## CONSTITUTION AND COMMON LAW PRINCIPLES FOR CONSERVATION OF NATURAL RESOURCES

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Part - 1

Constitutional Law Provisions for Conservation of Natural Resources

2.1. Introduction

Human relation with the nature is an integral part of human history and civilization. In the early stage of the history of mankind, this beautiful child of the nature fully depended on the natural wealth for its survival. In the company of vast forests, plenty of land, clean air, pure water and abundant animal life, man was happy in the state of nature. However in the process of evolution, man being endowed with the thinking, reasoning ability and intelligence has tried to change his status from one of the creatures of the nature to the regulator, controller and ultimately the destroyer of the nature and its components. Man’s incessant quest for happiness has led him to the conflict with the nature. His quest for the industrial development and the economic prosperity dismantling the ecology has resulted into the tampering with the nature’s cycle. Even he has forgotten the universal truth that any civilization that has tampered with nature’s cycle of renewal has fallen by the wayside of history.\(^{114}\) Man’s role in manipulating his surroundings is enormous and ranges from the obvious-damming of great rivers, to the subtle—the effects of DDT on the reproduction of wildlife. This concern over environmental impact generated a great deal of worry starting in the late 1960s. Many environmentalists, therefore, began to propose a ‘right’ to environmental quality.

We live in an era of convergence. The values of human rights, environmentalism, development, federalism and participative democracy converge. They stimulate us to go beyond the conflicting and overlapping multiplicity of jurisdictions and the mind-boggling procedural rigmaroles, and to use the instrumentalities of power, both public and private, to uphold and effectuate these values.\(^{115}\)

Right to a healthy environment is based on the premise that no individual or entity [whether Government or business] has the privilege to endanger the environment to the extent that it adversely affects the ecological sustainability of all natural resources including air, water and land resources. On the other hand, that right includes an obligation to see that natural resources

\(^{114}\)Suresh Mane, Environmental Protection: The Constitutional Imperatives in Vijay Chitnis [ed] on Environmental Law, [CEERA, National Law School of India University], 1999.

are held in trust for use of the present and future generations. This is the duty of all responsible and concerned citizens. However, not everyone in the society is aware of this duty.\textsuperscript{116}

In the Indian Constitution, the seeds of environmental promotion could be seen in Art. 47 of the Constitution, which commands the States to improve the standard of living and public health. To fulfill this constitutional goal, it is necessary that the State should provide free environment. The UN Conference on Human Environment held at Stockholm placed the issue of the protection of Biosphere on the official agenda of international policy and law. The Conference acclaimed man’s fundamental right to adequate conditions of life in an environment of quality that permitted a life of dignity and well being.\textsuperscript{117} ‘Both aspects of man’s environment, the natural and the manmade are essential to his well being and to the enjoyment of basic human rights, even the right to life itself’.

To comply with the principles of [the] Stockholm Declarations adopted by the International Conference on Human Environment, the Government of India, by the Constitutional 42\textsuperscript{nd} Amendment Act 1976 made the express provision, by introducing Art. 48-A\textsuperscript{118} and 51-A(g)\textsuperscript{119}, which forms a part of the Directive Principles of State Policy and the Fundamental Duties respectively. Part IV on Fundamental Duties has been incorporated by the Constitution Act 1976\textsuperscript{120} in accordance with the recommendations of the Swaran Singh Commission bringing the Constitution in line with Art. 29(1) of the Universal Declaration of Human Rights and the Constitutions of China, Japan and USSR.\textsuperscript{121}

In protecting the natural environment, Article 48 A\textsuperscript{122} is of immense importance in the present scenario. Because with the activist approach of judiciary in India, the legal value of Directive Principles jurisprudence has constantly grown up in the Indian Constitutional set up. India was not only amongst the first nations to incorporate environmental conscience, but is also the only

\textsuperscript{117} The agenda consisted of: a) Planning and management of human settlements for environmental quality, b) Natural resource management, c) Control of pollutants and nuisance of broad international significance, d) Education, information exchange of environmental issues, e) International co-operation and action plan for development and environment.
\textsuperscript{118} ‘State shall endeavor to protect and improve the environment and to safeguard the forest and wildlife of the country’.
\textsuperscript{119} It shall be the duty of every Citizen of India to protect and improve the natural environment including forest, lakes, rivers and wildlife and to have compassion for living creatures’.
\textsuperscript{120} 42\textsuperscript{nd} Amendment.
\textsuperscript{121} D J De, Constitution of India, Asian Law House, Hyderabad, p. 897.
\textsuperscript{122} ‘State shall protect and improve and safeguard forest and wildlife of the country’. This is a positive obligation inscribed—For the improvement of the natural environment the use of positive action is highlighted.
country to obligate the State as well as the citizen to protect and conserve the natural environment. Hence the above provisions are of pivotal significance.

The Government of India to accelerate the pace of environmental protection, further amended the constitutional text by making the necessary changes in the Seventh Schedule of the Constitution. ‘Forest’, which was in the State List was transferred to the concurrent list, while protection of ‘wild life’ and population control and family planning were incorporated. Because of the change, in order to have a uniform policy in the forest management, the Government of India in 1980 set up the Ministry of Environment and Forests.

The Parliament also enacted a central legislation i.e. Forest Conservation Act, 1980, as it stands amended in 1988. Further subjects like soil conservation, water management, social and farm forestry, drinking water, fuel and fodder etc. were assigned to the Panchayats with a view to better environmental management. The entry 8 of the Twelfth Schedule added to the constitutional text by the 74th Amendment Act 1992 provided for the urban local bodies, with the function of environment and promotion of ecological aspects for environmental protection. This made environment and natural resource management a federal subject. The relevance of federalism brought the extensive use of central power to legislate on several areas of conservation and also helped in bringing about a holistic approach towards conservation.

India follows cooperative federalism. Human welfare and human rights get due and equal protection. The Indian Constitution is a fine blend of national sovereignty and due respect towards international conventions. Art. 253 insist that the Government not only give due respect to international obligations but also implement international commitments, which are specially significant toward protection of human rights. Towards this the central government need not take any State into confidence and may enforce the same even if it may involve a State Subject under the Seventh Schedule.

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123 Entry 17-A, 42nd Amendment, 1976.
124 Entry 17-B, Concurrent List.
125 Entry 20-A, Concurrent List.
126 The government also adopted a National Forest policy 1988 with a twin object, one to protect the forest and another to consider the needs of the forest dwellers.
128 The passing of the Wildlife Protection Act 1972, the Forest Conservation Act 1980, Environmental Protection Act 1986 are instances of federalism and proactive approach towards conservation in atleast the legislative sense.
129 Entry 14 of the Union List confers on the Union Parliament exclusive power to make laws with respect to ‘entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries’. V N Shukla’s Constitution of India, Eastern Book Company, ninth ed. –p. 673.
130 Vishaka v State of Rajasthan AIR 1997 SC 3011.
2.2. RIGHT TO ENVIRONMENT

2.2.1. Evolution of the Right

Philosophy and legal literature keep on reflecting on the object “environment” and on the subject entitled to enforce the right, and many authors have already concluded that we are on the advent of a subjective right enforceable “erga omnes” and of a fundamental nature, to be located in the category of human rights. It is true that a human right to environment normally belongs to the third generation\(^{131}\) or solidarity rights and is therefore among the most generic, ambiguous and complex rights as regards judicial control. However, it has to be underlined that the environment which we are enjoying right now is not at all the fruit of human solidarity but the result of the relationship between life supporting systems, although we may need human solidarity to protect it. Moreover, the maintenance of the biospheric parameters of which the environment consists is indispensable for the human species and the other creatures to remain alive.\(^{132}\) Thus, the right to an adequate environment is firmly attached to the right to life, in relation to which it seems to be at the same time prior: *Without environment no life is possible.*\(^{133}\)

Most environmental lawyers only accept a procedural concept of the right to environment; this means that it has a triple content represented by the right to information, the right to participation and the right to administrative and judicial review. This limitation is based on the deep difficulties to reach an agreement on a concept of environment, which can be legally determined and is amenable to judicial control.\(^{134}\) However, procedural law cannot be applied if there is no substantive right to be protected. Thus the right to an adequate environment is a substantive right and we must keep on reflecting on achieving a proper construction of its doctrinal basis. The features that characterise a subjective right exist here because there is a subject, an object and a legal relationship. All humans are subjects of this right, whilst its object is the environment, and the legal relationship is constituted by the law – the constitution, which establishes pertinent statutes as well as unwritten principles, which determines the way in which humans may use and enjoy the environment and the natural resources.

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\(^{131}\) The First generation rights were attributed as Political rights when the UDHR and the ICCPR were passed, where as the second generations rights were the social, economical and cultural rights.


\(^{133}\) This reading has lead to include the right to clean and healthy environment under Art. 21 of the Indian Constitution.

In a modern welfare state, justice has to address social realities and meet the demands of time. Protection of the environment throws up a host of problems for a developing nation such as ours. Administrative and legislative strategies of harmonization of environmental values with developmental values are a must and are to be formulated in the crucible of prevalent socio-economic conditions in the country. In determining the scope of the powers and functions of administrative agencies and in striking a balance between the environment and development, the Courts have a crucial role to play.

The right to life enshrined in Art. 21 of the Indian Constitution means something more than just survival or animal existence; it is substantiated by various Directive Principles and Statutes. It includes the right to live with human dignity and all those aspects of life, which make life complete, and worth living: tradition, culture, heritage and protection of that heritage in its full measure, and the right to a decent environment would be included under this right. The importation of the due process clause by the activist approach of the Supreme Court in Maneka Gandhi's case has revolutionized the ambit and scope of the expression of right to life embodied in Art.21 of the Constitution. Narrow interpretation of legal and constitutional provisions gave way slowly to a more liberal juridical interpretation that kept the purpose of constitutional guarantees in view. The post Maneka developments truly reflect the ideals of

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135 Lord Denning observed in Jones v National Coal Board [1957] 2 OB 55 at 64 ‘it is very well to paint justice blind, but it does better without a bandage round her eyes. She should be blind indeed to favor or prejudice, but clear to see which way lies the truth and the less dust there is about the better’.

136 Do States have a duty to take measures to prevent and safeguard against environmental hazards? See R G Ramcharan, The Right to Life, at 310-311 [The Hague, 1983] arguing that:
1. There is a strict duty upon States, as well as upon the international community as a whole, to take effective measures to prevent and safeguard against the occurrence of environmental hazards, which threaten the lives of human beings. 2. Every state, as well as the UNEP, should establish and operate adequate monitoring and early-warning systems to detect hazards or threats before they actually occur. 3. States which obtain information about the possible emergence of an environmental hazard to life 4. The Right to life, as an imperative norm, takes priority above economic considerations and should in all circumstances be accorded priority. 5. States and other responsible entities [corporations, individuals] may be criminally or civilly responsible under international law for causing serious environmental crimes irrespective of whether the act or omission in question is deliberate, reckless or negligent. 6. Adequate avenues of recourse should be provided to individuals and groups at national, regional or international levels, to seek protection against serious environmental hazards to life. The establishment of such avenues of recourse is essential for dealing with such risks before they actually materialize.

137 AIR 1978 SC 597.

138 On many occasions, the Supreme Court doubted the basis of decision, where it was held that even in the absence of a statutory stipulation, rules of natural justice have to be followed. See Kharak Singh v State of UP AIR 1963 SC 1295.
democratic freedom. The Supreme Court held that Art. 21 not only generated a processual justice, but also widened the scope of the substantive right to life.

The right to live in healthy environment is one more golden feather. This right connotes that the enjoyment of life and its attainment and fulfillment guaranteed by the Article [Art. 21] embraces the protection and preservation of nature’s gift without which life cannot be enjoyed.

There were attempts to attribute a juristic personality to all living and non-living beings to whom the Constitution guarantees right to live. A noted Indian environmentalist quotes the Mahabharata and the research carried out by scientists like Jagatish Chandra Bose to support his view that trees are not dead things as modern economists see them, but living beings like the humans. Justice Douglas of the US Supreme Court, in one of the most scintillating judgments endowed a legal personality on ‘valleys, beaches, ridges, groves of trees, swamp lands or even air that feels the destructive pressures of modern technology and modern life.

In one of the early cases on right to environment, viz. Ratlam Municipality case, the Supreme Court evolved right to environment from duties arising out of laws that aimed to effectuate Directive Principles. V R Krishna Iyer J. for the Court observed, ‘where Directive Principles have found statutory expression in Dos and Don’t’s the Court will not sit idly by and allow municipal government to become a statutory mockery. The state will realise that Art. 47 makes it paramount principle of governance that steps are taken for the improvement of public health

140 Francis Corolie Mullin v The Administrator AIR 1981 SC 746, People’s Union for Democratic Rights v UOI AIR 19872 SC 1473.
141 UNCHE Stockholm, 1972: Principle 1: Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being.
142 Ratlam Municipality v. Vardichand, AIR 1980 SC 1622, where the Bench of Justice V. R Krishna Iyer and Justice Chinnappa Reddy held “Even as human rights under Part III of the Constitution have to be respected by the State regardless of provision, decency and dignity are non-negotiable facets of human rights and are a first charge on local self governing bodies”.
143 Dr. L. M Singhvi, former High Commissioner to the United Kingdom, had developed this concept of the right to environment for the living and non-living things under Art. 21 of the Constitution, in his public law lecturers of the Cochin University entitled ‘Prevention of Eco-Cide: Towards a New Environmental Order’ in March 1991.
145 Sierra Club v Morton 405 US 727; 31 L Ed 2nd 636 at 741.
as amongst its primary duties’. The link between good environment and public health is harnessed by the Court for a more effective enforcement of right to environment.

