ROLE OF JUDICIARY IN THE GROWTH OF ENVIRONMENTAL JURISPRUDENCE IN INDIA

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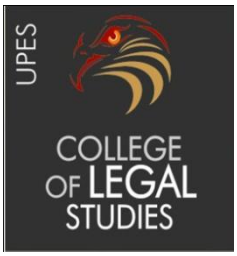
Submitted under the guidance of Professor Tony George

This dissertation is submitted in partial fulfillment of the degree of B.A., LL.B. (Hons.)



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CERTIFICATE

This is to certify that the research work entitled **"ROLE OF JUDICIARY IN THE GROWTH OF ENVIRONMENTAL JURISPRUDENCE IN INDIA"** is the work done by Sumedha Singh, under my guidance and supervision, for the partial fulfillment of the requirement of B.A., LL.B. (Hons.) at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

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DECLARATION

I declare that the dissertation entitled **"ROLE OF JUDICIARY IN THE GROWTH OF ENVIRONMENTAL JURISPRUDENCE IN INDIA"** is the outcome of my own work conducted under the supervision of Prof. Tony George, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Signature & Name of Student

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CHAPTER 1: INTRODUCTION

As Justice Chinappa Reddy stated in Sachidanand Panda v State of West Bengal[1]:

> *Every part of the Earth is sacred …every shining pine needle, every sandy shore, every mist in the dark woods, every claring and humming insect is holy in memory and experience of any people. The sap which courses through the trees carries the memories of red man… We are part of the earth and it is part of us. The perfumed flowers are our sisters; the horse, the great eagle, these are our brothers. The rocky crusts, the juices in the meadows, the body heat of the pony, and man- all belong to the same family.*

The above quotation, from the letter of 'the wise Indian chief of Seattle' to the 'great white chief in Washington', reflects a praiseworthy consciousness towards environment and the inner gratitude of those people, towards the contribution of nature in the development of mankind. The wise ancient sages had realized that the entire existence of man was dependent on the blessings of nature. So, to harmonise the behaviour of the people with that of nature, they identified the trees, rivers, seas and air with supernatural spirituality. Cutting of trees, contamination of waters, etc., were viewed very seriously. Therefore, the ancient texts like Manu Smriti, Katyana and Brihaspati Samhita, prescribed condign punishments for infliction of any harm upon the environment. The ancient society was very conscious about the impact of the surrounding environment and ecology on mankind.

However, with the growth of civilization, man became materialistic. His sole aim in life was to secure more and more material wealth. This gave rise to scientific inventions and new technologies, and paved way for the modern man's realization of dream the exploitation of nature. He lost the wisdom of the old sages and, also their message, that the continuous imposition of harm upon the environment, may, one day, jeopardize the existence of man himself. The basis of development is industrialization; but rapid and

[1] (1987) 2 SCC 295

uncontrolled industrialization is a potential threat to the environment. The fulfillment of the ever- increasing demands of the civilized society disturbs and devastates it.

The post industrial revolution in Europe marked the beginning of massive industrial growth and it extended across the country. The resultant effect of industrialization was the massive consumption of natural resources around the globe and the massive piling of pollutants of industrial process in surroundings which was beyond the sustainable capacity of environment on many occasions. The Second World War and the industrial disaster witnessed large scale pollution and degradation of the environment of this earth.

The realization dawned upon the people that if this continued, the existence of man would be at stake. Their anxiety for the preservation of environment was evinced in several national and international conferences and conventions, like Stockholm Conference, Nairobi Declaration, earth Summit, etc. Opinion crystallized in favour of formulation of environmental laws within the municipal legal framework. In trying to decipher the caused responsible for the depletion of environment, it was found that industrial operations were major contributors to pollution.

1.1 IMPORTANT DEFINITIONS:

1.1.1 **ENVIRONMENT:** Defining environment is possibly the most difficult task for a legal researcher; because, the study of environment is based on different disciplines of knowledge. Bell[2] has defined environment as:

> *In normal meaning relates to 'surroundings', but obviously that is a concept that is relative to whatever object it is which is surrounded. Used in that sense environmental law could include virtually anything; ... However, 'the environment' has now taken on a rather more specific meaning, though still a very vague and general one, and may be treated as covering the physical surroundings that are common to all of us, including air, space, waters, land, plants and wildlife.*

[2] Stuart Bell & Donald McGillivray, Environmental Law, Oxford University Press, 2000, p 3-4.

The author has stressed on the interdependence and interaction between the physical and biological elements of environment and considered them as subject matters of environmental law.

Generally, the ambit and definition of environment differ with the perspective and objective of the subject matter. But the crux of all the definitions hints at protection of the environment, with the ultimate objective of right to protect the clean and habitable environment.[3]

The Stockholm Declaration[4] did not attempt to define environment. It reads:

Man is both, creator and moulder of the environment, which gives him physical sustenance and afford him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet, a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and man made, are essential to his well being and to the enjoyment of basic human rights- even the right to life itself.

The conference has acknowledged the fact that the environment has immense impact on the life of human kind and sustainable modification or harm may challenge the very existence of mankind.

The Rio Declaration[5], on the other hand, emphasizes sustainable interaction between living and non living and the balance between development and preservation of environment. It reads:

> *In order to achieve sustainable development, environment protection shall constitute an integral part of the developmental process and cannot be considered in isolation from it.*

[3] Veena Jha, Trade and Environment Issues and Options for India, United Nations Publication, 2003, p 21
[4] Declaration of the United National Conference on Human Environment', 5 to 16 June, 1972, Stockholm.
[5] The United Nations Conference on Environment and Development, 3 to 14 June, 1992, Rio De Janeiro.

Environmental Protection Act defines 'environment'[6] as follows:

> *"environment" includes water, air and land and inter relationship which exist among and between water, air and land, and human beings, other living creatures, plants, micro organism and property;*

This definition put forward by the Indian Parliament, is very wide in its context. It includes the interaction and equilibrium between the physical and biological element in nature, importance of the micro organism which continuously works for maintaining the equilibrium within an internal and external ecology, and all living beings including human life and even the property. Presumably, the apex body of legislations has felt that it is difficult to have a precise definition of environment and there is a need to have a comprehensive approach for protection of the same. They have included all the broad components of the environment, so, that any problem which arises from any discipline of knowledge, which affects the right jurisprudence can be countered by the legal process.

The Indian judiciary has also shown tremendous concern about the protection of environment, natural resources, ecology and physical elements of nature. In doing so, the judiciary has not attempted to define the environment; rather, it has shown concern for the protection of environment by evolving legal devices for its adequate protection. The judiciary has expressed concern for sustainable development and controlled efforts towards the progress of society, the environment and ecology of the country.

1.1.2 **ENVIRONMENTAL POLLUTION:** Nature follows its own rules to arrange and re arrange the components of environment, but, if there are any external interventions which disturb the process, the same is referred to as environmental pollution. This disturbance in environment may arise due to numerous reasons; because of human interventions like industrial processes, domestic reasons or nuclear industries, weapons, etc, or because of natural calamities. The anti pollution; legislations in India have attempted to define pollution in different biological and atmospheric spheres like water, air, noise, soil, etc. A comprehensive definition of environmental pollution has been provided under the Environmental Protection Act, 1986. In first instance, the act defines

[6] Section 2 (a)

environmental pollutants[7] as 'the environmental pollutant means any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to the environment.' Furthermore, environmental pollution[8] means 'the presence in the environment of any environmental pollutant'. The definition, apparently, is very wide and can include within its ambit any type of pollution.

