification.

Another defect is the Acts disregard of noise pollution. Although the Environment (Protection) Act, 1986 provided for an expanded role for legal action, litigation has mixed record in environmental matters in India. Litigation is time consuming, and there is a large backlog of cases in various High Courts and the Supreme Court. Prosecutors and courts are reluctant to pursue criminal violations against corporate managers and senior executives due to their social positions. When criminal charges are filed, it is difficult to prove criminal liability since there can be temporal and spatial changes in emissions depending on actual production. In addition, tort law (concerned with private action to obtain compensation for injury and negligence, but which also seeks to encourage prevention) is not well developed in India, Constituting a ‘low accountability low-remedy system’.

Finally, litigation is uncertain due to the complexities of the environmental laws and the problematic rules of evidence for these laws. These problems with judicial action have contributed to the lack of implementation. Other forms of pressure (such as lobbying, public education and political action) to promote implementation of environmental regulations in India. On the other hand, judicial action has some advantages. Because Judges are not involved in electoral politics, they are better positioned to take decisions that are unpopular in the short run but beneficial in the long run.

3.2.(f). Factories (Amendment) Act, 1987

Another post Bhopal improvement in environmental policy was the Factories (Amendment) Act, 1987, which provided significantly better controls than the Indian Factories Act, 1948 over the use and handling of hazardous substances in the work place, along with the stricter punishment for non-compliance. The Act made important progress in requiring the disclosure of information about hazardous processes to government officials, workers and local
residents. This Act also permits employees to inform the Factory Inspectorate directly about safety violations during the operation of a plant. Another important change is the definition of a manufacturing facilities occupier, who is responsible for the implementation of the Act’s safety and hazard management. The amendment specifies that the occupier is the person with ultimate control over the affairs of the factory, thereby raising the level of responsibility within a company and increasing the probability of compliance with safety regulations. The amendment also specifies workplace exposure standards for many chemicals for the first time.

3.2.(g) Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985

After having enunciated the new principle of strict and absolute liability and the principle of measure of compensation on the basis of magnitude and capacity of the enterprise having a deterrent effect, the Supreme Court brought about an abrupt end of the Bhopal Gas case totally ignoring the vital issue involved and not heeding even its own verdict in Shriram’s case.\textsuperscript{149} The judgment of the Supreme Court is to say the least unfortunate, shocking and distressing. It is simply a judicial let down. The most objectionable thing in this connection is that though the highest tribunal of the land has ended the litigation relating to Bhopal Gas Leak Disaster rightly termed as Industrial Hiroshima, the court has not considered the constitutional validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 in proper perspective. One may not agree with the view that it is a ‘total sellout’, but it is undoubtedly a defeat of the Apex Court of the hands of the strategy of the Government of India and the might and power of Multi National Corporation has been manifested in the case. It will go down in history as the ‘Waterloo’ of Indian Judiciary. The court fell to the strategy of the government which has taken plea in the American court that India’s legal system lacks the procedural and practical capability to handle this litigation. The judgment of the court clearly shows that this plea of the government was correct. The judgment in the Bhopal case also confirms what Mr. Palkiwala had deposed

\textsuperscript{149} M.C. Mehta Vs. Union of India (Sriram’s case) AIR 1985 Sc 812.
The judgment is neither ‘equitable’ nor to the best advantage of the claimants and is thus contrary to the letter and spirit of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. The Bhopal Gas Leak case is thus the anti-climax of the climax achieved by the Supreme Court in M.C. Mehta Vs. Union of India. In respect of the principle of strict and absolute liability and the principle of measure of damages “correlated to the magnitude and capacity of the enterprise” having a deterrent effect. The award of 470 million US dollars (Rs. 715 crores) is to say, the least neither adequate nor correlated to the magnitude and capacity of U.C.C. much less having deterrent effect. Last but not the least, contrary to all principles of criminal jurisprudence, the judgment has quashed all criminal proceedings relating to Bhopal Gas Leak Disaster.