The Court’s decision in the Ratlam case was founded on its earlier decision in Govind v Shanti Sarup, where Sec. 133 of the Code of Criminal Procedure was used by the Court to preserve the environment in the interest of health, safety and convenience of public at large. It is interesting to note that in these two cases the Supreme Court nowhere refers to Article 21 of the Constitution. But it is amply clear that, the judgment was based on the right to live with decency and dignity as provided in the right to life.

Like access to food and health, access to good environment is also a condition prerequisite for dignified life. In fact, deterioration of environment arises from abuses of economic and other freedoms. As observed by Chinnappa Reddy, J. in Shri Sachidanand Pandey, “industrialization, urbanization, explosion of population, over-exploitation of resources, depletion of traditional sources of energy and raw materials, and the search for new sources of energy and raw materials, the disruption of natural ecological balances, the destruction of a multitude of animals and plant species for economic reasons…. are all factors which have contributed to environmental deterioration”.

It can be seen that many of the above activities are traceable to abuses of either individual freedom or state power, and are subject to reasonable restrictions under Art. 19(6) in the interest of general public or controllable under Art. 14.

Further when we analyse the remedy of writ, it is a remedy par excellence. Art. 32 and 226 provide any person to move the Courts for the enforcement of the rights conferred and guaranteed by the Constitution. The Courts have the authority to issue the writs of Habeas corpus, mandamus, prohibition, quo-warranto and certiorari. One of the most effective arguments has been to interpret the Fundamental Right to Life under Article 21 of the Constitution, to include the right to a clean and healthy environment. Litigation seeking such an

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148 AIR 1957 SC 1943, a case of a bakery owner refusing to install air chimney. The owner claimed that if the bakery were closed down his right to livelihood would be affected and at the same time due to financial constraint refused to comply with safety norms.
149 AIR 1987 SC 1109 at p. 1114.
151 Rights such as Fundamental, Constitutional, Statutory, customary, contractual rights.
interpretation has often resulted in the judiciary attempting, through its judgments, to rescue specific sites from the destructive influences of pollution, deforestation and so on. *Rampal v State of Rajasthan*\(^{153}\) illustrates the use of the writ process in securing government action to improve the urban environment. It also shows the simplicity of the writ procedure compared with the more cumbersome prosecution of a suit to enforce common law rights. The petitioners in the present case, residents of Bhilwara District of Rajasthan, complained lack of drainage facilities made available by the district administration due to which drinking water, drain and storm water used to mix and get collected in open chowks, leading to the growth of insects and moss and caused possible threat of epidemics. As the Board had not cared to take any action in the matter, the petitioners had to file a writ of *mandamus* praying for a direction to the Municipal Board for removal and discharge of the filth and dirty water and the construction of proper drainage or sewers for the discharge of such water.\(^{154}\) Though no explicit mention of a ‘right’ is stated by the Court, the issue of writ itself substantiated the concern of the Judiciary for good environment. This was the start for judicial interpretation on the notion of making local bodies responsible for conservation and to impose statutory obligation on the commitment toward better protection of human rights.

The Court continued its hidden approach of not referring to Art. 21 directly in another landmark case, *Rural Litigation and Entitlement Kendra*\(^{155}\) v *State of Uttar Pradesh*\(^{156}\). The Court nevertheless read Art 21 with Art 48-A. In this case, the Apex Court converted a letter into writ petition alleging that the operation of unauthorized and illegal, mining in the Mussorie-Dehradun belt affected the ecology of the area and led to environment disorder.\(^{157}\)

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\(^{152}\) In *Shri Anadi Mukta Sadguru S MVSJMS Trust v VR Rudani* AIR 1989 SC 1607, the Supreme Court held that in all cases of violation of fundamental right under Art. 21, the writ of Mandamus can be maintainable even against a private body.

\(^{153}\) AIR 1981 Raj. 121.

\(^{154}\) The Rajasthan Municipalities Act, 1959 deals with the primary and secondary functions of the Boards, and it shows that the primary duty of the Board to keep the city clean, removing filth, rubbish or other noxious and offensive matter and constructing drains, sewers, drainage works etc. The Court allowed the writ petition by awarding suitable order and directing to the Municipal Board to clean and maintaining proper drainage system in the city.

\(^{155}\) Though the Silent Valley agitation could be considered as one of the first and foremost judicial agitation towards environmental protection, the Rural Litigation and Entitlement Kendra case\(^{155}\) was the turning point for the Environmental Judicial activism in India.


\(^{157}\) The Bench consisted of Chief Justice Bhagwati, Justice A. N Sen and Justice Ranganath Misra. The striking feature of this decision is that, the Court converted a letter into writ petition under Art. 32, without referring to any article from the chapter on fundamental rights. From the Juristic process it could be submitted that Court restrained itself from invoking Art 21 directly, but regarded the right to live in healthy environment as a part of fundamental right.
The Court\textsuperscript{158} ordered closing down of mining operations on the ground that lime stone quarries operation was causing ecological imbalance and a hazard to healthy environment. “Preservation of the environment and keeping the ecological balance unaffected is a task which not only the government but also every citizen must undertake. It is a social obligation and let every Indian citizen be reminded that it is his fundamental duty enshrined in Art. 51(g) of the Constitution. The enjoyment of life and its fulfillment guaranteed by Art. 21 of the Constitution embraces the protection and promotion of nature’s gift without which life cannot be enjoyed”.\textsuperscript{159}

The Supreme Court referred to the Stockholm Declaration of 1972 and along with it cited Indian scriptures. While stopping mining in the forest area in Doon Valley, the Supreme Court quoted from the \textit{Atharva Veda} (5.30.6) to the following effect:

“\textit{Man’s paradise is on earth; This living world is the beloved place of all; It has the blessings of Nature’s bounties; Live in a lovely spirit.”}

In an activist approach the Judiciary used practical solutions at all levels towards conservation and maintenance of ecological balance in this eco fragile valley. The Court though restrained itself from making or creating any landmark history, nevertheless made its intention clear about environmental issues, which are sensitive to mankind and human survival. While passing orders for closure of all illegal limestone mines, the Court asked the Government to take affirmative action towards restoring the lost ecology due to over exploitation of nature in that area.\textsuperscript{160}

It is clear that the enunciation of legal right to livelihood has received emphatic recognition, which more or less assures of a guarantee to earn livelihood. This right assumes another dimension which has the potential to check government actions connected with developmental planning and execution with an environmental impact that threatens to dislocate poor people and disrupt their lifestyles. In \textit{Banawasi Seva Ashram v State of U. P.},\textsuperscript{161} the Supreme Court prescribed detailed safeguards to protect tribal forest dwellers who were being ousted from

\textsuperscript{158}Bench consisting of Chief Justice P. N Bhagwati, Justice A. N Sen and Justice Ranganath Misra.

\textsuperscript{159}\textit{T.Damodar Rao v S. O Municipal Corporation} AIR 1987 S.C 171. In this case the Court did not directly refer right to life to mean right to clean and healthy environment.

\textsuperscript{160} A three judge bench of the apex court, headed by Chief Justice B N Kirpal, on Sept. 26 ordered Coca-Cola and publishing firm Malhotra Book Depot to pay $62,500 each, while pepsi was told to pay $31,250, textiles major Grasim and manufacturer of detergents Fena $20,833 each, Amaron Batteries $5,208, as well as the State Bank of India and Sleepwell mattresses, $2,604 each for damaging rocks at the Rotang Pass in Himachal Pradesh. Ramaswamy Iyer’s \textit{The Law of Torts}, LexisNexis Butterworths, Ninth Ed, p. 309.

\textsuperscript{161} AIR 1987 SC 374.
their forest land by the National Thermal Power Corporation Limited for the Rihand Super Thermal Power Project. The Court permitted the acquisition of the land only after the NTPC agreed to provide certain Court-approved facilities to the ousted forest dwellers.\textsuperscript{162} During the course of its order the Court accepted the traditional rights of the tribals who “for generations had been using the jungles around for collecting the requirements for their livelihood—fruits, vegetables, fodder, flowers, timber, animals by way of sport and fuelwood’. In two other cases under Art 32, the Court passed interim orders requiring the state agencies to resettle and rehabilitate tribals who were being displaced by dams.\textsuperscript{163}

In \textit{M. C Mehta v Shriram Food and Fertilizer Industries [Oleum Gas Leak case]}\textsuperscript{164}, petitioner filed the writ against the oleum gas leakage and for closing down of one of the units of Shriram Food and Fertilizer, belonging to the Delhi Cloth Mills Ltd. The Court allowed restarting the plant subject to certain stringent conditions laid down in the order. But the notable development was that the Court held that, an enterprise, engaged in any hazardous or inherently dangerous industry that could pose a threat to public health owed an ABSOLUTE\textsuperscript{165} and NON-DELLEGABLE duty to the community to ensure that no harm resulted to anyone. Here again the Court made no reference to Article 21. But in Oleum Gas Leak III\textsuperscript{166} Chief Justice Bhagwati speaking for the Court clearly treated the right to live in a healthy environment as fundamental right under Art. 21 of the Constitution. This case came before the Apex Court’s Judges Bench by a reference made by a Bench of three Judges. On 4\textsuperscript{th} and 6\textsuperscript{th} December, there was leakage of Oleum Gas from one of the units of Shriram, which affected the health of large number of people and death of one person. On behalf of affected people, application for compensation came up for hearing. The claim of Article 21 against a private corporation engaged in an activity which had potential to affect the life and health of the people was vehemently argued, whereas Shriram opposed subjecting a Corporation like Shriram to the discipline of Art 21. In the Judgment Chief Justice P. N Bhagwati speaking for the Court, observed “these application for compensation are for the enforcement of the fundamental right to life enshrined in Art. 21 of the Constitution and while dealing with such application, we

\textsuperscript{162} Ibid at 378.
\textsuperscript{163} Karanjan Jalasay Y.A.S.A.A Samiti v State of Gujarat, AIR 1987 SC 532 and Gramin Sewa Sanstha v State of U. P 1986 SCC 578. In all these three cases neither the right to livelihood nor Art. 21 has been explicitly mentioned.
\textsuperscript{164} AIR 1987 SC 1965.
\textsuperscript{165} The Rule has been come to be known as the ‘Rule of Absolute liability’.
\textsuperscript{166} M. C Mehta v Union of India AIR 1987 SC 1086.
cannot adopt a hyper-technical approach which would defeat the ends of justice. If this Court is prepared to accept a letter complaining of violation of the fundamental right of an individual or a class of individual who cannot approach the Court for Justice, there is no reason why these application for compensation which have been made for the enforcement of the fundamental right of persons affected by oleum gas leak under Art. 21 should not be entertained. We in India cannot hold our hands back and venture to evolve a new principle of liability, which English Courts have not done. We have to develop our law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because, it has not been so done in England.

The concept of absolute liability has come into vogue in the modern law of torts to mean liability without fault, i.e., without intention or negligence. This rule was approved in Charan Lal Sahu v Union of India. The Court pointed out that this rule is ‘absolute and non-delegable’ and the enterprise cannot escape liability by showing that it has taken reasonable care and there was no negligence on its part. The Supreme Court also explained the basis of this rule as follows:

1. If an enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident [including indemnification of all those who suffer harm in the accident under the Public Liability Insurance Act 1991] arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads; and

2. The enterprise alone has the resource to discover and guard against hazards or dangers and to provide a warning against potential hazards.

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167 The Court was referring to the RLEK petition in 1985.
168 AIR 1987 SC 1089.
169 AIR 1987 SC 1089.
170 Liability of this kind is exceptional under the common law as the ordinary rule is that a person is liable only for harm due to his intention or negligence and not for other kinds of harm which would be merely an inevitable accident.
171 AIR 1990 SC 1480.
172 The M C Mehta rule will not depend on the non-natural use of land and escape from that land of the defendant, to impose this stricter liability, which were necessary aspects of the rule in Rylands v Fletcher. The only specific and significant requirement is that the accident must have resulted out of such activity.
The Constitutional and statutory provisions protect a person’s right to fresh air, clean water, and a pollution-free environment, but the source of the right is the inalienable common law right of clean environment. Our legal system having been founded on the British Common Law, the right of a person to a pollution-free environment has been considered a part of the basic jurisprudence of the land. The right to environment means a positive right while the right to pollution-free environment would suggest a negative right, rather a duty cast on the State to make urban living conditions livable.

Hence we find that since 1980 there is a substantial growth in the case law in environmental matters before the Supreme Court. In 1987, the Apex Court delivered 13 Judgments on the issue, among the Judges, Justice Ranganath Mishra, Justice P. N Bhagwati and Justice G. L Oza decided the maximum number of cases. Though the Apex Court favoured the balanced approach between the environmental protection and development process, Bhagwati’s last Judgment on the eve of his retirement in M. C Mehta’s case opened new horizons in the development of environmental law and also administration of environmental justice. Though the Supreme Court was reluctant for a short period to declare explicitly that the right to life under Art. 21 included the right to clean and healthy environment, the High Courts in the country enthusiastically declared that the right to a clean and healthy environment as an integral part of the right to life.