The Indian Judiciary has also attempted to explain the meaning of the term 'environmental pollution' taking references from different sources.[9] It has opined thus:

> *"Pollution" is a noun derived from the transitive verb "pollute," which according to the Random House Dictionary of the English Language (College Edition, 1977) means:*
>
> *(1) To make foul or unclean, dirty; to pollute the air with smoke.*
> *(2) To make impure or morally unclean, defile, desecrate to soil, defile."*

1.2 TYPES OF ENVIRONMENTAL POLLUTION

1.2.1 **SOIL EROSION/ DEGRADATION:** Top soil is eroded by forces of water and wind, thus affecting the productivity. It causes erosion in slopes and land slides in hills. Increased dependence on intense cultivation also results in salinisation, alkalization and water logging. To ensure food security and sustainable development, controlling such degradation should get a priority. Forests contribute significantly to maintaining ecological balance. However, heavy biotic interference and indiscriminate felling of trees contribute to degradation of already fragile forest areas. Depletion of vegetative cover results in loss of sites for water improvement and leads to extinction of animal habitats and microbial species. Even though thrust is being given to preserve the biosphere and bio system, greater attention is needed to raise the stock of this resource.

[7] The Environment (Protection) Act, 1986, s 2 (b)
[8] Ibid, section 2 (c)
[9] Bijayananda Patra and Others v District Magistrate Cuttack and Others MANU/OR/0002/2000

1.2.2 **AIR POLLUTION:** High level of suspended particulate matter (SPM) is the most prevalent form of air pollution. Concentration of sulphur dioxide has been detected in major cities, contributed primarily by industrialization and increasing growth of population. Industries, such as petroleum refineries, pulp and paper, chemical, iron and steel industries and non metallic mineral industries, contribute to this tupe of pollution to a great extent. Thermal power plants are also sources of pollutants. Increase in the urban traffic contributes to pollution in mega cities. Large scale increase of private vehicles, old vehicles, poor roads and congestion and poor traffic management system are the causative factors.

1.2.3 **WATER POLLUTION:** The quality of water suffers on account of pollution. Major source of water pollution are organic pollutants from industries, discharge of domestic sewage and run off from land based activities. These affect the water bodies such as lakes, rivers, and underground sources. High bacteriological and heavy metal contamination add to severe pollution.

1.2.4 **SOLID WASTE:** Unregulated growth of urban areas, inadequate infrastructure facilities and lack of proper facilities for collection, transportation, treatment and disposal of wastes has contributed to increased pollution, causing health hazard. Heterogeneous mixtures of plastic, cloth, metal and organic matters generated from households, commercial establishments and markets also aggravate the situation. Fly ash, phosphor gypsum and iron and steel slags are the main forms of industrial wastes generated in India. There is very little infrastructure for the proper disposal of these wastes which creates serious hazards for environment.

1.2.5 **MARINE POLLUTION:** A number of chemical and other industries discharge their effluents into the coastal water. Further, coastal areas are exposed to environmental stress, like unplanned and improper developments, without appropriate coastal zone management plans and shipping and sea based activities,,

leading to oil spills, sludge disposal and petroleum and gas exploration. The impact of climatic changes and global warming can be seen in the forms of rise in sea level (coastal flooding), erosion, storm surges and intense wave activity.

1.2.6 SOCIAL FACTORS: Growing population is a major factor for environmental problem when it exceeds the threshold limits of support systems. Impact of population on the quality of environment is primarily through the use of natural resources and the stress it gives to the bio diversity, air and water pollution. Increased growth of population and the incidence of poverty have direct effect of environmental degradation. There is a circular link between poverty and environment. The poor people who rely on natural resources more than the rich contribute to the depletion of the natural resources at a faster rate and this in turn, leads to degraded environment. Poverty alleviation among other measures will help to break this link. Environmental degradation imposes a real cost on the society, the burden of which is higher on those who depend more on the fragile eco- system.

1.2.7 NOISE POLLUTION: Noise pollution is expressed in terms of decibel, a unit for showing the relative intensity of sound on a scale from 0 for the average least perceptible sound to about 130 for the average pain level. Noise is originating from the automobiles and industrial units. Higher the noise, higher the average pain level I terms of decibel.

1.3 EFFECTS OF ENVIRONMENTAL POLLUTION

Development activities carry with themselves the seeds of environmental damage, assisted and abetted by both, the needs and greed of man. Activities such as manufacturing, processing, transportation and consumption, not only deplete the stock of natural resources, but also add stress to the environmental system by accumulating the stock of wastes. The productivity of the economic system, however, depends on the supply and quality of natural and environmental resources. While water, soil, air, forest,

and fisheries resources are productive assets, the pollution of water, air, atmosphere and noise are the byproducts of economic development, particularly industrialization and urbanization. 'Green house effect', 'global warming' and acid precipitation' are cases in points. Pollution is an 'external cost' (sometimes called a 'spill over cost' or a 'neighbourhood cost'). Untreated or improperly treated waste becomes pollution, increasing not only private costs but also social cost. Environmental degradation, often tending to become irreversible, impose damage costs on the economy resulting in output and human losses, loss of labour productivity from ill health and loss of crop output.

Pollution degrades the environment which in turn leads to the depletion of the earth's ozone layer and makes a hole in the ozone. Industrial effluents and emission of carbon monoxide endanger the environment. Over- fishing damages the delicate marine eco system. Global warming, acid precipitation, green house effects and noise pollution are different forms of pollution which are the debit sides of industrial development. Nature's repurcative powers are finite. The earth does not belong to man, but man belongs to the earth.

The level of environmental problems of a state varies with the stages of development, current production techniques and the environmental policies implemented. Lack of economic development also contributes to environmental pollution in the form of inadequate sanitation and lack of availability of clean drinking water. Economic development without environmental considerations can cause serious environmental damage affecting the quality of life of the population, both present and future. There is, therefore, an urgent need for ensuring sustainable development, which strikes a balance between the demands of development and the levels of environmental protection. It should at least ensure non- declining human welfare over time, if not aiming at maximization of the net benefits of economic development.

CHAPTER 2: INTERNATIONAL TREATIES AND CONVENTIONS ON ENVIRONMENT

2.1 STOCKHOLM CONFERENCE[10] AND EARTH SUMMIT[11]

The Stockholm and Rio Declarations are results of the first and second global environmental conferences, respectively, namely the United Nations Conference on Human Environment in Stockholm, which took place from June 5-16, 1972, and the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, which took place from June 3-14, 1992. Other policy or legal instruments that emerged as a result of these conferences, such as the Action Plan for the Human Environment at Stockholm and Agenda 21 at Rio, are intimately linked to the two declarations, both, conceptually as well as politically. However, the declarations, in their own right, represent signal achievements. Adopted twenty years apart, they undoubtedly represent major milestones in the evolution of international environmental law, bracketing what has been called the "modern era" of international environmental law.