The role of the government in the Bhopal case deserves to be strictly criticized and condemned. In the first place, it went to a court of foreign country and argued that its own judiciary was incompetent and inefficient and lacked procedural and practical capability to deal with this litigation. Secondly, instead of giving proper and adequate relief to the victims of Bhopal Gas Leak Disaster it waited for U.C.C. to give compensation. Thirdly, after having filed the suit for compensation and damages to the tune of Rs.3,900 crores, it entered into compromise with I.J.C.C. to accept only Rs. 715 crores. It assumed the role of ‘Trustee’ of the victims and hence it was incumbent upon it to settle the claims ‘to the best advantage of the claimants’. Instead of taking advantage of the principles enunciated in Sri Ram’s case152 it betrayed the role of guardian and trustee of the victims. Fourthly, it took the position that the most important issue in the case was the liability of multinational enterprise, it totally ignored this and other vital issues. Fifthly, being the leader of the Non-Aligned countries, third world countries were looking towards India for its contribution in the development of human rights jurisprudence. Instead of assisting the Apex Court in developing

150 Mr. N.A. Palkiwala had deposed ‘The ends of justice often require the truth to be faced squarely and stated bluntly. Indian courts are inadequate only in the sense that they are inadequate instrument for procuring the fabulous damages which American Juries are prone to award’

151 M.C. Mehta Vs. Union of India (Sriram’s case) AIR 1985 SC 982.

152 Id.
human rights jurisprudence and principles of multi-national enterprise liability, it scuttled and nipped in the bud this August development by the highest tribunal. “It used the Judiciary to disguise what was really a settlement”

The judgment of the Supreme Court in Bhopal Gas case is unfortunate, shocking and distressing. It has been termed as shocking, devasting and as calamitous as the Bhopal Gas Leak Disaster itself.

The judgment of the Supreme Court in Bhopal Gas Leak case has created more problems that it has solved. The way the Supreme Court has dealt with the Bhopal case has sagged its prestige very low. “The error is human but wisdom lies in not so repeating and taking lessons from past errors.”

3.2.(h). Public Liability Insurance Act, 1991

The main reason for initiating this Act was the occurred in providing compensation to the Bhopal accident. The judicial craftsmanship has been mirrored into the enactment on Public Liability Insurance Act of 1991. The act envisages mandatory insurance for the purpose of providing immediate relief to the victims of accident arising out of hazardous process and operation. The growth of these industries accompanied by the inherent risk not only to workmen employed in such undertaking but also the innocent members of the public has been a cause of deep concern. Public Liability Insurance delay that victims of Act, 1991 and 1992 Amendment share the passion of compensatory justice to the valiant victims. The Act mainly protects the members of weaker sections of the society who by reason of their limited resources cannot afford the prolonged litigation in a court of law. To achieve this goal, it envisages for the mandatory public insurance based on the principle of no fault liability. However, the relief provided under the act is a temporary solace and victims are free to approach the court for claiming large compensation.

153 Bhopal Gas case, AIR 1990 SC. 273
The Act in its original shape could not be implemented on account of insurance companies not agreeing to give policies for unlimited liability of owner. It was therefore, felt, that the liability of the insurance companies should be limited to the amount of insurance policy though the owners liability shall continue to be unlimited. The via media has been created by the establishment of ‘Environment Relief Fund’.

The scope of relief is limited to accident arising out of handling hazardous substances. Accident arising out of other equally perilous factors will not fetch any monetary compensation. In case of hazardous substances too only overdose exposure i.e., exceeding such quantity as may be prescribed by notification of central Government attracts condemnation. The routine exposure and its deleterious affect on health and property has been ignored. The immediate relief to the victims will be provided on the ground stated in the schedule. It includes reimbursement of medical expenses, compensation for fatal accidents, mitigation of loss of wages and damages to property. To sustain a claim for compensation, the petitioner shall not be required to plead and establish the death, injury and damage have been caused due to any wrongful act, neglect or default of any person. It means the liability of the owners is strict.