The Andhra High Court in Damodhar Rao case while deciding a complaint against the building of residential quarters for LIC in an area earmarked in the development plan as open space for recreational purposes held that:

“there can be no reason why practice of violent extinguishments of life alone would be regarded as violative of Art.21 of Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to

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174 UDHR 1948: Article 3: Right to Life; Article 25: Right to a standard of living adequate for the health and well being of himself and of his family; ICESCR 1966: Article 11: Right to an adequate standard of living for himself and his family and to the continuous improvement of living conditions.
175 Oleum gas leak case.
176 Art. 41 of the Argentina Constitution expressly recognizes the right to a healthy environment. ‘All individuals have the right to a healthy and harmonious environment, conducive to human development and to productive activities that satisfy present needs without compromising the needs future generations; and the need to have duty to preserve the environment.
178 The Master Development Plan of the city of Hyderabad divided various parts of the city into residential, commercial, recreational zone.
violation of Art.21 of the Constitution”. The Court reasoned that the enjoyment of life and its attainment and fulfillment guaranteed by Art. 21 of the Constitution embraced the protection and preservation of nature’s gift without which life could not be enjoyed. Looking at the problem from an environmental perspective, the Court observed that protection of the environment is not only the duty of the citizens, but also the obligation of the State.

The Rajasthan High Court too in L.K. Koolwal v. State of Rajasthan\textsuperscript{179} held that “though termed as duty under Art. 51 A(g) the provision gives citizens a right to approach the Court for a direction to the Municipal authorities to clean the city”. Further it was held that “maintenance of health, sanitation and environment falls within Art.21 thus rendering the citizens the fundamental right to ask for affirmative action”. This case was filed seeking a direction to clean the city of Jaipur and save it from its unhygienic conditions.

The Kerala High Court in Attakoya Thangal v. Union of India\textsuperscript{180} observed “the administrative agencies cannot be permitted to function in such a manner as to make inroads into the fundamental right under Art. 21. The right to sweet water, and the right to free air are attributes of the right to life, for these are the basic elements, which sustain life itself”. The major question in the above case was that of pumping up ground water to supply potable water to the Lakshadweep islands in Arabian Sea, when implemented, would not bring more long-term harm than short-term benefits. Interfering, the Kerala High Court asked for a deeper study to examine whether the scheme, if allowed to operate, would not dry up, and result in salt water intrusion into the aquifers. The Court stressed on the need for interdisciplinary cooperation for providing of civic amenities.\textsuperscript{181}

The Karnataka High Court\textsuperscript{182} as early as in 1992 pointed out that—“entitlement to clean environment is one of the recognized basic human rights.... The right to life inherent in Art.21 of the Constitution of India does not fall short of the required quality of life which is possible only in an environment of quality”. “Where on account of human agencies, the quality of air and quality of environment are threatened or affected, the Court would not hesitate to use its innovative power to enforce and safeguard the right to life to promote public interest”. This

\textsuperscript{179} AIR 1988 Raj 2.
\textsuperscript{180} 1990 KLT 580.
\textsuperscript{181} The right to enjoy life as a serene experience in quality for more than animal existence is thus recognized. Personal autonomy free from intrusion and appropriation is thus, a constitutional reality. The right to live in peace, to sleep in peace and the right to repose and health, is part of right to live. See Madhavi v Thilakan [1989] Cri. L J 499 at p 501.
\textsuperscript{182} Lakshmipathy v. State of Karnataka AIR 1992 Kant 57.
case was filed by *V Lakshmipathy v State*\(^{183}\) challenging the establishment of industries in residential areas contrary to the zoning of land use in an urban development place prepared in accordance with planning laws. Interestingly in this case, the respondents neither denied the existence of pollution from the industrial undertaking nor came forward to explain what measures were taken to curtail pollution. This case clearly and specifically unveils what is hidden within Art. 21 and declares that the provision guarantees right to environment.

A more specific application of right to equality to expand and effectuate right to drinking water—a component of right to environment, and in turn, of right to life— took place in *State of Karnataka v Appa Balu Ingale.*\(^{184}\) Here the Court condemned the practice of untouchability which denied to the Dalits access to drinking water, as violative of right to equality. According to the Court, the egalitarian spirit of the Constitution charged the State to improve the quality of life for Dalits and to make right to life under Art. 21, meaningful for them. Concerning equitable access to scarce ground water resource in Lakshdweep islands, the Kerala High Court in *F K Hussain* ruled for reasonable exercise of discretion by the State authority on the basis of expert scientific advice. However, in *Puttappa Honnappa*\(^{185}\) a Single Judge Bench of the Karnataka High Court abstained from applying an administrative circular providing for inter-spacing of borewells on the ground that right to water can be regulated only through law. It is submitted, the Court looked only to the aspect of deprivation of individual right, and failed to look to the larger perspective of conservation of natural resource for equitable use, which in turn protected the life interests of the society as a whole. The ratio in Puttappa was overruled in *Venkatagiriappa*, and the inter-spacing rule was upheld. The Court reasoned, “it is true that life without water cannot be conceived. But, it is equally true that water resource being limited, its use has to be regulated and restricted in the larger interest of the society and for the welfare of the human beings. We are, therefore, of the opinion that the right under Art. 21 which is available to all the citizens, can be held at the most to have water for drinking purposes….however, the right to have water for irrigation purpose cannot be stretched to the extent of bringing it within the ambit of Art. 21 of the constitution of India”\(^{186}\).

### 2.2.2. The Supreme Court and Right to Environment:

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\(^{183}\) AIR 1992 Kant 57 at p 62, para 17.


\(^{185}\) *Puttappa Honnappa Talavar v D. C., Dharwad* AIR 1998 Kant. 10.

Any disturbance of the basic environment elements, namely, air, water and soil which are necessary for ‘life’ would be hazardous to ‘life’ within the meaning of Art. 21 of the Constitution. The Supreme Court has accepted the doctrine of public trust, which rests on the premise that certain natural resources like air, sea, waters are means for general; use and cannot be restricted to private ownership. These resources are a gift of nature and the State, as a trustee thereof, is duty bound to protect them. The State is the trustee, and general; public the beneficiary, of such natural resources as sea, running waters, air, forests, ecologically fragile lands.

The Supreme Court of India in Chetriya Pradushan Mukti Sangarsh Samiti v. State of UP for the first time, declared that the right to environment was contemplated in Art. 21. In his judgment the then Chief Justice Sabyasachi Mukerji observed that “every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated by Article 21 of the Constitution of India. Anything, which endangers or impairs that quality of life, is entitled to take recourse to Article 32 of the Constitution of India”. This case was initiated by a letter written to the Court, which was treated as a writ petition under Art. 32. It was alleged that certain oil mills and refineries located in the Sarnath area caused environmental pollution and thereby a serious health hazard.

In the case of Subhash Kumar v State of Bihar, the petitioner by way of public interest litigation, filed a petition for ensuring enjoyment of pollution free water and air. Justice K. N Singh and Justice N. D Ojha held “right to live is a fundamental right under Art. 21 of the Constitution and it includes the right to enjoyment of life. If anything endangers or impairs the quality of life in derogation of laws, a citizen has a right to have recourse to Art 32 of the Constitution for removing the pollution of water or air which may be determined to the quality of life”.

In Bangalore Medical Trust v B. S Mudappa, the Court observed, “protection of the environment, open space for recreation and fresh air, play grounds for children 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 play grounds

190 AIR 1990 SC 2060.
191 AIR 1991 SC 424.
192 AIR 1991 SC 1902.
cannot be sacrificed by leasing or selling such sites to private persons for conversion to other user”. This case was filed challenging the leasing of an open space laid down in a development scheme for a park for a private nursing home. Though the case was about usurpation of land earmarked for park for private self-interests, the Court laid down an important precedent, in warning the government against any policy decision against conservation aspects. What and how is a park relevant in a urban locality and to what extent its preservation and conservation for recreational purposes serve the interest of the common man was significantly stressed by the Court. Though the contribution of the case cannot be compared to the mighty judgments on conservation aspects, laid down by earlier judgments, the Court did not hesitate to ask the government to make provision for parks and open spaces in town and country planning.

In *Virendra Gaur v. State of Haryana*¹⁹³ the Court after reciting, reaffirming and applying principle 1 of the Stockholm Declaration held that Article 21 protects right to life as a fundamental right. ‘Enjoyment of the life and its attainment including their 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 would cause environmental pollution. Environmental, ecological, air, water pollution etc., should be regarded as amounting to violation of Article 21. Further, the concept of intergeneration equity has a central tenet natural inheritance from past generations and has the obligations to preserve such heritage for future generations. This concept has a sound basis in right to equality.¹⁹⁴ In this case the order of the Municipality and the Government permitting the building of Dharmasalas [resting places] in the open space earmarked to provide the residence of the locality public amenities such as recreation, play space and ventilation was quashed. Holding that the Government had no power to sanction lease of the land vested in the Municipality for being used as ‘open space for public use’, the Supreme Court observed, after referring to the Stockholm Declaration of 1972 and Principle 1 laid down in that Conference and after referring to Art. 48-A, Art. 47 and Art 51A(g), and Art. 21, as follows:

“The word ‘environment’ is of broad spectrum which brings within its ambit, “hygienic atmosphere and ecological balance. It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment. The State, in particular has duty in that

¹⁹³ 1995 2 SCC 577.
¹⁹⁴ *State of Himachal Pradesh v Ganesh Wood Products* AIR 1996 SC 149.
behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment.”

In *Kinkri Devi*\(^{195}\), an arbitrary grant of permission for mining was quashed as violative of Arts. 14 and 19, and offending intergeneration equity.

Further in *B. L. Wadhera v Union of India*,\(^{196}\) the Court relying on *Ratlam*\(^{197}\) categorically asserted that residents had constitutional as well as statutory right to live in a clean city and authorities concerned had a mandatory duty to collect and dispose of the garbage/waste generated from various sources in the city. Non-availability of funds, inadequacy or inefficiency of staff, insufficiency of machinery etc, cannot be pleaded as grounds for non-performance of their statutory obligations. This PIL was filed against Municipal Corporation of Delhi for the non-performance of mandatory duties like garbage clearance, disposal of biomedical wastes, scavenging and cleaning the city of Delhi.

Yet another decision emphasizing the importance of the environmental aspects of right to life is the *A P Pollution Control Board v M.V. Nayudu*.\(^{198}\) The Court held that environmental concerns arising in the SC under Art. 32 or under Art.136 or under Art.226 in the High Courts are of equal importance as human right concerns. In fact, both are to be traced to Art. 21, which deals with the Fundamental Right to life and liberty. It was further observed while environmental aspects concern ‘life’, human rights aspects concern ‘liberty’.\(^{199}\) This PIL was filed challenging the permission given by the appellate authority under the Water Act to a company which sought to set up an industry for production of castor oil derivatives within 10 kms radius of the two important lakes Himayat sagar and Osman Sagar which supplied drinking water to the twin cities of Hyderabad and Secundrabad.

In *Narmada Bachao Andolan v Union of India*\(^{200}\) the Supreme Court declared that water is the basic need for the survival of human beings and is part of right to life and human rights as enshrined in Art. 21. The Court observed that ‘It is a matter of great concern that even after more than half a century of freedom, water is not available to all citizens even for their basic drinking necessity violating human right resolution of all international convention and Art. 21’.


\(^{196}\) *1996 2 SCC 594*.

\(^{197}\) *1980 4 SCC 162*.

\(^{198}\) *((1999) 2 SCC 718)*.

\(^{199}\) Principle 1 of Stockholm Declaration stipulates that: ‘man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being’.
The Judgment has received criticism as the consequences of the judgment saw the submersion of large vest of forestland which were rich in biodiversity. The Court laid more emphasis on rehabilitation of the evictee rather than on the impact of the dam on natural resources. That the Court justified its judgment as lot of money, time and energy was already spent on the project and hence any abandonment was futile cannot be accepted. The Court strangely relied on the right to access to drinking water to the Rann of Kutch at the cost of submersion of forestland in Madhya Pradesh. However, one must note that these decisions are often driven by anthropocentric needs more than an ethical concern for plant and animal species as such.

In a case filed by the *Vellore Citizens’ Welfare Forum*201, the issue raised was the discharge of untreated effluents from tanneries and other industries in Tamil Nadu. It was found that thousands of hectares of agricultural land had been rendered unfit for cultivation. Agricultural diversity and sustainability was pitted against the economic gains argument of the foreign-exchange-earning tannery business. The Supreme Court, calling for the regulation of these activities, advocated the concept of sustainable development, and indicated that the Precautionary Principle and the Polluter Pays principle are essential ingredients for this. The Court has also evolved the special burden of proof in environmental cases. The Court has stated in Vellore ‘the ‘onus of proof’ is on the actor or the developer/industrialist to show that his action is environmentally benign’.