Stockholm represented a first taking stock of the global human impact on the environment, an attempt aimed at forging a basic common outlook on how to address the challenge of preserving and enhancing the human environment. As a result, the Stockholm Declaration espouses mostly broad environmental policy goals and objectives instead of detailed normative positions. However, following Stockholm, global awareness of environmental issues increased dramatically, as did international environmental law-making proper. At the same time, the focus of international environmental activism progressively expanded beyond trans-boundary and global commons issues to media-specific and cross-sectoral regulation and the synthesizing of economic and development considerations in environmental decision-making. Therefore, by the time of the Rio Conference, the task for the international community became one of systematizing and restating existing normative expectations regarding the environment, as well as of boldly positing the legal and political underpinnings of sustainable development. In this vein,

[10] The United Nations Conference on the Human Environment was held at Stockholm from 5 to 16 June, 1972. It laid down 26 principles which should be guidelines for all the nations in implementation of environmental law.

[11] Rio Declaration on Environment and Development, held at Rio de Janiero

UNCED was expected to craft an "Earth Charter", a solemn declaration on legal rights and obligations bearing on environment and development, in the mold of the United Nations General Assembly's 1982 World Charter for Nature (General Assembly resolution 37/7). Although the compromise text that emerged at Rio was not the lofty document originally envisaged, yet the Rio Declaration, which reaffirms and builds upon the Stockholm Declaration, has nevertheless proved to be a major environmental legal landmark.[12]

2.2 NAIROBI DECLARATION

In the tenth anniversary of the Stockholm Conference, the world community, assembled in Nairobi, reviewed the measures taken for the implementation of the recommendations of the conference and the action plan adopted in the Stockholm Conference. The states observed that the Stockholm Conference had requested the governments of the states and the people to build up consciousness to preserve the human environment nof the countries. They realized that significant improvements had been achieved in the years and different countries had amended their constitutions and adopted environmental policies, in line with the Stockholm recommendations. Remarkable achievements had been made in the field of environmental science, education and training towards the conservation of it. Apart from these, many governmental and non- governmental organizations had been established in different levels to implement the national policies for conservation and restoration of the human environment of the countries. The declaration reaffirmed the political principles adopted in the Stockholm Conference and observed that it should be treated as the governing code of environmental law of the nations.

The Nairobi Declaration further contended that the action plan had only been partially implemented, and the results could not be considered as satisfactory, mainly due to inadequate foresight and understanding of the long-term benefits of environmental protection, inadequate co-ordination of approaches and efforts, and unavailability and inequitable distribution of resources. For these reasons, the Action Plan did not have

[12] Available at http://legal.un.org/avl/ha/dunche/dunche.html , last accessed on March 28, 2015.

sufficient impact on the international community as a whole. Some uncontrolled deterioration, deforestation, soil and water degradation and desertification were reaching alarming proportions, and seriously endangered the living conditions in large parts of the world. Diseases associated with adverse environmental conditions continued to cause human misery. Changes in the atmosphere - such as those in the ozone layer, the increasing concentration of carbon dioxide, and acid rain-pollution of the seas and inland waters, careless use and disposal of hazardous substances and the extinction of animal and plant species further led to grave threats to the human environment.[13]

Emphasis was placed upon the formulation of policies regarding sustainable socio-economic development and human environment. It was further stated that efforts should be made on the part of the national governments to adopt sound environmental management policies and effective steps to strengthen the the country's eco- system. Attention should be paid towards technical innovation, promoting resources, eradication of poverty, recycling the waste and conservation of environment. The present conference stressed upon the need for regularization of activities of the enterprises, including the multinationals, which had become a major threat to the fragile ecology of the country. Suggestion was made for the adaptation of timely and adequate legislative measures. It was stressed that environmental deficiency had generated due to under development, inequitable distribution of technical and economic resources among the states. Therefore, to achieve sustainable human environment, developed countries should take initiative to minimise the gap between themselves and the developing countries.

2.3 THE VIENNA CONVENTION

The Vienna Convention for the Protection of the Ozone Layer is often called a framework convention, as it served as a framework for efforts to protect the earth's ozone layer. The Vienna Convention was adopted in 1985 and entered into force on 22 September, 1988. In 2009, the Vienna Convention became the first of any kind to achieve universal ratification. The objectives of the Convention were for parties to promote cooperation by means of systematic observations, research and information exchange on

[13] Available at http://www.un-documents.net/nair-dec.htm , last accessed on March 28, 2015.

the effects of human activities on the ozone layer and to adopt legislative or administrative measures against activities likely to have any harmful or adverse effects on the ozone layer.

The Vienna Convention did not require countries to take concrete or prompt actions to control ozone depleting substances. Instead, in accordance with the provisions of the Convention, the countries of the world agreed to the Montreal Protocol on Substances that Deplete the Ozone Layer[14] under the Convention to advance that goal.

The Parties to the Vienna Convention meet once every three years, back to back with the Parties to the Montreal Protocol, in order to take decisions designed to administer the Convention.[15]

[14] The **Montreal Protocol** on Substances that Deplete the Ozone Layer was designed to reduce the production and consumption of ozone depleting substances in order to reduce their abundance in the atmosphere, and thereby protect the earth's fragile ozone Layer.

[15] Available at < http://ozone.unep.org/new_site/en/vienna_convention.php> , last accessed on March 28, 2015.

Chapter 3: JUDICIARY AND ENVIRONMENTAL LAW REGIME IN INDIA

Every individual from the moment of birth, inherits certain rights. One such right, which is as old as man himself is the right to live in a clean environment. All human beings have the right to a healthy, pollution free environment in order to enjoy their very existence on this earth. Ancient texts have recognized and vindicated this natural right of the individuals. In India, the Constitution and different statutes have given expression to this aspect. The former, in Articles 47 and 48 B mandates in favour of preservation of the natural environment of this country. It directs the state to protect and improve the environment and make endeavors to safeguard forest and wildlife. The Constitution, under article 51 (1) (g), also imposes a duty on the individual to protect and improve the natural environment including forest, lakes, rivers and wildlife, and to have compassion for living creatures.

Anti pollution laws have been passed by the Parliament in order to provide for a clean and healthy environmental regime. It seeks to curtail environmental pollution through certain preventive and punitive measures. For its effective implementation, these Acts impose statutory obligation on state authorities, like the Central Pollution Control Board and State Pollution Control Boards, to take effective steps for proper preservation of natural resources and abatement of pollution.

While numerous legislative steps have been taken to give effect to the significant right of man to live in a sound environment and the corresponding duty of the state and individuals to ensure environmental preservation and conservation, the present objective is to analyse the steps taken by judiciary to forward this goal.

The Relaxation of Locus Standi: Instead of an adversarial setting where the judge relies on the counsels to produce evidence and argue their cases, the PIL cases are characterised by a collaborative problem-solving approach. Acting either at the instance of petitioners or on their own, the Supreme Court has invoked Article 32 of the Constitution to grant interim remedies such as stay orders and injunctions to restrain harmful activities in many cases.