The insurance policy will be equivalent to amount of paid up capital of undertaking or an amount not exceeding 50 crores rupees subject to the periodic renewal. Since the enforcement of the Act has been delayed due to refusal of insurance companies on the ground Of unlimited liability, the 1992 amendment provided for a limited liability. The amount of premium received under the insurance policy should be credited to environment relief fund. However, the Central Government has discretion to exempt the central, state and local government and public provided a fund has been created for meeting any

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156 Section 2 (a) of the Act
157 Section 2 (d) of the Act.
158 Section 4 (2—A) (inserted by 1992 Amendment).
159 Section 4 (2-c) and (2—d).
liability.\textsuperscript{160} (Under sub-section (1) of Section (3). This provision unnecessarily dilutes the concept of mandatory insurance. Moreover, the discretionary power of Central Government may lead to arbitrariness.

Apart from providing immediate relief the Act touches some of the pertinent issues relating to strict monitoring and vigilance of the hazardous operations. The penalties provided and gradation of offences to deal with the accident is based on strict liability principle.\textsuperscript{161} Besides, the act exercises the power of entry, inspection, search and seizure.\textsuperscript{162} The Collector is also statutorily empowered to make application for restraining owner from handling hazardous process. The court can take cognizance of offences on the complaint made by Central Government or any authority.\textsuperscript{163} It discourages the public complaint which might prove a disincentive to the public participation in setting the machinery of the court in motion. The requirement of 60 days notice to the Central Government or the authority appointed on its behalf for filing a complaint is an unnecessary embargo keeping in view the inherent risk involved in handling hazardous substances. The government or the authority not always but at times exhibits callousness and indifference in initiating action at appropriate time. Though the Act prescribes the punishment in a graded manner but in effect it carries low deterrent effect. No punishment has been prescribed to deal with the cases of non-compliance of liability to pay immediate relief under Section 3. This provision keeps the no fault or strict liability principle in abeyance. Under Sec. 6 of the Act an application for claim for relief can be filed by a person who sustained injury, an owner, whose property has been damaged, and their legal representatives and agents. No scope has been provided for social action litigation and public participation\textsuperscript{164} in claiming the compensation. The Act intends to protect the innocent victims but on the other hand it discourages the representative suit, class action and social action litigation. Discretion can be exercised by the Collector

\textsuperscript{160} Section 4 (3).
\textsuperscript{161} Section 14.
\textsuperscript{162} Section 11
\textsuperscript{163} Section 18.
\textsuperscript{164} P. Leela Krishnan,’ Public Participation in Environmental Decision Making’ (Law & (Environment) 1992 ed. pp. 162-174
while determining the award of compensation. The payment of award within 3 months of filing is laudable. The voluntary agencies engaged in health and environment protection should be given representation. It is the need of the hour that long term compensation should be provided in the Act itself.

Environmental Protection is the mandate of the Indian Constitution. It contains various Articles and Provisions which are exclusively dealing with the environment. Article 21 which is in the Part III of Fundamental Rights of the Indian Constitution guaranties every one the Right to Life. The word ‘Right to Life’ has been interpreted in a number of cases to include all Human Rights. The ‘Right to Hygienic Environment’ is no exception. Thus, the Article 21 has immense potentiality to preserve the ecology by guaranteeing the ‘Right to Life’. The Constitution itself contains Directive Principles of State Policy in Part IV. Article 48A has been added to this Part by 42nd Constitutional Amendment Act, 1976 to protect and improve the environment. The nature of the Directive Principles of State Policy in Part IV is that the goals and objectives in this part are set to the present and future Governments to achieve and accomplish. Therefore they are called Directives Principles. This is constitutional obligation on each and every successive Government to fulfill the aspirations of the Constitutional makers. As a part of it, Indian ‘Environmental Policy’ has been framed in order to control the pollution and to protect the environment. Indian Environmental Policy concern has been discussed in the next Chapter.