The Court also directed the Madras High Court to constitute Special bench ‘Green Bench’ to monitor the environmental matters. Further the Central Government was asked to constitute an authority with all the powers necessary to deal with the situation created by the tanneries.203 A brief comparison to the American right to environment shows that the American Constitution has nowhere an explicit right embodied as the right to clean and healthy environment. Some environmentalist earlier hoped to use the Ninth Amendment broadly interpreted, to expand the right to privacy to include a right to clean, unspoiled environment. In many-failed attempted

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200 AIR 2000.
202 It is known that environmental disputes have unique characteristics, but this alone does not explain why environmental policy implementation has resulted in judicial involvement in substantial decision making and why traditional administrative procedure used to negotiate decisions have been by-passed.
203 The Authority is now known as the Ecological Conservation Authority, T. N. This authority has the task of restoring back the lost ecology due to tanneries with a cost of 30 crore which was collected as fines from these tanneries.
cases, the Supreme Court’s reluctance to recognize such a right probably can be explained by two factors.\textsuperscript{204} First, there is nothing explicit in the Constitution or in its early interpretations to indicate that the drafter had any intention of protecting the environment. Second, from a practical perspective, it would be extraordinarily difficult for the Courts to define the boundaries of such a right. Protecting the environment appears to be an area better left to legislature and administrative agencies.\textsuperscript{205}

The framers of the American Constitution were strongly influenced by the philosophy of John Locke.\textsuperscript{206} Locke saw government as a social compact by which people living in a state of nature, agree to form a government that would make rules by which all would abide. To prevent government from being oppressive, individuals, according to Locke had to retain certain rights. The inalienable rights included the right to the pursuit of life, liberty and property. The United States Constitution was perceived as the embodiment of our social compact.\textsuperscript{207}

\textbf{2.3. FREEDOM OF TRADE AND ENVIRONMENT}

Trade and development, free trade and globalization are threats to conservation of natural resources. All development comes at a cost, which is often destructive. Current models of development have proven environmentally destructive, the argument goes, and because free trade will by definition increase commerce and development, increased trade will lead to further environmental degradation.\textsuperscript{208} Business and trade are at loggerheads with environmental conservation. The conflict between individual interests over societal interest has been a long-standing debate, which has failed to arrive at any conclusion in the present notion of globalization.

When the Wildlife Protection Act 1972 was amended in 1991, it imposed ban on trade of imported animal or animal products. This was a challenge as unreasonable restriction, unfair and arbitrary exercise of power and violative of the fundamental rights of the citizens under Art. 14 and 19 (1)(g) of the Constitution.\textsuperscript{209} The Apex Court before examining the submissions

\begin{footnotes}
\item[204] Reading of some Supreme Court decision in 1970-80s.
\item[205] Nancy K Kunasek and Gracy S Silverman; Environmental Law; Prentice Hall, New Jersey, 1990, p. 19.
\item[206] \textit{Ibid}, p. 29.
\item[207] \textit{Ibid}, p. 20.
\item[208] David Hunter, p. 1130.
\item[209] M/s Ivory Traders and Manufacturers Association and others v Union of India, AIR 1997 Del. 267.
\end{footnotes}
of the parties, made a brief reference to the legislation, which preceded the present one. The Principal Act and the Amendment Acts of 1986 and 1991 were referred to for better understanding of the matter.\textsuperscript{210} The Court held that ‘in the present case restriction undoubtedly imposes total ban on trade in ivory. The Central Government has pointed out in its counter affidavit that there was serious problem to protect the Indian elephant as long as the traders were allowed to deal with the ivory, imported from abroad. Rights guaranteed under Art. 19(1) are not absolute rights but are qualified rights and restrictions including prohibition thereon can be imposed in public interest. There is high authority for the proposition that when it is reasonable in public interest, a trade could even be prohibited under Art. 19(6) and such prohibition would not fall foul of Art. 19(1) (g).\textsuperscript{211} The trade in ivory case\textsuperscript{212} settled the matter that ‘any trade which is pernicious to the protection and conservation of the natural environment can be totally banned without attracting Art. 19(1)(g) of the Constitution’. There is a string of authority for the proposition that no citizen has any fundamental right guaranteed under Art. 19(1)(g) of the Constitution to carry on trade in any noxious and dangerous goods like intoxicating drugs or liquor.\textsuperscript{213}

\textsuperscript{210}The Court referred from the statement of the MoEF in the Lok Sabha; ‘wildlife in our country has suffered serious depletion. We can no more afford to kill wild animals for the sake of pleasure of a few person, thus disrupting life forms and linkages vital for the preservation of bio-diversity. Wildlife is also in no position to bear the burden of capturing of wild animals for commercial purposes. Poaching of wild animals and illegal trade, has over the years, taken serious dimensions because of the exponential rise on the price of wild animals and their products. Population of the Indian elephants, particularly in South India, is under serious threat by ivory poachers. Although the trade in Indian ivory was banned in 1986, the trade in import gives an opportunity to unscrupulous ivory traders to legalize poached ivory in the name of imported ivory’. The Statement of Objects and Reasons of Wild Life Protection Amendment Act 1991 reads: ‘ Poaching of wild animals and illegal trade of products derived therefrom together with degradation and depletion, of habitats have seriously affected wild life population. In order to check this trend, it is proposed to prohibit hunting of all wild animals [other than vermin]. However, hunting of wild animals in exceptional circumstances, particularly for the purpose of protection of life and property and for education, research, scientific management and captive breeding, would continue’.

\textsuperscript{211}In Narender Kumar v Union of India AIR 1960 SC 430, the Court, while interpreting the word ‘restriction’, held as follows: ‘it is reasonable to think that the makers of the Constitution considered the word restriction to be sufficiently wide to save laws inconsistent with Art. 19(1) or ‘taking away the right’ conferred by the Article, provided this inconsistency or taking away was reasonable in the interest of the different matters mentioned in the clause. There can be no doubt therefore, that they intended the word ‘restriction’ to include cases of prohibition also. The contention that a law prohibiting the exercise of a ‘fundamental right is in no case’ saved, cannot therefore be accepted’.

\textsuperscript{212}The word ‘Ivory’ is used in comprehensive sense including indigenous as well as imported ivory is dangerous subversive and pernicious as it has the potential to deplete the elephant population and to ultimately extinguish the same.

\textsuperscript{213}To understand the fundamental challenges toward sustainable development, it is important to recognize the inherent bias of present economic system against environmental protection. Though the country has a specialized Central Service for Forest Officer [IFS], the country’s forest area has reduced since 1950 and wildlife have decreased in numbers.
To reconcile the right of butchers to carry on their trade, and restrictions imposed on killing of animals through several State laws, the Supreme Court has adopted an economic approach, viz., killing of useful animals could be prohibited but not of those animals who have become economically useless to the society. The Court has emphasized that a prohibition imposed on the Fundamental Right to carry on trade and commerce could not be regarded as reasonable if it was imposed not in the interest of the general public, but merely to respect the susceptibilities and sentiments of a section of the people. Thus, it is reasonable to prohibit slaughter of cows of all ages and male or female calves of cattle.\textsuperscript{214} The Court observed ‘the maintenance of useless cattle involves a wasteful drain on the nation’s cattle feed’. To maintain them is to deprive the useful cattle of the much-needed nourishment. The presence of so many useless animals tends to deteriorate the breed’. This narrow approach towards cattle and so called blatant carelessness toward ‘living creatures’ as mentioned in the Directive Principles of State Policy under Art 48 A is violated. In \textit{Hasmattullah v State of M. P}\textsuperscript{215}, the Supreme Court quashed the total ban on the slaughter of bulls as unreasonable restriction on trade under Art. 19.

In India religious practices have contrary effect on conservation. During festivals and other religious ceremonies, fresh water in the river is contaminated and polluted. This interestingly conflicts with the rights of Individuals under Art. 26 and right under Art. 21. Though no fundamental right is absolute, restriction on idol emersion is long from being banned or prohibited in India.\textsuperscript{216} Religious practices like the use of loudspeakers\textsuperscript{217} have now been regulated and the same principle could be applied for conservation aspects of water and air.

2.4. RECOMMENDATION OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION\textsuperscript{218}

The NCRWC in its report has mentioned that the right to safe drinking water, clean environment etc, is to be included as Art 30-D\textsuperscript{219} of the Constitution, thus making it a

\textsuperscript{214} \textit{M H Quareshi v State of Bihar}, AIR 1958 SC 731.
\textsuperscript{215} AIR 1996 SC 2076. After referring to all the provisions in the case, the Court struck to its view that these animals were useful only to the age of 16 years and their slaughter thereafter could not be banned. This only shows how man can think in selfish terms to decide what is convenient for himself.
\textsuperscript{216} Apart from pollution on water, these idols of God are painted and in India paints contain ‘Lead’ [heavy metal] which cannot be separated from water.
\textsuperscript{218} The Commission submitted its report on 31st March 2002.
\textsuperscript{219} The Art would be: Right to safe drinking water, prevention of pollution, conservation of ecology and sustainable development:
fundamental right on its own standing. For this, the Commission has looked into declarations of the UN General Assembly, the Rio Conference of 1992, Declaration on the Right to Development of 1986 and the 1997 Earth Summit meeting of 100 Nations in New York. The Commission recommended incorporating

“30 D. Right to safe drinking water, prevention of pollution, conservation of ecology and sustainable development. Every person shall have the right—

a. to safe drinking water

b. to an environment that is not harmful to one’s health or well-being; and

c. to have the environment protected, for the benefit of present and future generations so as to—

i. prevent pollution and ecological degradation;

ii. promote conservation; and

iii. secure ecologically sustainable development and use of natural resources while prompting justifiable economic and social development”.

The major question to be asked is not how relevant are these suggestion for amendment, but whether India as a developing nation can afford or is capable of ensuring the protection and conservation of these rights. As a matter of economics, making available safe drinking water to one billion population is not what the nation can afford in the nuclear age.

The Commission also makes recommendation for afforestation and wasteland development to bring an additional 12 million hectares under forest plantation and contribute to rural asset building activity. Soil and water conservation to support afforestation and natural resource conservation towards eco-friendly agriculture are also stressed.\textsuperscript{220}

It is surprising that the Commission, though has mentioned the ideas of Gandhiji in this regard, has not mentioned the stand of the Supreme Court and the High Courts on the matter as it is they who have till now held the right to environment and right to wholesome environment as a fundamental right. But still, the recommendation may have many ramifications if it is accepted.

\begin{itemize}
\item Every person shall have the right
\item a) to safe drinking water
\item b) to an environment that is not harmful to one’s health or well being; and
\item c) to have the environment protected for benefit of present and future generations so as to
\item i) prevent pollution and ecological degradation;
\item ii) promote conservation; and
\item iii) secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development.
\end{itemize}

\textsuperscript{220} Supra at n 37, p. 619.
by the legislature.\textsuperscript{221} Some of these can be that right to environment will become a Fundamental right in its own standing and it will have the dimensions of ‘wholesome environment’, ‘prevention of pollution’ ‘ecological sustainable development’ etc. which will be much more than the rights vested in the people by the various cases of the judiciary in India. Also, the judgment like the Narmada case\textsuperscript{222} will not be constitutional and the decisions will not have ambiguities, which are present today as some judges are [taken as] ‘green’ judges, and some are not. All in all, the recommendation can be seen as the acceptance of the group rights or the third generation rights.\textsuperscript{223}

2.5. INTERNATIONAL COMPARATIVE CONSTITUTIONAL ANALYSIS


The Constitution of South Africa is also an example where Art. 24 deals with this aspect. It reads as follows:

\textbf{Article 24: Everyone has the right –}

\textit{(a) to an environment that is not harmful to their health or well being; and

(b) to have the environment protected, for the benefit of present and future generation, through reasonable legislative and other measures that –}

\textit{(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of national resources while promoting justifiable economic and social development.”

\textsuperscript{221} As it raises the question; Are the State Governments in India capable of ensuring and protecting the right; either financially, ethically or morally. The continuing pollution of river Ganga may just be a debate on this point.

\textsuperscript{222} AIR 2000 SC 3751.

\textsuperscript{223} Shobana Ramasubramanyam \textit{v} The Member Secretary, Chennai Metropolitan Development Authority, AIR 2002 Mad. 125.
The republic of Russia has incorporated right to wholesome environment in the Constitution explicitly to give a substantial force to this right. Article 42 of the Russian Constitution is a fascinating and encouraging example revealing the importance of right to environment. It is as follows:

**Article 42:** Everyone shall have the right to a favorable environment, reliable information about its condition and to compensation for the damage caused to his or her health or property by ecological violations.

The Constitution framers were so vigilant and cautious regarding the right to healthy environment that they strived to implement it in totality. The importance of the environment was realized by the Russian legislators and Article 36 of the Constitution of Russia undoubtedly reveals their caution and attention towards environmental issues:

**Article 36**

1. Citizens and their associations shall have the right to have land in their private ownership.
2. The possession, use and management of the land and other natural resources shall be freely exercised by their owners provided this does not cause damage to the environment or infringe upon the rights and interests of other persons.
3. The terms and procedures for the use of land shall be determined on the basis of federal laws.

The Canadian Environmental Protection Act, 1988 sec 3(1) defines ‘environment’ to mean component of the Earth and includes:

- a) air, land and water
- b) all layers of the atmosphere
- c) all organic and inorganic matter and living organisms and
- d) the interacting natural systems that include components referred to in para a to c

In America the right to environment as a fundamental right can be found in the Ninth Amendment- which has been described as “those so basic and important to our society that it would be inconvincible that [they can] not protected from unwarranted interference”- and those rights “that…. Would be a natural subject of constitutional protection”.  