In Hussainara Khatoon v Home Secretary, State of Bihar[16], the court implicitly recognized the standing of a public spirited lawyer to move a petition on behalf 18 prisoners awaiting trials for very long periods in jails in the State of Bihar. The petition led to the discovery of over 80,000 prisoners, some of whom had been languishing in prisons longer than they would have served, if convicted.[17]

Likewise, in People's Union for Democratic Rights v Union of India[18] the court allowed a group of social activists to petition on behalf of exploited government construction workers, who were being paid less than the statutory minimum wage. The court observed:

> *Here the workmen whose rights are said to have been violated and to whom a life of basic human dignity has been denied are poor, ignorant, illiterate humans who, by reason of their poverty and social economic disability, are unable to approach the courts for judicial redress and hence the petitioners have, under the liberalized rule of standing, locus standi to maintain the present writ petition espousing the cause of the workmen.*

Reliance has also been placed on the power to do complete justice under Article 142 to issue detailed guidelines to executive agencies and private parties for ensuring the implementation of the various environmental statutes4 and judicial directions. Beginning with the Ratlam Municipality case,[19] where the Supreme Court directed a local body to make proper drainage provisions, there have been numerous cases where such positive directions have been given.

The tool of a 'continuing mandamus' has been used to monitor the implementation of orders by seeking frequent reports from governmental agencies on the progress made in the same. The adjudication and monitoring of environmental cases has also benefited from the inputs of fact-finding commissions and expert committees which are constituted

[16] AIR 1979 SC 1360
[17] Although essentially a habeas corpus case, it is widely recognized as the earliest example of PIL in the Supreme Court. Though the case title carries the name of several prisoners, the petitioner was the advocate, Kapila Hingorani
[18] AIR 1982 SC 1473
[19] (1980) 4 SCC 1622

to examine a particular environmental problem. In several cases, the Court also relies on the services of the leading members of the bar who render assistance in their capacity as 'amicus curiae'. The involvement of expert committees and amicus curiae is needed to gain an accurate understanding of an environmental problem and to explore feasible solutions. For instance, court-appointed committees have conducted substantial empirical research and provided valuable insights in cases that have dealt with vehicular pollution, solid waste management and forest conservation. If one examines the judicial approach in cases involving environment-related objections against the construction of infrastructural projects, there have been different approaches taken by different courts in the past. One can broadly conceptualise these judicial approaches under three categories:

- The first of these can be described as a 'pro-project' approach wherein judges tend to emphasize the potential benefits of a particular project or commercial activity.
- The second approach can be described as that of 'judicial restraint' wherein judges refer to the determinations made by executive agencies and experts with regard to the environmental feasibility of a project.
- The third approach is that of rigorous 'judicial review' wherein judges tend to scrutinize the environmental impact of particular activities.

It is in this form of judicial interventions that the services rendered by expert committees, amicus curiae and public-spirited NGOs prove to be a valuable asset. The different judicial approaches that have been outlined above have evolved over the last three decades or so and it would be instructive to refer to some examples.

An example of 'judicial restraint' would be the Kerala High Court judgment in the Silent Valley case[20] where the Court refused to second-guess the State government's position relating to the environmental impact of a hydel-power project. The judgment mentions that the project was unanimously supported by the legislature of Kerala and it would be improper for the judiciary to interfere. However, this led to an agitation and subsequently there was a re-think on the viability of the project.

[20] Society for Protection of Silent Valley v. Union of India and others, 1980 Kerala HC

A relatively robust standard of 'judicial review' is discernible from the litigation related to the Tehri Dam case[21] which had reached the Supreme Court. Even though the eventual decision was in favour of the project proponents, the Court did inquire into diligence of the government in ascertaining the environmental impact of the proposed projects. Even though it is argued in some quarters that the Courts lack the technical expertise needed to gauge the relevant reports and data, the judges are well-equipped to assess whether the concerned agencies have taken all necessary steps to study and ascertain the potential environmental costs. An example of the Supreme Court adopting a rigorous standard of judicial review is in the Calcutta Taj Hotel Case[22] where the Court inquired extensively into the government permission granted for the construction of a medium-rise hotel against objections that the building would interfere with the flight path of migratory birds.

In the ensuing years, the general approach of the higher judiciary in environmental litigation can be described as 'activist' in nature. A prominent example of such activism in evaluating the environmental impact of commercial activities justified in the name of development is the decision given in the Dehradun Valley case.[23] In that case, the court itself appointed a committee to look into the adverse effects of the illegal and indiscriminate mining activities being carried out in the Uttarakhand region. The respondent government was also asked to show the national importance of the lime-stone procured from those quarries so as to determine whether the demand could be satisfied by mining in other areas. A similar approach was adopted in Tarun Bharat Sangh, Alwar v. Union of India[24] where the court adopted a firm stand against the owners of mines that were being operated inside the reserve forest areas. In both the cases mentioned above, the court appointed independent committees of experts to ascertain the environmental impact of the commercial activities that were being undertaken.[25]

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[21] Tehri Bandh Virodhi Sangharsh Samiti v. State of Uttar Pradesh, (1992) Supp 1 SCR 44
[22] AIR 1987 SC 1109
[23] Rural Litigation and Entitlement Kendra v State of Uttar Pradesh and Others , AIR 1985 SC 652
[24] AIR 1992 SC 514
[25] Hon'ble Mr. K.G Balakrishnan, 'Role of Judiciary in Environmental Protection', dated March 20, 2010, available at http://supremecourtofindia.nic.in/speeches/speeches_2010/dp_shrivastava_memorial_lecture_20-3-10.pdf , last accessed on March 28, 2015.

The case of T.N Godavarman Thirumulkpad v Union of India,[26] is the best example of the pro activeness of the Indian Judiciary. Being December, 1996 the Supreme Court issues sweeping directions to oversee the enforcement of forest laws across the nation. Assisted by an amicus curiae the court froze all wood based industrial activity, reinforced the scope of the embargo on forest exploitation, issued detailed directions for the sustainable use of forests and created its own monitoring and implementation machinery through regional and state level committees. Here, the court assumed the role of a super administrator, regulating the felling, use and movement of timber across the country in the hope of preserving the nation's forests.

Also, to achieve this end, the judiciary has evolved certain principles to provide effective remedy in case of violation of constitutional and legislative mandate.

3.1 RIGHT TO A WHOLESOME ENVIRONMENT

Judicial recognition of environmental jurisprudence, in the backdrop of industrialization, reached its peak with the pronouncement of the Supreme Court that the right to wholesome environment is a part of article 21 of the Constitution. 'The judicial grammar of interpretation has made right to live in healthy environment as the spectrum of human rights.'[27] In the case of Subhash Kumar v State of Bihar[28], the court observed that article 32 of the Constitution has been designed to enforce the fundamental rights of the citizen. The sad article provides for extraordinary procedure to enforce the right of a person. The right to life under article 21 includes '…the right to enjoyment of pollution free water and air for full enjoyment of life.' If anything endangers or impairs that quality of life of life in derogation of laws, a citizen has right to have recourse to article 32 of the Constitution for removing the pollution of water or air which may undermine the quality of life. A petition under Article 32 for the prevention of pollution is maintainable at the instance of affected person or even by a group of social workers or journalists.

[26] AIR 1997 SC 1228
[27] SS Prakar and PVN Sharma, 'Environment Protection vis-à-vis Judicial Activism', (1998) 2 SCJ 56, p 58
[28] AIR 1991 SC 420

In MC Mehta v Union of India[29] (popularly known as Oleum Gas Leak case), a public interest litigation was filed under article 32 of the Constitution on the event of leakage of Oleum Gas from one of the units of Shriram Foods and Fertilizer industries (Shriram Industries), which claimed a number of lives in the vicinity of Delhi. The basic issues raised in the instant case were the scope of articles 21 and 32 of the Constitution, and the norms of determining the liability for environmental crime. The court considered the reports of various committees constituted to investigate the incident of accidents. Subsequently, the matter was referred to the Constitutional Bench[30] to decide the issues raised in the previous case. The court pointed out that:

> '…the application for compensation are for enforcement of fundamental right to life enshrined in Article 21 of the Constitution and while dealing with such application, we cannot adopt a hyper technical approach which would defeat the end of justice.'

The court put emphasis on public interest litigation for enforcement of fundamental rights. It (apex court) contended that claim for compensation under article 21 is sustainable; otherwise, it will amount to gross violation of right to life under article 21 of the Constitution. Regarding Article 32, the Court held that:

> '… Article 32 does not merely confer powers on this court to issue a direction, order or writ, for enforcement of fundamental rights but it also lays a constitutional obligation in this court to protect the fundamental right of the people and for that purpose this court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights.'

This present article of the Constitution is unique in nature; it is in itself an adequate procedural code to redress the violation of any right. The word 'direction' in this article is substantially strong to provide for compensation to the victims of industrial disasters. The court pointed out that the powers of the court to grant compensation fall within its

[29] AIR 1987 SC 965
[30] MC Mehta v Union of India AR 1987 SC 1086

remedial jurisprudence under the said article. It will exercise such jurisdiction only in appropriate cases. The relief under this article has been restricted by the court to cases where other civil remedies are not available.

Judicial concern regarding right to wholesome environment has been reflected in subsequent pronouncements. It has issued appropriate directions where the government machinery has failed to perform its statutory duty, and thereby undermined the right to life guaranteed under Article 21 of the Constitution. In Indian Council for Enviro- Legal Action And others v Union of India and Others,[31] the chemical industries surrounding Bichhri Village in Udaipur (Rajasthan) contaminated the water, soil and air through the discharge of highly toxic effluents, particularly iron- based and gypsum based sludge. The court considered different reports from the expert committees and was of the view that the industries of that vicinity had failed to comply with the laws, rules and directions issued by lawful authority and through their hazardous activities had made life miserable for the villagers. The court, therefore, interfered to give proper remedy to the destitute villagers. It opined that the social interest litigation under article 32 of the Constitution was a weapon in the hands of people to enforce their right to wholesome environment, when it was blatantly disregarded by industries. In other words, the court re affirmed that the right to clean environment is an important facet of the right to life. In RLE Kendra v State of Uttar Pradesh[32], the apex court declared that right to life includes 'the right of the people to live in the healthy environment with minimal disturbance of ecology and without avoidable hazard to them and to their cattle, home and agricultural land and undue affection of air, water and environment'. In this present case, the Supreme Court read article 48 A within article 21 of the constitution. Subsequently, in the Ganga Pollution Case[33], their Lordships made an attempt to protect the river Ganges from pollution through effluent discharges from the tanneries. Here also, their Lordships showed their utmost concern and sensitivity for the preservation of the healthy environment.

[31] (1996) 3 SCC 212
[32] Supra note 23, at p 24
[33] MC Mehta v Union of India AIR 1988 SC 1037

In the case of Andhra Pradesh Pollution Control Board v MV Naydu[34], the Supreme Court has put forward the view that matters relating to environment are of equal significance with those of human rights. Inits own words:

> "Environmental concerns arising in this court under Article 32 or under Article 136 or under Article 226 in the High Courts, are in our view of equal importance as Human Rights concerns. In fact, both are to be traced to Article 21 which deals with fundamental right to life and liberty. While environmental aspect concern 'life', human right aspect concern liberty.

In the present case, the court expressed its anxiety about the technicality involved in these types of environmental problems and the inherent lacuna of delay in the judicial process, which amounts to violation of right to clean environment under article 21 of the Constitution.

Judicial craftsmanship has not been restricted to giving of remedies under article 21 of the Constitution; it has tried to apply even the 'unused provision of law, as significant tools in the preservation of natural environment of the country. It has often used the principles of civil and criminal laws to meet the ends of justice.

Vehicular pollution in Delhi, in the context of Article 47 and 48 of the Constitution came up for consideration in M.C Mehta v Union of India[35]. It was held that it was the duty of the Government to see that the air was not contaminated by vehicular pollution. The right to clean air also stemmed from Art 21 which referred to right to life. Lead free petrol supply was introduced in M.C. Mehta vs. Union of India[36] and phasing out old commercial vehicles more than 15 years old was directed in M.C. Mehta vs. Union of India[37]. These judgments are important landmarks for the maintenance of clean air in Delhi.

[34] AIR 1999 SC 812
[35] 1998(6) SCC 60; 1998(9) SCC 589
[36] 1998 (8) SCC 648
[37] 1998(8) SCC 206

Right to clean air and the need for slowly eliminating 'diesel' for motor vehicles came up in M.C.Mehta vs. Union of India (matter regarding diesel emissions). Right to life was held to include right to good health and health care.[38]

3.2 THE RIGHT TO LIVELIHOOD

The Supreme Court recognized the right to livelihood in the case of Olga Tellis v Bombay Municipal Corporation,[39] The petitioners, a journalist and two pavement dwellers, challenged a government scheme to deport pavement dwellers from Bombay to their places of origin. The main plank of the petitioners' argument was that right to life includes right to livelihood, and since the pavement dwellers would be deprived of their livelihood if they were evicted from their slum and pavement dwellings, their eviction would be tantamount to deprivation of their life, and was hence unconstitutional. Accepting the petitioners' argument the court held:

> *Deprive a person of his right to livelihood and you shall have deprived him of his life… The State may not by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.*

The court directed the municipal corporation to provide alternative sites or accommodation to the slum and pavement dwellers within a reasonable distance of their original sites; to earnestly pursue a proposed housing scheme for the poor; and to provide basic amenities to slum dwellers.

Thereafter, in Banawasi Seva Ashram v State of Uttar Pradesh,[40] the Supreme Court detailed safeguards to protect tribal forest dwellers who were being ousted from their forest land by the National Thermal Power Corporation (NTPC) for the Rihand Super

[38] 1999(6) SCC 9
[39] AIR 1986 SC 180
[40] AIR 1987 SC 374 In the course of its order, the court observed that the tribals '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 fuel wood.' Although not explicitly refrred to in the order, article 21 and the right to livelihood were impliedly relied on by the court.