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224 *U. S v Lails Baking co.*, 238 F supp 217 1968, DC Ohio.
Industrialization brought a major threat to the environment and thus the eyes of the whole world were on these countries questioning them the ways by which they would tackle this problem. Some of the countries enacted legislations with the help of the principles evolved in Stockholm and Rio conferences and many attempted to protect this right through their activist judiciary imparting new dimensions to environmental jurisprudence. But still some countries enacted the laws only on the paper and in reality industrialization received an edge over environment.

2.6. PROPOSALS FOR ENVIRONMENTAL COURTS IN INDIA

Environmental Courts manned by a Judge and two experts at the regional level was advocated by the Supreme Court in *M.C. Mehta v. Union of India*\(^{225}\). This was reiterated by the Supreme Court in *Indian Council for Enviro-Legal Action v. Union of India*\(^{226}\). Finally, the need for such Environment Courts was referred to in *A.P. Pollution Control Board v. M.V. Naidu*\(^{227}\) and in the follow up case in *A.P. Pollution Control Board II v. M.V. Naidu*\(^{228}\), the Court required the Law Commission to go into this question. In this regard a Law Commission was set up which was headed by Justice M. Jagannadha Rao. The Commission in its report emphasized on the need of environmental Courts and ordained:

'It is the duty of the Parliament to provide for the establishment of additional Courts and the Central Government has to bear the cost of establishing and maintaining these Courts under Art. 247\(^{229}\) of the Constitution of India'.\(^{230}\)

Finally the commission proposed that:

*We, therefore, recommend that a law be made by Parliament under Art. 253 for constitution of Environmental Courts in each State (or group of States) having original and appellate jurisdiction as stated in this Chapter and having jurisdiction on environmental issues. The Courts will be manned each by three members with judicial or legal experience as stated and a*

\(^{225}\) 1986 (2) SCC 176 (at 202).

\(^{226}\) 1996 (3) SCC 212.

\(^{227}\) 1999 (2) SCC 718.

\(^{228}\) 2001 (2) SCC 62.

\(^{229}\) Art. 247. Power of Parliament to provide for the establishment of certain additional Courts: Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment of any additional Courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List.

panel of expert Commissioners. An appeal against the judgment shall be to the Supreme Court of India.231 Thus there is a need of establishment of Environmental Courts in India which would deal with the cases and disputes relating to the environmental pollution and protection and would help the citizens to realize their ‘right to clean environment’ more readily and easily and thus materialize the right to wholesome environment in its true sense.232 Moreover the civil or criminal Courts which handle the environmental cases usually are not able to appreciate the facets of environmental jurisprudence and fall short to value the scientific dimensions involved in those cases. Also proclaiming and publicizing this basic human right essentially indispensable for survival and endurance of a citizen amid dignity and esteem without the creation of effective judicial authority to adjudicate upon these matters would be symbolizing parody of justice as it would frustrate the object as well as the necessity of the constitutional guarantee.

2.7. LOOKING BEYOND HUMAN RIGHTS: DEEP ECOLOGY AND DUTY TO PRESERVE THE ENVIRONMENT

Deep ecology is one of the several new philosophies, which have developed in response to the worsening environmental crisis. It was made popular by a Norwegian philosopher, mountaineer and environmental activist Arne Naess in 1973 and the theory is non-anthropocentric in nature. The basic of the theory is that the ecological science, concerned with facts and logic along, cannot answer ethical questions about how we should live. For this we need ecological wisdom and deep ecology seeks to develop this by focusing on deep experience, deep questioning and deep commitment.233 Recognition of the vast being of living nature, which we call Gaia is done here. According to this theory, there is a fundamental equality between human and non-human life in principle.234 This eco-centric perspective, contrasts with the anthropocentric view, which ascribes intrinsic value only to humans, valuing nature only if it is useful to our own species.

The main points of this theory are as follows: all life has value in itself independent of it usefulness to humans, humans have no right to reduce this richness and diversity except to satisfy vital needs in a responsible way and the diversity of life, including cultures, can flourish

231 Ibid. (para 162).
232 Emphasis Supplied.
234 See; Frank B Golley, Deep ecology from the Perspective of Ecological Science; http://www.fw.umn.edu.
only with reduced human impact. Thus according to this theory, the human rights approach or the constitutional right to environment, which is anthropocentric will have no place in the environmental jurisprudence.

Deep ecology relies on the duty of human beings to protect and conserve the natural environment. Human beings have no right whatsoever to make development at the cost of natural resource exploitation. Art. 48 A and 51 A (g) have definitely looked at incorporating the concept of deep ecology in the Indian Constitution but its implementation is far short of expectation.

But there are several criticism of this theory. According to social ecologist Murray Bookchin, deep ecology fails to see that the problem of the environmental crisis is directly linked to authoritarianism and hierarchy. Bookchin says those are the real problems and they are expressed both socially and environmentally. By supposedly not recognizing the social roots of the environmental crisis, deep ecologists invite themselves to be accused of nature mysticism. Also, the danger that social ecologists and others see is that the deep ecologists imagination will become a new kind of a totalitarianism or ‘eco-fascism’, in other words, would government compel people to change their social practices and totally control their behavior to make it consistent with the demands of the eco-sphere? Though on general terms there cannot be any difference on the ideology of this theory, the bigger question asked is how to make technology grow without hurting the planet?

2.8. A Scope for Improvement

‘Life’ in Article 21 of The Constitution of India, goes beyond survival, viz., incorporates within its ambit air, water, forest, undisturbed existence, and so on. Overall thus, it pleads that a balance must be found in the context of each individual's duty and right to environment. If one opens the ancient literature, he will find that there are evidences to prove that the society in the ancient time paid more attention to the protection of the environment than what we think today. The right to wholesome environment though declared by the Courts as a fundamental rights yet this right is far beyond the reach of a layman. To evolve this right as a right in its absolute sense lot of work and amendments in the present society have to be done. The present work

endeavors to cull out those discrepancies in the system and seeks to suggest reforms to rectify the same.

2.8.1. **Obliviousness in the society.**

The society is unaware and unacquainted of the legal provisions by which they could invoke their right to wholesome environment and most of the times they bear the sufferings occurring to them due to the industrial pollution or when municipalities or other state authorities fail to perform their statutory duties. Merely publication of an enactment in the official gazette and then presuming that everybody knows what the law is, as it is assumed that everybody knows what the law is after the law is published in the official gazette, does not serve the purpose of the enactments.

Thus it is suggested that the government should spend the resources in constructive purposes i.e. in letting the public acknowledge their rights and the law which would provide them the remedy for its breach rather than spending resources on marking ‘rath yatras’ or ‘building hoardings’ audaciously demonstrating their success in achievements everything when they have failed to do anything. Measures like representation of clippings visualizing the provisions under the environment acts which a citizen can invoke when he is affected during the interval in cinema halls, in radio, television and newspapers. These efforts may seem small steps to many but we should not forget that: A journey of thousand miles begins with a single step.

2.8.2. **Judiciary: Yet to play the real role.**

The judiciary has played a major role in evolving an activist environmental jurisprudence in the country and recognizing the right to wholesome environment as a fundamental right but yet a lot of the work in this arena is left undone. Accepted that many problems prevail while deciding an environmental case as it involves a precise scrutiny and strict inspection of the facts, circumstances prevailing, scientific advise rendered and its correctness and the extent of pollution done and the extent to which it is justified, thus the Green Bench remains busy studying the situation and searching for solutions, but the problems are always accompanied with solutions.

According to S.D. Dave, an environmentalist, the task of a green judge is the most important for a nation. Thus he states: A judge on the Green Bench would often feel that, though being called upon to decide and pronounce upon something squarely within the arena of law, his prime concern and task, week after week, for an umpteen number of dockets landing on his desk, appears to be of striking a balance between the two most competitive concepts of the
present-day world – environment and development – and that too at a belated stage. Neither the concern nor the tasks depend upon the stage of the proceedings; they remain consistent during the hearings-admissional, final or intermittent.\textsuperscript{236}

Thus it is suggested that functioning of a green bench should remind of the character and significance of the duties of a chastising class teacher. Regardless of the stage of hearing or the juncture of the events, immediate measures should be ordered with a view to arrest further damage and salvage the situation. Fines should be imposed and cash deposits or bank guarantees to be ordered to ensure the improvement and, thereafter, the maintenance of consistent good behavior. Errant industrial units should be subjected to \textit{en masse} closures. Experts should be invited for scientific study, opinion and advice on specified issues to seek solutions and make requisite arrangements, either interim or final.

\textbf{2.8.3. A need to ‘green the bench and the bar’}

Environmental issues involve within their domain a very wide scope and requirement of judicial interpretation and scientific thrust, the fusion of which derives the power to propel the environmental jurisprudence in a nation. Thus the judges alone who are not scientific experts nor experts in environmental law (as the environmental law is made a compulsory subject only in 1999 by the Bar Council of India and therefore almost each and every sitting judge of the Supreme Courts and High Courts is environmentally blank) sometimes discover themselves in trance amidst the mayhem of complicated environmental laws and reports of the scientists and thus they are not able to deliver judgments beneficial for the environment and favorable for the country.

Thus it is suggested that the government as well as the judiciary should initiate environmental seminars, workshops and lectures for the judges so that they may acquire a better knowledge about the problems faced by the environmental scenario of the country as well as the possible solutions to those problems which would help them to deliver judgments environmentally benevolent and benign. Moreover the ‘orientation programmes’ should be conducted to educate the judges in the new environmental enactments and the intention of the legislature behind those so as to facilitate a better functioning of environmental laws in the country. Along with the judiciary the advocates of the bar should also be included in these process for the nation.

requires the prospective and daring volunteers who may hit hard upon the polluters and drag them to the Courts of law.

2.8.4. Need for the constitution of ‘Environment Courts’

_The Supreme Court and the High Courts are Courts not having exclusive jurisdiction as regards environmental issues and the result is that there is delay in their disposal as compared to the time within which any special Environmental Court dealing only with issues relating to environment could have taken._ It cannot be disputed that environmental matters have to be taken up early, monitored from time to time and be finally disposed of by a procedure quicker than that obtaining now. _Thus there exists a need for the Courts which would deal specially with the environmental matters and are accessible and would be able to provide an efficient remedy taking into consideration the scientific facts and environmentalist dimensions to protect the right of the citizens of enjoying a clean and healthy environment._ Even the _Carnegie Commission_ has stressed that ‘_there should be experts at the bench’._

The idea of a “multi-faceted” Environmental Court with judicial and technical/scientific inputs as formulated by Lord Woolf in England recently and the Environmental Court legislations as they exist in Australia, New Zealand and other countries is of urgent need in India as well. Having regard to the complex issues of fact of science and technology which arise in environmental litigation and in particular in the elimination of pollution in air and water, it is now recognized in several countries that the Courts must not only consist of Judicial Members but must also have a statutory panel of members comprising Technical or Scientific experts.

2.9. Conclusion

Since right to environment is a right of the community as a whole, a participative approach of duty performance by all the duty holders is a suitable approach concerning protection of environment.\(^\text{238}\)

Judicial interpretations using the Constitution are one avenue. The other is the direct use of environmental Acts, Notifications, Rules and Guidelines. The most intimately connected to biodiversity are the _Wild Life (Protection) Act of 1972_, the _Forest Act of 1927_, and the _Forest_
Conservation Act of 1980. Others include the Air and Water pollution control laws. Official agencies have used these laws with good effect, to conserve large stretches of biodiversity-rich areas, though unfortunately neither of these provides for substantial public involvement in their enforcement, and indeed often dis-empowers local communities.

Any social process of change must be backed by the social sanction. If it is not then, no Court, no law, no constitution can enforce it. It is therefore, although now we find some constitutional provisions protecting the ecological balance it calls for the social sanction through the observance of the constitutional morality, which we lack today, as a national morality. Hence constitutional directives of decisions fail to produce a desired result. It is also now being suggested that the Constitution of India must provide a new Art. 21-A stating that, all persons shall have the right to clean and livable environment, throughout the territory of India subject to any law imposing reasonable restriction in the interest of general public.\(^{239}\)

However with due respect to the above views it is humbly submitted that it would be better if such matters are left to the specific legislation or judicial laws rather than accumulating everything in the Constitutional text. After all the sanctity of the document called as the fundamental law of the land, the constitution must be upheld\(^{240}\) so as to distinguish it from any other ordinary legislation; besides, the exploration of the different dimensions of the Art. 21 is a ongoing process. The new horizons of Art. 21 are coming up from case to case. The need is for mass education and awareness. This aspect has been very rightly upheld by Court.\(^{241}\) The people’s collective conscience should wake up before the matter slips out of the hands. Each country now must seriously strive in its fundamental policy for the maintaining of ecological balance; or else tomorrow will be a bit too late for us to act.