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.[41]

3.3 THE RIGHT TO EQUALITY

Apart from Article 21, the right to equality guaranteed in Article 14 of the Constitution may also be infringed by government decisions that have an impact on the environment.[42] Article 14, among other things, strikes at arbitrariness, 'because an action that is arbitrary must necessarily involve a negation of equality.'[43]

Thus, urban environment groups frequently resort to Article 14 to quash 'arbitrary' municipal permissions for construction that are contrary to development regulations. Besides, Article 14 may also be invoked to challenge government sanctions for mining and other activities with high environmental impact, where the permissions are 'arbitrarily' granted without an adequate consideration for environmental impacts.[44]

In State of Himachal Pradesh v Ganesh Wood Products,[45] the Supreme Court held that a decision making authority must give due weight and regard to ecological factors such as environmental policy of government and the sustainable use of natural resources. A government decision that fails to take into account relevant considerations affecting the environment is invalid. Also, the Supreme Court recognized the obligation of the present generation to preserve natural resources for the next and future generations.[46]

3.4 FREEDOM OF TRADE VIS-À-VIS ENVIRONMENTAL PROTECTION

As environmental regulation grows more stringent and its enforcement becomes more vigorous, industrial challenge to agency action is likely to increase. Courts will then need to balance environmental interests with the fundamental right to carry on any occupation,

[41] AIT 1987 SC 374, 378
[42] Article 14 states: ' The State shall not deny to any person equality before law or the equal protection of the laws within the territory of India.'
[43] Ajay Hasia v Khalid Mujib Shervardi AIR 1981 SC 487, 499
[44] Kinkri Devi v State of Himachal Pradesh AIR 1988 HP 4
[45] AIR 1996 SC 149, 159, 163
[46] Ibid

trade or business guaranteed in Article 19(1)(g)[47]. For example, effluent discharge standards prescribed by the pollution control boards may be challenged under article 19 for being excessive or otherwise unreasonable. Likewise, unreasonable government decisions relating to the shifiting or translocation of industry may also be assailed under Article 19(1)(g).

Such future clashes between industry and enforcement agencies are presaged in the case of Abhilash Textile v Rajkot Municipal Corporation[48]. Here, the Gujarat High Court was required to balance the right to carry on business against the danger to public health from the discharge of 'dirty water' onto public roads and drains.

3.5 PRINCIPLES OF COMMON LAW

In 1980, the Supreme Court held that clean civic life is the right of the inhabitants who reside within the municipal area. In Municipality Ratlam v Vardichand[49], the petitioner a municipal council, filed an appeal against the direction of the magistrate under section 133 of the Code of Criminal Procedure, 1973. The judicial magistrate on application by the people of the area passed certain directions against the civic corporate body to bring cleanliness within the municipal area, as it had been polluted by open drains, human excreta, in absence of proper sanitation, and discharges from alcohol factories. The high court affirmed the directions issued. Thereafter, the civic corporation filed a Special Leave Petition before the Supreme Court on the ground that the magistrate had no powers to pass orders against the municipality. The Supreme Court took a very serious note of the miserable condition of the municipal area which posed health hazards for the people. Additionally, the discharges from the alcohol plant overflowed the open grains making the condition more miserable. It (apex court) refused to accept the plea of the petitioner that shortage of funds restrained them from taking proper actions. The court held:

> "The state will realize that Article 47 makes it a paramount principle of grievance that steps are taken for the improvement of the public health as amongst its

[47] Article 19(1)(g) states: 'All citizens shall have the right …to practice any profession, or to carry on any occupation, trade or business.'
[48] AIR 1988 GUJ 57
[49] Supra note 19, at p 22

> primary duties. The municipality, also, will slim its budget on low priority items and elitist projects to use the savings on sanitation and public health."

Furthermore, it also rejected the municipal council's contention relating to the applicability of the applicability of the Code of Criminal Procedure, 1973, and said, 'The Criminal Procedure Code operated against statutory bodies and others, regardless of the cash in their coffers, even as human rights under Part III of the Constitution have to be respected by the state regardless of budgetary provisions.' The Supreme Court issued certain directions, in addition to the magisterial directions, and fixed the time limit within which those were to be implemented. The significant contribution of this judgment, from the point of view of environmental criminal law was that, if any officer of the corporation failed to discharge his duties, then he could be punished under section 188 of the Indian Penal Code 1860. In the instant case, the Supreme Court had shown its willingness to use vintage legislations as means to protect the environment, and uphold the civic right of individual citizens. To put it in words of the court:

> "Although these two codes are of ancient vintage, the new social justice orientation imported to them by the Constitution of India makes it a remedial weapon of versatile use. Social justice is due to the people and therefore, the people must be able to trigger off the jurisdiction vested for this benefit in any public functionary like a Magistrate under section 133 of the Criminal Procedure Code, 1973."

The court clearly indicated that the alibi of shortage of funds and procedural technicality should not be a hindrance in the way of enforcement of the right of civil dwellers. This landmark pronouncement marked the beginning of environmental jurisprudence of this country, wherein, under the name of public nuisance, the court awarded remedies to the aggrieved people.

Subsequently, in Ram Baj Shing v Babulal,[50] the Allahabad High Court tried to read atmospheric pollution within the broad spectrum of private nuisance, and it issued permanent injunction against the polluting brick grinding machine factory. The court

[50] AIR 1982 SC 1622

enumerated that the dust emitting from a grinding machine factory created public hazards and injured the health of individual members of the society. 'Any act would amount to private nuisance which caused injury, discomfort or annoyance to a person.' This was a firm step on the part of judiciary to protect the environment, under the notion of private nuisance. The court also awarded special damages under tortuous liability.

The Andhra Pradesh High Court reaffirmed the above view of the Allahabad High Court in B Venkatappa v B Lowis[51]. The court held that emission of smoke from the chimney caused discomfort and damage to the health and, therefore, would constitute an actionable nuisance. Mandatory injunction was said to be an appropriate remedy for the purpose. These cases, clearly reveal that common law principles have conveniently been used by courts as effective tools to redress the wrongs concerning environmental pollution.

3.6 PUBLIC TRUST DOCTRINE

The doctrine of public trust, an aspect of ancient Roman jurisprudence, primarily rests on the principle that natural resources like air, seashore, rivers and forests are of immense importance to the people and the society as a whole, and that, it would be improper to make them subject to public ownership. The Supreme Court in M.C. Mehta v Kamal Nath and Others[52] adopted this principle within the ambit of our environmental jurisprudence. Herein, a club had been built by a private company, Span Motel Pvt. Ltd. At the bank of rover Beas by encroaching land, including substantial forest land, to which the family of Kamal Nath (a former minister for Environment and Forest) was directly linked, and which was later regularized and leased out to the company during the tenure of Kamal Nath. The primary allegation made by the environmentalist, MC Mehta was that, efforts had been made on the part of the Span Motel Company to create new channels by diverting the river flow, to save it from future floods. The Supreme Court took serious notice of the act of environmental degradation on the part of the Span Motel Company. It put forward the view that the Himachal Pradesh Government had committed patent breach of the public trust doctrine by leasing the ecologically fragile land to the

[51] AIR 1996 Andh Pra 239
[52] (1997) 1 SCC 388

private owners. In the instant case, the court discussed the facets of the doctrine. The court observed that this doctrine rests on the principle that certain natural resources have great utility to the people, and it is wholly unjustified on the part of the state to make them a subject of private ownership. The doctrine enjoins upon the government to protect the resources for public enjoyment. Three types of restrictions on Government authority are often thought to be imposed by the Public Trust Doctrine:

- First, the property subject to the trust must not only be used for a public purpose but it must be held available for use by the general public;
- Second, the property may not be sold even for a fair cash equivalent, and
- Third, the property must be maintained for particular types of uses.

While discussing the scope and applicability of this doctrine in this country's legal system, the Supreme Court observed that our legal system is based on English common law and it includes the doctrine as a part of its jurisprudence. It said that the state, as a trustee of its natural resources, is under the legal obligation to protect the natural resources. The court, therefore, cancelled and set aside the lease granted in favour of the Span Motel Company and directed the Himachal Pradesh Government to take over the area and restore it to its original natural conditions. It further directed that the cost for darning the damage caused by the Span Motel Company to environment and ecology, should be levied from it. The adoption of public trust doctrine within the municipal legal order, further strengthened the environmental jurisprudence of the country. In other way, it recognized the collective right of individual citizens in preservation of natural resources, and the aesthetic beauty of the nature. Very recently, the Supreme Court opined that the public trust doctrine is an integral part of 'sustainable development principle'.[53]

3.7 ABSOLUTE LIABILITY PRINCIPLE

The question, regarding the imposition of liability on industries, engaged in hazardous or inherently dangerous activities, was raised before the Supreme Court in MC Mehta v

[53] Intellectuals Forum v State of Andhra Pradesh (2006) 3 SCC 549

Union of India.[54] The court was of the view that the common law rule of Rylands v Fletcher,[55] had lost its potentiality in the context of present environmental jurisprudence. The court contented:

It emphasized upon the evolution of a new principle which could suit the present economic conditions and could face the new challenges of the present industrialized society in the back drop of new environmental justice. The court was of the view that an enterprise which is engaged in a inherently dangerous and hazardous activity and consequently proves to be a potential threat to the health and safety of the persons working in the factory or the surrounding inhabitants, owes an absolute liability and non delegable duty to the community. So, it should ensure that its activities are conducted with the highest standards of safety and, if harm results on account of such hazardous or inherently dangerous activity, the enterprise must be held absolutely liable to compensate the harm. The enterprise, in that situation, would not be allowed to say that it had taken all reasonable precautions, and the harm occurred without any negligence from its part. The court pointed out that the jurisprudential basis of this principle is that, when the hazardous industries are given the permission to operate, the law presumes that such permission is conditional and, if, any accident occurs from its activities, it must bear the whole cost to make good the damage arising out of it. The principle of absolute liability is not subject to any exceptions which operate vis-à-vis the tort principle of strict liability under the rule of Ryland and Fletcher.

On the question of the measure of compensation to be paid by the hazardous industries, it was decided that it '…must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

The above principle has the capacity of operating as a puissant weapon to arrest the problem of environmental pollution caused by negligent industrial enterprises.

[54] Supra note 30, at p 26
[55] (1886) LR & HL 330

Unfortunately, this principle was not applied in the MC Mehta v Union of India[56] case. The court opined that, as it had not decided the issue as to weather a private corporation, like Sriram Industries, would come under the purview of Article 12 of the Constitution, and thereby subject to Part- III, it would not apply this principle. It may be submitted at that at that point, the Court was confused as to the jurisprudential basis of the principle. On one hand, it tried to read absolute liability within the broad spectrum of articles 21 and 32 of the Constitution, wherein its application demanded that the delinquent corporation must be a 'state' within the meaning of article 12 of the constitution. On the other, the court evolved this principle on the lines of Common Law concept, because, it said that the law presupposes, when it gives permission to hazardous industries, that it would bear the liability to pay compensation or make good any harm committed to environment or human settlement, due to accident. Thus, a sort of tortuous liability was imposed on the erring industries, which was distinct from the concept of constitutional liability referred to earlier by the court. If the first proposition of the court is to be accepted, then it follows that the principle of absolute liability can be imposed only in cases where the industries are 'state' within the meaning of article 12 of the Constitution. But, if, the later proposition is to be adopted, then the liability may be imposed on any industry, whether a state or not, wherever an accident occurs causing injuries to lives and property. Though the second line of thought appears to be more appropriate and proper, the Supreme Court was in dilemma and did not clear its correct stance.

Referring to the above aspect, RN Mishra, the then Chief Justice, in Union Carbide Corporation v Union of India[57], observed that 'No compensation was awarded as this court could not reach the conclusion that Shriram came within the meaning of 'state' in Article 12 so as to be liable to the discipline of Article 21 and to be subjected to proceeding under Article 32 of the constitution. Thus, what was said was essentially an obiter.

[56] Supra note 29, at p 26
[57] (1991) 4 SCC 584

Fortunately, in the subsequent case of Indian Council for Enviro Legal Action v Union of India,[58] the court once again considered the bindingness and utility of the absolute liability principle. With great respect, the court declined to agree with the view of RN Mishra, the then Chief Justice, and said '…it is binding upon us'… 'We are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country. The court in the present case held that the industries '… are absolutely liable to compensate for the harm caused by them to the villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove the sludge and other pollutants in the affected area… and also to defray the cost of the remedial measure required to restore the soil and the underground water resources. By upholding this principle of absolute liability, the court contributed substantially in the formulation of principles regarding the quantification of damages. Unliquidated damages, which are an integral part of tortuous liability is of immense use in the matter of environmental disasters. It serves two purposes- it deters the potential delinquent corporations to pattern their behavior in line with existing laws of the land, because it imposes a large financial burden upon the enterprise, and secondly, the standard of burden of standard of proof is much less, in comparison to criminal cases. Another aspect, rightly pointed out by the court, is that sections 3 and 5 of Environment (Protection) Act, 1986 clothes the Central Government with considerable powers to issue directions for achieving the objects of the act. The said powers include the power to impose the sum of remedial measures on the offending industries, and to utilize the amount so recovered for carrying out remedial measures.

3.8 SUSTAINABLE DEVELOPMENT

Environmental pollution and degradation is a serious problem nowadays.[59] Judiciary being a social institution, has a significant role to play in the redressal of this problem. The progress of a society lies in industrialization and financial stability. But, industrialization is contrary to the concept of preservation of environment. These are two conflicting interests and their harmonization is a major challenge before the judicial

[58] Supra note 31, at p 27

[59] Ayesh Dias, 'Judicial Activism in the Development and Enforcement of Environmental Law: Some Comparative Insights from the Indian Experience', Journal of Environmental Law. No 6, 1994.

system of a country. The judiciary, in different pronouncements, has pointed out that there will be adverse effects on the country's economic and social conditions, if industries are ordered to stop production. Unemployment and poverty may sweep the country and lead it towards degeneration and destruction. At the same time, polluting industries, impend the stability of the environment.

The judiciary was therefore, of the opinion that the pollution limit should be within the sustainable capacity of the environment. In fact, Roscoe Pound's concept of social engineering which advocates for the resolution of conflicting interests, whereby there will be maximization of interest with minimum fiction and waste, is quite appropriate in these cases.[60] The court further added that there should be a balanced approach in the fulfillment of social needs, through industrialization and preservation of environment, because the polluted environment is the major cause of health hazards, especially of persons working in the factories or residing in the surrounding areas. It may, therefore, be asserted that the judiciary in India has found its appropriate answers in the concept of sustainable development.