Right to life is a fundamental natural right. What the Courts are in fact doing in the public interest litigation cases is to locate the duty bound agencies that will satisfy [or not violate] the fundamental rights of the people. Whether judicial activism should mean expanding constitutional law or rectifying the existing statutory law is a controversial point. However, in so far as the Courts have expanded the meaning of Art. 21, 19 and 14 and partly resurrected the common and customary law view of natural resource rights, there is a whole new range of

\(^{240}\)M. C Mehta v Union of India AIR 1992 SC 382.
\(^{241}\)Ibid.
possibilities wherein the liberal ideology of natural rights of individuals as well as groups can be pushed further through litigations and new meanings can be given to this inchoate right.\textsuperscript{242}

\textsuperscript{242}Chattrapti Singh, Existing Legal Framework for Water Rights, CEERA Library.
Part- II

Common Law Principles for Resource conservation

2.10. Introduction

Civil law principles for environmental protection are based on the common law system, which are based on the principle of the law of tort or the law in relation to civil wrong. Since the UK, USA and India follow the common law system, civil remedies available to individuals in these countries against environmental harm are almost identical in nature. The law of tort has its origin in the common law of England. The different kinds of torts related to environmental pollution are:

1. Negligence,
2. Trespass,
3. Nuisance and
4. The rule in *Rylands v. Fletcher*\(^{243}\).

Under the law of tort a person who has suffered personal injury or damage to property can sue for damages. The law further states that unless the aggrieved individual proves specific damage, the action would fail. However, an intentional trespass is actionable per se *i.e.* without any proof of damage. Besides damages, another remedy available under the law of torts is the injunction.

It should be noted that a five judge Constitution Bench of the Supreme Court of India had ruled that industries which are engaged in inherently dangerous and hazardous business cannot rely on the exceptions to the rule in *Rylands* and that they are strictly and absolutely liable\(^{244}\) to compensate for the damage caused by them. In cases of public nuisance, neither the Attorney General at Central level nor the Advocate General in the States has any role as *parens patriae*. However, he may institute suit for declaration and injunction or for other relief in cases of public nuisance. The Code of Civil Procedure 1973\(^{245}\) enables two or more private citizens to file suit for public nuisance, with the leave of the Court, even though they have not suffered any special damage. Civil litigation in the common law system views public nuisance as an exclusive concern for the State.

\(^{243}\) *Rylands v. Fletcher*, (1868) LR 3 HL 330.

\(^{244}\) *Shriram gas leak case* [Oleum gas leak], *M. C Mehta v Union of India*. AIR 1987 SC 965.
2.11. **NUISANCE**

Modern environmental law has its roots in the common law principles of Nuisance. The substantive law for the protection of the citizen’s environment has basically emanated from the common law relating to nuisance. Acts interfering with the comfort, health or safety are covered under nuisance. Nuisance also means anything that annoys, hurts or that which is offensive. Pollution of water *vis-a-vis* nuisance is doing something which changes the natural qualities of water, including its temperature, may be actionable at common law as an infringement of proprietary rights, such as riparian rights, or a right to take underground water, or an easement to a flow of water, or a *profit a pendre*, or a right of fishery, or may be actionable under the common law relating to nuisance.

There are two kinds of nuisance, one affecting private individuals and the other affecting the public. Under English law an individual can sue only for private nuisance. In cases of public nuisance which generally affects the public at large, a single individual citizen is not allowed to sue as he would lack *locus standi*. Only the Attorney General, in his capacity as *parens patriae* can sue for public nuisance, as he is presumed to be the protector of public interest. There may be cases where an interference with a public right involves interference with some private right. This situation arises where no interference of private rights is involved but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right. In such cases the action under the law of tort for nuisance is permissible.

The general principle applicable to nuisance is ‘*Sic utere tuo ut alienum non laedas*’ [A man may not make such use of his property as ‘unreasonably and unnecessarily’ to cause inconvenience to his neighbor.] The Court in such cases, will consider both the type of harm and the gravity of harm caused by the escape together with the frequency of the escape, in order to determine whether the facts constitute an actionable nuisance. It is interesting to note that the Courts have more readily given relief in those cases where there was apparent physical damage caused to the property in contrast to personal inconvenience, discomfort and suffering, probably because granting a remedy ultimately depends upon a proof of the wrongful damage.

In *Janki Prasad v Karamat Hussain*, the plaintiff in a representative capacity had brought a suit for declaration of their right of worship and taking out processions with music past an adjoining

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245 Nuisance as a tort means an unlawful interference with a person’s use or enjoyment of land or some right over, or in connection with it.

246 The interference may be due to smell, noise, fumes, gas, water, heat, vibrations, smoke, germs etc.

mosque and for an injunction restraining the defendants from interfering at any time with the aforesaid rights of the plaintiffs. The Court recognized the right of the plaintiffs to worship and take procession accompanied by music, provided it did not amount to nuisance and hence no injunction was granted since it would defeat the defendant’s right to restrain any nuisance.  

2.12. CRIMINAL LAW PRINCIPLES

All the common law countries treat deliberate acts of pollution as a crime. The criminal law system of early days could envisage only pollution of rivers, streams, ponds and wells. The law those days did not contemplate the widespread industrial pollution of the commons. When specific statutes were enacted for the regulation of environmental deterioration, certain activities were said to be criminal offences.

The Indian Criminal law has few relevant sections that can be refereed to in combating or at least questioning an act resulting in some kind of a pollution on the grounds of public nuisance.

The offence dealt by the Indian Penal code may be broadly divided into three heads vis:

a) Public health [sec. 269-278];

b) Public safety [sec. 279-291];

c) Public Morals and Decency [Sec. 292-294A].

The India Penal Code deems it an offence if any person voluntarily fouls the water of any public spring or reservoir, as to render it less fit for which it is ordinarily used. Such persons are punished with imprisonment extending upto six months and/or fine upto one thousand rupees. Relevant provisions also include Sec. 278 for making the atmosphere noxious to health and Sec. 268 that deals with an act or omission causing common injury, damage or annoyance. The scope of these provisions are so vast that even a motorist blowing smoke into the face of another may be challenged under these provisions. Sec. 425 incidentally includes penalty against mischief causing water pollution, or reducing the quality of the property.

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249 Sec. 277 of IPC.
250 Criminal prosecution for Public Nuisance.
251 These won’t include natural interference or discomforts due to urbanization.
252 The sections in the IPC provide for a fine of Rs. 500 or imprisonment to the maximum of 6 months of violation of various offences. The Police is hardly aware of these provisions and don’t know its implications. They are also not sure of the method of prosecution and the style of collecting evidence. Moreover the Police cannot be expected of knowing the scientific details of the level of pollution and cannot also be expected of being the watch dogs for such high profile environmental crimes.
Besides these provisions, S. 133 of the Code of Criminal Procedure\textsuperscript{253} empowers the Executive Magistrate to make an order for the removal of a nuisance.\textsuperscript{254} The Supreme Court in the celebrated \textit{Ratlam Municipality case}\textsuperscript{255} held that any citizen can initiate proceedings under the above provision, if it is found that the municipal authorities are not discharging their statutory duty of providing drainage and other sanitary facilities. The Court’s decision was found on its earlier decision in \textit{Gobind v Shanti Sarup}\textsuperscript{256}, where S. 133 of Cr. PC was used by the Court to preserve the environment in the interest of ‘health safety and convenience of public at large’.

Though the power under Sec. 133 involve speedy remedy and justice and avoids judicial delay, Court fee, stamp fee and lawyers fee, the power is limited only to pass an injunction or for the removal of obstruction. This power lacks the teeth to abate pollution or to take cognizance of the person guilty of the offence of Public Nuisance.

In \textit{R. B Gopala v KSPCB}\textsuperscript{257}, the High Court of Karnataka, while dealing in matter concerning power of the Executive Magistrate u/sec. 133 of Cr. P. C for curtailment, stoppage and removal of various forms of public nuisance, held that the power did not extinguish when a specified law under the Environmental Protection Act or the Water Act was passed. Unless the special law, or the later law expressly conflicts or repeals the general provision of the law, the same shall stand good. The power u/sec. 133 is wide enough to cover environmental as well as non-environmental issues.

The Common law remedies for nuisance as applicable to cases of environmental pollution are not exhaustive and contain certain gaps, which have largely been filled by legislative remedies provided progressively over the past few years.

\section*{2.13. CIVIL LAW PRINCIPLES}

Class actions and representative actions are special procedures which enable a class of persons having the same interest to sue or to be sued. In a society where mass production and mass consumption are ubiquitous, a situation may occur where a large number of persons become aggrieved about a common occurrence affecting all of them alike. When such persons are too

\textsuperscript{253} See generally Sec. 133-144 Criminal Procedure Code 1973.

\textsuperscript{254} This power exercised under Sec. 133 are far broader than the ones exercised by the Pollution Control Board. Under the relevant law or specific law for prevention and control of pollution by the PCB, the power under the former general law like the one in Cr. P. C can be continued to be exercised.

\textsuperscript{255} \textit{Municipal Council Ratlam v Varidhichand} AIR 1980 SC 1622.

\textsuperscript{256} AIR 1979 SC 143.

\textsuperscript{257} Cr.P NO. 736/97.
numerous to be joined together easily, class action is the most economical, fair and efficient way of making justice available to all members of that class. In the case of environmental harms, since all injured persons have identical interests and since their grievances are common, class action is the most suitable form of litigation for redressing their grievances.

Similar provisions can be found in Order I rule 8 of the Code of Civil Procedure 1976 (CPC) of India. It provides for representative action when the class has numerous members and when they have the same interest in the suit. It permits any member to join the class if that person wishes. Order I r.8 CPC prescribes that notice be published in a newspaper having circulation in the place where the members of the class reside, or that notices be served if persons are ascertainable. Suits filed under Or.I r.8 CPC too cannot be compromised or settled until the Court issues notice to all members of the class. The decree in such cases will be binding on all the members of the class. The provision in Order I rule 8 CPC was successfully employed by the Supreme Court of India in a public interest litigation against pollution of the river Ganga. In that case the Court directed the issue of notice under Order I rule 8 CPC, treating the case as a representative action by publishing the gist of the petition in the newspapers in circulation in northern India, and calling upon all industrialists and municipal councils having jurisdiction over the areas through which the river Ganga flows, to appear before the Court and to show cause against the petition. Likewise, in the Bhopal tragedy, Government of India filed a class action suit on behalf of all the victims as per the provisions of Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 by which the government assumed parens patriae jurisdiction.

When the traditional civil Courts insist on the rigors of standing to sue, class action is a very effective remedy for the persons who are victims of environmental pollution to sue for damages and for obtaining preventive relief from Courts. However, even in class actions and representative actions, the plaintiffs shown, as representatives should prove that they have suffered damage or injury.

2.14. THE RULE IN RYLANDS V FLETCHER

The principle known as ‘the rule in Rylands v Fletcher’ was first established in the case of that name reported in 1865. It involved the construction of a reservoir on the defendant’s land.

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259 1865 H&C 774.
The contractors failed to block off mine shafts with the result that when the reservoir was filled up, water went into the shafts and flooded a mine belonging to the plaintiff. Although there was no negligence on behalf of the defendant, the House of Lords held that he should be liable. In the lower Court J, Blackburn first expounded the principle:

‘……that the person who for his own purposes brings onto his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape’.

Thus, the principle imposes strict liability [but not absolute liability] if something brought onto land or collected there escapes. The implications as far as environmental protection is concerned are clear. Many acts of pollution are caused by materials and/or substances which are brought onto land escaping from that land. Over the years the rule has been applied in relation to water, fire, gases, electricity, oil, chemicals, colliery spoil, poisonous vegetation and even a chair-o-place at a fairground. The sheer simplicity of the principle would seem to cover many potentially hazardous situation. However, the limitations of the principle are such that it is rarely successful nowadays.

2.15. NON-NATURAL USER

By far and away the most important restriction upon the principle is that where a substance is kept on land it must have been kept by means of a ‘non-natural user’. Originally, this may have meant only that there is no liability if the water [in the case of Rylands v Fletcher] had been a natural lake or naturally flooded area rather than a man-made reservoir. In time, it came to mean that the use had to be ‘some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community’. 260

Thus a slightly different interpretation to the word ‘natural’ came about. Instead of meaning ‘artificial’ the Courts began to interpret the phrase as meaning an ‘abnormal’ use of land. Consequently, some rather strange things have been held to be a natural use of land and a flexible test of what is an especially or unduly hazardous activity has evolved which has attempted to import some element of public utility.
2.15.1.  The Shriram Principles

The Shriram case, differently from the Bhopal proceedings, did deal with matters of safety, liability, responsibility and principles of compensation. On December 4, 1985 a day and a year after Bhopal, a major leakage of oleum gas resulted from the bursting of a tank containing the gas in the caustic chlorine plant, when the structure on which the tank was mounted collapsed. A large number of persons, including workmen and the public, were affected, and an advocate practicing in the district Courts which was in the line that the gas traveled died on account of inhalation of the gas. Within two days, on December 6, 1985, there was a further, even if more minor, escape of gas from the plant. It was then that the plant was ordered to be closed down.

There was a PIL pending in the Supreme Court since about June 1985 asking the Court to order closure of the various units of Shriram since they were hazardous to the community. The question of relocation of hazardous industry was already being considered. The Court ordered the closure of the plant, appointed technical committees to report on its safety, and worked out the conditions before allowing the company to reopen its plant. Acknowledging the importance of any decisions made on matters of liability, responsibility and compensation to the Bhopal case, the Court moulded the law to meet the needs of the Bhopal litigation too.

The Court's directions have largely been incorporated into statute law, except, strikingly, for the principles of absolute liability and enterprise liability, which the Shriram Court set out.

Having found negligence in the management of the plant, which had resulted in the leakage of the gas, the Court made the reopening of the plant conditional on:

- An expert committee's report after its examination of the safety features of the plant
- A designated officer being personally responsible for a group of safety devices or measures, and the head of the caustic chlorine division being individually responsible for the efficient operation of the device/measure.
- The identification of critical and non-critical devices by the expert committee, and the shutting down of the plant if any device identified as critical is non- or mal-functioning.
- Weekly inspection by a Chief Inspector of Factories with the necessary expertise to inspect chemical factories, as also a senior Inspector of the Central Pollution Control Board (CPCB).

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260 *Rickards v Lothian* 1913 AC 263.
Before the plant could be reopened, the Court insisted, the management of Shriram would have to obtain an undertaking from the Chairman and Managing Director of DCM Ltd., which was a prominent industrial enterprise and the owner of various units of Shriram that, "in case there is any escape of chlorine gas resulting in death or injury to the workmen or to the people living in the vicinity" he would be "personally responsible for payment of compensation for such death or injury."

In its original rendering, the Court extended this condition of personal liability to all officers in actual management of the caustic chlorine plant. Upon appeal by the company that that this condition of absolute unlimited liability would turn competent people away from employment in these positions, the Court, albeit reluctantly, backed down somewhat. The condition was modified requiring the undertaking to be given by the officer designated as "occupier" under the Factories Act 1948 and/or the officer responsible to the management for the actual operation of the caustic chlorine plant as its head. The liability was also limited to the extent of annual salary with allowances, unless the escape of gas occurred as a result of an act of god or sabotage or if he was able to show that he had exercised all due diligence to prevent such escape of gas, in which event he may be indemnified by Shriram.

**Liability and compensation in Shriram**

The Shriram Court, delivering its judgment on issues of liability and compensation, encountered a catch in the nature of a constitutional conundrum: would a writ under Article 32 lie for a violation of the right to life under Article 21 against the Delhi Cloth Mills Ltd., to which larger corporate entity Shriram belonged, a public company limited by shares? Would a private corporation like *Shriram* share the character of the state to be brought to bar in a petition made to the Supreme Court for violation of the right to life? The answers would have determined whether the Court's dictum would have binding effect or not. While the Court inclined to view that the disciplining force of Article 21 should extend to the corporation, it left the issue unresolved. This has created an obstacle in the absorption into law of the principle expounded in *Shriram*. Both because no other, rational principles of liability and compensation have emerged, and because these principles find a place in the dictum of the Supreme Court, these principles do continue to exercise a persuasive influence.261

On liability, the Court held:
“We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.

Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm, the enterprise must be held strictly liable for causing such harm as part of the social cost of carrying on the hazardous or inherently dangerous activity."

When hazardous or inherently dangerous activity is permitted to be carried on for profit, the law must presume that the permission is conditional on the enterprise absorbing the cost of accident. Such activity for private profit can be tolerated only on condition that the enterprise indemnifies all those who suffer on account of its activity "regardless of whether it is carried on carefully or not." This principle was also explained as being sustainable since it is the enterprise alone which has the resources to discover and guard against hazards or dangers to warn against potential hazards. "We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for e.g., in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability under the rule in Rylands v. Fletcher."

In an exposition of enterprise liability, the Shriram Court asserted that the measure of compensation in such cases must be correlated to the magnitude and capacity of the enterprise "because such compensation must have a deterrent effect." Further, "[t]he larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the

harm caused on account of an accident in carrying on of the hazardous or inherently dangerous activity under the enterprise."

The Bhopal Courts, confronted with these principles after the settlement-order, exhibited a certain uneasiness. The Bhopal Court which considered the Claims Act called it "an uncertain promise of law" which, on the basis of the available evidence "and on the basis of the principles so far established" it was difficult to see "any reasonable possibility of acceptance of this yardstick." Elsewhere, the Shriram principle which might have arisen for consideration in a "strict adjudication" was held to be rendered redundant by the settlement which notionally substituted the tortfeasor by the settlement fund "which now represents and exhausts the liability of the alleged hazardous entrepreneurs, viz., UCC and UCIL." A judge even shrugged it off as being "essentially obiter". This observation has, however, since been overruled and the Shriram principle affirmed and applied in a decision pinning liability on polluting private industrial units.262

2.16. IMPOSING CRIMINAL LIABILITY UNDER ENVIRONMENTAL LAW

In most countries there has been an increased presence of criminal remedies in the Statute book with the object of deterring263 environmental crimes.264 Criminal Prosecutions have increased considerably in Developed Countries over the last few decades. In India, however although the number of criminal provisions punishing environmental violations both under the Environmental statutes and the other General laws [including the Penal laws] are large, a criminal prosecution is rare.265 This is largely a result of the ambiguity, and ineffectiveness in the drafting of these criminal provisions and the lack of the adequate political will to enforce

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262 Usha Ramanathan Business and Human Rights: The India Paper; Published in IELRC Working Paper No. 2001-2 part I.
263 Criminal sanctions for environmental violations have considerable deterrent value, even when the enforcement agencies decide not to prosecute, the fact that a criminal offence might be involved provides considerable deterrent value and acts as a reserve force that makes the other techniques of enforcement more effective.
264 This is increasingly evident in India with the recent amendments in the environmental statutes to provide for increased punishment for environmental law violations.
265 The prosecution level under the Water Act is 3.2 % and under the Air Act is just 1.4%. Till date not even one person has been imprisoned for an environmental crime in India. The only fine imposing case is the Kamal Nath case wherein damages were imposed and the polluter pays principle is yet to find firm ground for quantifying environmental damages. CEERA Litigation profile, 2002. Other cases if imposing liability has arisen in the Bicchiri case and the Rock Defacement case.
these provisions. The uncertainty and irregularity considerably reduces the deterrent effect of these criminal provisions and delegates them to mere ‘venomless snakes’.  

All the pollution and nature-destruction crimes have long-term effect but immediately after pollution or nature-destruction, there is no scope to calculate or exhibit the injury caused by the crime. Stating from small vehicles to factories of different sizes, which release fumes and poisons destroying the nature etc., pollute the atmosphere, but severity of their crimes and its effect on public health needs to be measured to prove the gravity of their crimes. Due to lack of devices for monitoring quantum of pollution and for want of proper method to exhibit injuries of nature-destruction crimes and its effect on humanity, the defaulters are easily escaping from the clutches of prosecutions.  

2.16.1. The Dialectic of Environmental law and Criminal Law

The distinguishing characteristics of criminal law include-the greater role of intent in the criminal law, the relative unimportance of actual harm to the victim, a strong link between societal moral values and the criminal law content, the special character of incarceration as a sanction, and the criminal law’s greater reliance on public enforcement. Criminal law offences are prohibited while civil law or tort law violation are priced. Acts/omissions, which have some utility to society and for which an absolute prohibition is not desirous are priced and constituted civil wrongs.

Environmental violations challenge the conventional attributes of crimes. Environmental offence and other regulatory offences on the statute book, regulate economic activities which society does not wish to absolutely prohibit for the economic benefit they provide. The actions traditionally covered under criminal law have no social utility and are punished with the intention to stop such actions. With regard to this special consideration in environmental offences the criminal law must guard against over-deterrence.

Environmental offences unlike traditional offences generally do not require a mens rea and are strict liability offences. Strict liability offences must be assessed from the

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266 D’ Monte; Environmental Law has no Teeth; 1 Encology No. 4, 24-25 [Sept 1986]. Shyam Divan, Environmental Law and Policy, OUP at 82.
267 See 1997 Cri. LJ Journal Section 57 at p. 61.
269 These statutes displace the common law presumption of a requirement of a mens rea for criminal law offence.
consequentiality and the deontological perspectives on punishment. Each perspective would give different justification for such offences. The consequential model, which focuses on the impact of punishment on others, looks to punishment for deterrence, rehabilitation and incapacitation. Under such a model absolute liability offences could be justified as it increases deterrence (1) Prosecution will be able to establish guilt with greater ease, as there will be no requirement of proof of fault. This ease in conviction will increase the deterrent value. (2) The public will be more cautious while engaging in such activities as they risk punishment even without fault. Others from the same school would counter that deterrence does not depend on the chances of conviction alone [for which strict liability is relevant] but on the probability of being prosecuted, and the level of prison sentence on conviction.  

The Deontologists would justify the strict liability offences as bringing the offenders to book for their acts. With the reduced burden on the prosecution, fewer guilty persons would escape liability. However the deontologists criticize the application of such offences on the innocent. They argue that it is morally wrong to punish those who are not at fault. One possible counter to this objection is that when persons are engaging in activity that could cause harm to the environment and the public, they are doing so to earn profit and are bound to exercise due care and if the damage results they are bound to compensate.

Under the Indian Environmental statutes, the environmental offences punished are not of one homogenous group. Under the Water Act and the Air Act, there are certain offences that prescribe (1) a minimum and maximum prison sentence and a fine and (2) others that prescribe a maximum prison sentence or a mere fine. This is in conformity with the two broad categories of offences that are punished under these statutes—the basic offences and those related to obstruction of the enforcement by the Boards. The Pollution Control Boards set certain permitted standards of pollution emission; violation of these standards constitutes a basic offence. The Boards are vested with considerable powers of investigation.

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270 If taken the strict interpretation of the Indian Supreme Court, then all hazardous Industries would be 'Absolutely liable' with the implication of 'No faulty theory' on the violators.
272 Ibid at 136.
273 Sec. 43 and 44 of the Water Act and Sec. 37 of the Air Act prescribes imprisonment for not less than two years and fine.
274 Sec. 41, 42 of the Water Act and sec. 38 of the Air Act. The offence punishable under this category are the more minor offences involving failure to assist or obstructing the Board in their tasks.
275 Sec. 24 of the Water Act, 22 of the Air Act, and sec. 7 and 8 of the EPA are basic offences.
obstruction or resistance to the investigation would constitute an offence against enforcement.277 Under the EPA, this categorization of the offences is not present. Sec. 15 provides a general punishment for violation of any provision of the Statute.278

Sec. 24 of the Water Act punishes persons who ‘knowingly’ allow illegal polluting matter into streams, wells etc. The word ‘knowingly’ is different from ‘intentionally’, it merely connotes conscious action on the part of the offender. The different mental states in decreasing order of culpability are intentionally, knowingly, recklessly, negligently. Knowledge can be established either through direct evidence or circumstantial evidence including situations where the accused has willfully avoided discovering facts that show environment violations. A defence of mistake of fact could exonerate a person from ‘knowing’ offence.279 Under the Environment statute if a company performs the illegal act, it is held liable. Imposing liability on corporation is very important as the majority of environment crimes are committed by companies; merely prosecuting the corporate officers for such offences would not sufficiently deter the company.

By application of the principle of respondeat superior the company is held vicariously responsible for the actions of its employees in the course of employment and for the benefit of the company. Such liability would be especially useful when it is difficult to pin liability on one particular official, as the environment violations is the result of the actions of several different officers. In the future, it is possible that holding companies280 will be held liable for the criminal acts of their subsidiaries.

If the offence has been committed by the company, then in addition to the company, every person who is directly in charge of and responsible to the company for the conduct of the business of the company shall also be liable.281 Such corporate officers would escape liability if they can prove that the offence was committed without their knowledge or that there was exercise of due diligence to prevent the commission of the offence. Sub-clause 2 of the respective sections under the Water Act, Air Act and the EPA then goes on to add that the

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276 These include the right to enter the investigated industry, to make inspection, to demand information, to take sample of pollutants, to require a person to carry out certain work etc. section 38 of the Air Act and sec. 42 of the Water Act.
277 Zakaria Siddiqi; Environmental Laws and Limits of Criminal Sanctions, IBR Vol. 21 (4) 1994, 25 at 43.
278 Sec. 15 imposes penalty beyond one year, which may extend to seven years.
279 Classic examples can be found in the Modi distillery’s case.
280 To succeed in a prosecution, however it would be necessary to establish not only the parent subsidiary control but evidence of actual pervasive control of the business of the subsidiary. This control can be determined by the extent-financial dependence, administrative commonality, managerial commonality etc.
director, manager, secretary or other officer shall be deemed to have committed an offence when it is proved that it was a result of the consent or connivance or is attributable to neglect of the said officer. The two sub sections are contradictory sub section (1) deems responsible officers guilty of an offence, while sub section (2) requires the prosecution to establish the connivance, consent or negligence of the ‘director, manager, ….or other officer’ [which would necessarily include the entire ambit of responsible officers] before an offence is established. There has been considerable conflicting case law by the Courts as to whether directors, managing directors, chairman etc. would be considered ‘directly in charge of and responsible’ and hence punishable under this law. That ‘in-charge of or responsible to’ must be interpreted broadly, to include even the lower level supervisory officers who have the ability to stop or control the polluting emissions is emphasized here.

Under the Environment Statutes there is scope for private prosecutions of environmental criminal cases. A Court can take cognizance of an offence under the various Statutes either by a complaint made by the Board or by a private person after giving due notice to the Board. However in India there has been little recourse to the latter. Private persons rather move under the writ jurisdiction, public interest litigation or for other civil remedies, as criminal prosecutions necessitate compliance with the strict evidentiary rules of criminal prosecution. Till date, it is hard to find any private prosecution in any of the States in India. Private prosecutions would prove useful and should be encouraged. It may be stated that an increased popularity of such prosecutions would reduce the burden on the public funds, would make public prosecution officers more vigilant, would protect the public when public prosecutors shy away from prosecuting large moneymed companies or individuals etc.

281 Sec. 47 of the Water Act, section 40 of the Air Act and Sec. 16 of the EPA. 282 To cite a few cases—In Mehmood Ali v State of Bihar, 1986 PLJR P. 123; a managing director was considered a responsible officer and was held liable under the Water Act. However in N. A Palkiwala v M. P Pradushan, 1990 Cri. L J 1958, the Chairman and Deputy Chairman were not considered person directly in-charge of, and responsible to the company for conduct of its business.

283 In United States of America all ‘responsible corporate officers’ doctrine is adopted. For more see US EPA regulations.

284 This provision enabling a private prosecution was introduced for the first time under the EPA [sec. 19] in 1986. Similar provisions were subsequently inserted into the Water Act and Air Act in 1987.

285 Section 49 of the Water Act ad 43 of the Air Act require a person wishing to make a complaint to first give a notice of not less than 60 days, of the alleged offence and of his intention to make a complaint to the Board. Section 19 of the EPA requires the person making a complaint to give a similar notice to the Government. This notice is intended to give the designated authority some chance to remedy or set right the environmental damage.


Environmental crimes which threaten the public health and safety because of their dangerous character are punished as public welfare offences. Punishment without a mens rea requirement is permissible because firstly the punishment imposed is minimal and secondly the conduct punished is such that a reasonable person would know that it is subject to stringent public regulation and may seriously threaten the community’s health or safety.

Environment offences should be divided into two categories with, accordingly, different punishment – (1) the intentional or knowing desecration of the environment, (2) the accidental damage of the environment despite the exercise of due care and diligence. The culpability of an individual should determine the offence, it should not be left to the enforcement authorities and sentencing authorities to determine whether to prosecute.

There is no such categorization presently under Indian law. There is no check on the exercise of power. With increased prosecutorial discretion and uncertainty, the deterrent value and the moral message behind the criminal punishment is accordingly reduced.

Absolute liability was introduced to reduce the severe burden on the prosecution to establish intention for certain social–welfare offences. Keeping this object in mind, we have the lower penal offences for cases where the prosecution cannot establish intention. In

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288 The Indian Penal Code under Chapter 14 has an exclusive chapter on Public Heath and Safety wherein various section are addressed towards Environmental pollution, but as the punishment is minimal as low as three months and enforcement weak with Police Officer either not equipped or informed, these provision have never found any enforcement. Section 133 of the Cr.P.C is another such provision which empowers an Executive Magistrate to pass injunction and other necessary orders to abate or stop a public nuisance which annoys, disturbs or create public disorder.

289 Some authors have criticized the knowing requirement as necessitating a very low level of culpability to establish a serious criminal offence. The establishment of intention will prove difficult, as few individual consciously engage in actions with the sole intention to harm the environment. The knowing standard furthermore is just one removed from the intentional actors, consciously engage in prohibited acts. One who acts intentionally wills that the act or result should occur, while the other one who is willing to let it occur—Kathleen F Brickey; The Rhetoric of Environmental Crime: Culpability, Discretion and Structural Reform; 1998, 84 Iowa L Rev. 115

290 Under the American environment statutes such a classification based on the level of consciousness of the environmental damage is present. For instance under the Clean Water Act a negligent discharge of water pollutants is punished as a misdemeanor with penalties of up to one year’s imprisonment and /or a $25,000 fine for each day of violation; while a knowing discharge is punished as a felony with a maximum imprisonment of 3 years and a fine of at least $5,000 and up to $50,000 for each day of the violations, and a knowing endangerment [creates an imminent threat of or cause serious bodily injury] is punished as a felony with a maximum imprisonment of up to 15 years and a maximum fine of $250,000—Kevin A Gaynor and Thomas R Bartman; Criminal Enforcement of Environmental Laws; 1999, 10 Colo. J. Int’l Envtl. L and Policy. p. 39.


292 As stated in the Sriram Gas leak case by J. Bhagwati, Though this principal was initially applied only to hazardous industries, today the same is applied to all kind of industries, through the case law judgments of the Apex Court.
establishing intention or knowledge reliance on circumstantial evidence must be freely permitted to establish the guilt of the individual.

For the first category, severe prison sentences and fines should be imposed.\textsuperscript{293} There should be a reconsideration of the current fines imposed. The present fine\textsuperscript{294} imposed does not satisfy the criminal law goal of retribution.\textsuperscript{295} Although no doubt by recent amendments the degree of fines have been increased, however to achieve any degree of deterrence especially for large companies, the method of calculation should be different.\textsuperscript{296} One option for calculation is that the fine imposed should be proportionate to the magnitude and capacity of the enterprise so that the punishment will have an adequate deterrent effect.\textsuperscript{297} Or else the level of punishment could be proportional to the profit garnered from the venture. The renowned Bentham states that the value of the punishment must not be less than that is necessary to outweigh the profit derived from the offence. As a corollary to this proposition, Bentham recommends that the value of punishment must be increased inversely when perpetrator indicates a habit, the punishment must not only outweigh the profit but also take into consideration other possible previous offences that were committed with impunity.\textsuperscript{298}

A heightened offence might be considered for knowing or intentional environment damage that causes injury to human life. For the prosecution to succeed in such a case it must prove that the accused was aware of his actions and was aware at that time that such actions were sufficiently likely to cause danger to human life.\textsuperscript{299} Such a knowing endangerment offence is present in the American law.\textsuperscript{300}

\textsuperscript{293} Fine upto 10 lakh and imprisonment upto 10 years has been extended under the EPA 1986.
\textsuperscript{294} Fines are hardly implemented. Take for example under the Water Act 1974 and Air Act 1981, the Pollution Control Board have the power of [Sec. 33-A] to cut the supply of water or electricity to any industry or operation which fails to comply with the conditions as laid down by the Board for abating air or water pollution.
\textsuperscript{295} Pollution Control Boards are fulfilling the pockets of the Government machinery by ‘Consent fee’ which runs into crores of rupees, while by paying consent fee, pollution continues unabated.
\textsuperscript{296} In T. N Godavaran series, on rock defacing, the Supreme Court did not hesitate to impose a fine upto Rs. 10 lakh as a clean up mechanism for companies like Coke and Pepsi and Asian Paints, who had painted their advertisement on rocks in Himachal Pradesh. This case set a new precedent on Natural resources conservation, by treating rock as attributes of nature, which cannot be taken for granted by individual for profits.
\textsuperscript{297} N. K Chakrabarti; Punishment for Crimes of Environmental Pollution: A Plea for Rethinking; IBR Vol. 23 (3&4) 1996, 67, at 73.
\textsuperscript{298} Ibid at 71. In India the Span Motel Ltd case goes to show how well the judiciary is in control of the environment. After nearly 4 years of its judgment in 1997 by J. Kuldip Singh , J M. B Shah and J. Doraiswamy [2002 3 SCC 653] did not hesitate in imposing fine upto 10 lakh rupees on Kamalnath for usurpation of Public Office in granting personal favours.
\textsuperscript{299} Enviro-Legal Defence Firm v Union of India [Bhiccri case].
\textsuperscript{300} Supra at n 176.
For culpable environment offences, the statutes should be construed strictly. The rule of lenity which postulates that Courts should read ambiguous criminal statutes narrowly\(^{301}\), giving benefit of any interpretative doubt to defendants should be applied here. This uncertainty in the law greatly reduces the deterrent effect; to increase the deterrent effect the public must have clarity as to the conduct that is prohibited. The nonculpable minor offences, in furtherance of the object of social welfare legislation of protection of human health and the environment [under the remedial purpose doctrine] should be interpreted broadly.\(^{302}\)

In furtherance of the object of individual deterrence, a second offence must have greater penalty. Of our present environment statutes only the Water Act provides an enhanced penalty for a second offence.\(^{303}\) Incorporation of a similar provision under the Air Act and EPA should also be considered.

### 2.16.2. Inadequacies of Criminal law

The way of evading the law on polluting control is many for corporate entities. Creating a smoke screen of legal problems, they try to free themselves from penal liability. Suppose the unit of a corporate industry commits the offence of discharge of pollutants without treatment and consent—and simply sleeps over the communications from the Pollution Control Board for a long time, no offence will be charged. In *Modi Distillery case*\(^{304}\) followed by the *V Arunachalam v TNPCB*\(^{305}\) a Managing Director of any Corporate Company may evade responsibility of such pollution if he/she shows that the pollution continued without his knowledge or consent, personal liability under the Water Act would not lie.

The difficulties in applying general principles of the criminal law to environmental law are part of wider problems that needs to be addressed.\(^{306}\)

The following may be the present inadequacies of the criminal law in India, as applicable to environmental protection and natural resource management.

1. *Not preventive or curative by nature*: Most often, criminal law is concerned primarily with post mortem punishment of unacceptable behavior and offer no room for curative action.

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\(^{301}\) Such ambiguity is very common in the provisions of environmental law. An example in point is the earlier discussed conflict on whether directors, chairman and other senior corporate officers are punished along with the company.

\(^{302}\) Joshua D. Yount; *The Rule of Lenity and Environmental Crime*; 1997 U Chi Legal F 607..

\(^{303}\) Sec. 45.

\(^{304}\) 1988 Cri LJ 112.

\(^{305}\) 1991 Cri LJ 188.

Even though it may ensure some deterrence, it does not prevent the occurrence of environmental harms that should be the fundamental basis of environmental protection regimes. It is sought as a ‘last resort mechanism’. Also, disputes are settled in Court, which takes up time and resources and may well delay the correction of the harm for which liability is being imposed.

6. Difficulty of establishing the constituents of an offence: The use of criminal law in the field of environmental protection also suffers from complexities due to procedure and legal requirements such as specific constituents of the crime, burden of proof. This problem is heightened when following a dualistic model, which imposes civil liability for minor damages and criminal liability for major damages. Further, the problem of proving the offence is aggravated by the fact that our scientific knowledge of how environment absorbs and transmits toxic substances is in its infancy. Unlike other harms like murder and theft, environmental harms can be difficult to identify primarily because the harmful impact are usually not be immediate but rather long term and varied. It becomes difficult, in such cases, to trace effects to causes, as most often there are multiple causative factors, though one of them may be a primary factor.

7. However, more pecuniary compensation may not be an effective deterrent in cases where the defaulter has the capacity to pay from the corporate account. While in extreme and appropriate cases, minimum period of imprisonment can be an effective sanction to deter the offenders who belong to the higher strata of society, it still does not remove the incapacity of the criminal law in dealing effectively with environmental harms as mentioned above.

Conclusion
Thus a satisfactory solution requires not merely a simple criminal prohibition model, say, on the lines of the statute against homicide or burglary, but an elaborate scheme of regulation, administered by a State agency empowered to grant, withhold and suspend licenses, following rules designed to promote fairness and efficiency. This is because imposing civil liabilities can check a lot of harms, for which criminal sanction cannot provide a solution. The role of criminal law would then be a derivative one to provide backup sanctions to enforce authoritative/administrative orders.

307 In cases like the Ram Kumar, [1979] 2 FAC 56 [Delhi], under the Wildlife Protection Act 1972, successful prosecution have taken place.
Civil law on the other hand, with its processes and sanctions, may be more effective and appropriate in dealing with environmental offences. Civil law has the advantages of flexibility and its sanctions can be more effectively tailored to the particular situation. Civil law also allows for ‘preventative policing’, through orders and injunctions to restrain prospective pollution. This has proved a problem with the traditional criminal law sanctions of imprisonment and monetary penalties. Civil law is also more easily enforced against corporate polluters as it side-steps the difficulty of proving the stringent requirement of *mens rea* standards of proof are easier [balance of probabilities], sanctions are more flexible and, often, individual and resident groups will more readily have access to the civil process than the criminal. However, in India, the field of environment tort, remediation and compensation are not well developed and the Court process is rather sluggish. The Supreme Court did advance the tort litigation field by introducing a new principle of ‘absolute liability’, developed post-Bhopal, later adopted in the form of Public Liability Insurance Act of 1991 and the National Environment Tribunal Act of 1995. The primary remedies under tort are for injunction or/ and damages. However both of these do not help repair the damage that was done or help in ensuring a system of constant monitoring. Further tort litigation is hardly pursued in India.

Civil law is often held up to be ‘morally neutral’ in that its penalties are not directed towards punishment but the prevention, cessation or correction of harmful activity. This, when combined with a system in which some pollution is rendered lawful [and by implication socially acceptable], fails to send adequate signals about what sort of environmental harm is not acceptable. It is arguable that the criminal law continues to have a valuable role to play in this arena.

Resource conservation can be successful, if the civil and criminal liability is enforced, implemented and evolved with appropriate theory model. The Cooperative theory for imposing liability based on deterrent model will effectuate an attitudinal change amongst the masses to have a more cautious approach towards conservation perspectives. A managerial technique for resource conservation envisages the need to bring about a sense of liability, which is practical and enforceable with Corporations, individuals and other agencies involved in resource use and exploitation.

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309 For more see Chapter 7, Conclusion on the Cooperative theory model.