In Vellore Citizen Welfare Forum v Union of India[61], the Supreme Court opined, 'The traditional concept that development and ecology are opposed to each other is no longer acceptable, 'sustainable development is the answer'. The genesis of the concept of sustainable development was in the Stockholm Declaration in 1972. Subsequently, the World Commission on Environment and Development 1987 (known as Brundtland Report) in its report, called 'Our Common Future', gave a definite shape to this concept. In 1992, at the Rio Conference it was reaffirmed and contended that the implementation of this concept of sustainable development is the true mode of achievement of development. The court accepted the definition of sustainable development given by this Commission. It reads as, 'Sustainable Development that meets the needs of the present without compromising the ability of the future generation to meet their own needs'. The court ascertained that sustainable development is a balancing concept between ecology and development. Its salient features were yet to be finalized by the jurists. However,

[60] MDA Freeman Lloyd's, Introduction to Jurisprudence, Sweet & Maxwell, sixteenth edn, p 524-531.
[61] AIR 1996 SC 2715

they deliberated upon that aspect and said that from the Brundtland Report and other international documents, it appears that sustainable development includes the following features: Inter- generational Equity, use and conservation of Natural Resources, environmental Protection and Precautionary principles, polluter pays principle, obligation to assist and cooperate, eradication of poverty and financial assistance to the developing countries. The Supreme Court, in the instant case, enumerated that 'precationary principle' and 'polluter pays principle' are the two most essential features of sustainable development. As it is a well settled principle of law that if a rule of customary International law does not contradict with the municipal law. It could be incorporated in the domestic law of land, the court therefore, tried to read these principles in constitutional and statutory provisions of this country. It said that, article 21 of the Constitution of India guarantees the protection of life and personal liberty. The fundamental duties, article 51 A (g), and the directive principles, articles 47 and 48 A, provide that it is the duty of the citizen as well as the state, to protect the material environment and ecology of the country. The other post independence legislations and precisely, the anti- pollution laws mandate the state to protect the environment and prevent its depletion. The latter have established implementing machineries in the form of Central and State Pollution Control Boards to obviate the possibility of environment degradation.

The precautionary principle emphasizes upon the preventive aspect of environmental laws. The necessary basis of this principle lies on the scientific innovation. The court gave the meaning of this principle in the context of municipal law. It means:

(i) Environmental measures- by the state government and the statutory authorities- must anticipate prevent and the causes of the environment.

(ii) Where there are threats of irreparable damage, lack of scientific certainty should not be used as a reason for postponing measure to environmental degradation.

(iii) The 'onus of proof' is on the actor or the developers/ industrialists to show that his action is environmentally benign.

The court categorized the salient features of this principle into three broad headings. First, the court was of the opinion that the state government and statutory authorities have to play a significant role in the implementation of the principle. It is the primary responsibility of the state to protect the country's ecology and health standards of its citizens from harmful effects of environmental pollution. To that effect, the state should ensure that any proposed developmental activity must be eco friendly. It should try to ascertain its harmful nature through 'impact assessment.' Secondly, the court pointed out that this principle lies on scientific uncertainty. In absence of clear scientific opinion, no enterprise should be allowed to operate so as to cause irretrievable damage to environment. The Rio Declaration of 1992 in principle 15 puts forward strong arguments in this behalf. It reads as follows:

> *In order to protect the environment, the precautionary approach shall be widely applied by the state according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measure to prevent environmental degradation.*

In Research Foundation for Science Technology and Natural Resources Policy v Union of India and Another[62], the court observed

> *'In respect of the precautionary principle, ... where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as reason for postponing cost effective measures to prevent environmental degradation. This principle generally describes an approach to the protection of the environment or human health based around precaution even when there is no clear evidence of harm or risk of harm from an activity or substance. It is a part of principle of sustainable development, it provides for taking protection against specific environmental hazards by avoiding or reducing environmental risks before specific harms are experienced.'*

A careful reading of the pronouncements of the courts reveals certain basic propositions:

[62] MANU/SC/0013/2005

- First, the polluter should be responsible for restoring the environment and
- Secondly, it should pay compensation to the victims of pollution.

Furthermore, this responsibility is absolute in nature. A question which may arise at this juncture is about the nature of liability- whether it is civil or criminal. The court has evolved the principle of absolute liability under the heading of tortuous liability. And in the case of Vellore Citizen's Welfare Forum v Union of India[63], the court interpreted the liability to be as absolute liability; so it is a part of civil liability. In S Jagannath v Union of India[64] the court said that liability on the aquaculture industry and shrimp culture industry would be imposed on the basis of polluter pays principle. It ordered the authority constituted by Central Government under section 8 (3) of the Environment (Protection) Act, 1986 to determine the compensation to be recovered from the polluter, as cost of restituting the damaged environment. However, it may be noted herein itself, that the court has not laid down any specific parameters to quantify the amount of damages. It is perhaps in favour of unliquidated damages. The court has further added that the collector/ district magistrate may recover the amount from the polluter, in case of necessity, as arrears of land revenue/ Direction may also be issued to the Central Government to recover the amount under sections 3 and 5 of environment (Protection) Act 1986, or other relevant provisions of the anti- pollution Act.

3.9 CRIMINAL LIABILITY

The concept for environmental preservation has gained momentum in the last few years. The courts have adopted various principles and policies to restore environmental damages and degradation; nevertheless, the matter with regard to imposition of sanctions for violation of environmental codes has still remained a distant dream. Fragmented efforts to impose liability in the form of fines and/or imprisonments have been made, but most cases, have viewed the problem, more from the civil law perspective than one of criminal liability.

[63] Supra note 61, at p 38
[64] (1997) 2 SCC 87

In MC Mehta v Kamal Nath & Others[65], the apex court stated that 'pollution fine[66] is a part of polluter pays principle. The question relating to determination of quantum of pollution fine was raised in the present case. The court observed that various laws in force, to prevent, control pollution and protect environment and ecology, provide for different categories of punishment in the nature of imposition of fine as well as of imprisonment or either of them, depending upon the nature and extent of violation. The fine that may be imposed, alone, may extend to one lakh rupees. The court observed that the object underlying the imposition of imprisonment and fine under the relevant laws is meant, not only to punish the individual concerned, but also serves as a deterrent to others to desist from indulging in such wrongs. The court fixed the quantum of fines payable by the polluter (Span Motors Private Ltd.) at Rs. 10 lakhs only. It further said the amount has been fixed keeping in view the undertaking given by the polluter to bear a fair share of the project cost of ecological restoration which would be quite separate and apart from their liability for the exemplary damages. Though, the court raised the issue regarding the principles of quantification of liability in environmental pollution, but the same was left unanswered.

In Centre for Environmental Law World Wide Fund for Nature (WWF), India v State of Orissa & Others[67], the Orissa High Court observed:

> "The number of criminal offenses for non compliance with environmental legislation is immense, and in recent years the regulation agencies have shown an increased willingness to resort to prosecution. Private prosecution is also a possibility. Fines will be the normal penalty; though in a number of cases, sentences of imprisonment have been imposed (there is normally a potential personal liability for directors and senior managers). Maximum fine levels have risen in recent years, as have actual levels of fine imposed.

[65] Supra note 52, at p 33

[66] The term 'pollution fine' had been coined by the apex court in the present case, to signify the exemplary damages for polluting fragile environment. The court was of the opinion that to impose fine under anti pollution legislation, the polluter must be proved guilty according to the law. But the same yard stick was not applicable in case of 'pollution fine'; the latter can be imposed even on prima facie damage committed by the polluter on the environment.

[67] MANU/OR/0005/1999

To conclude, it is re emphasized that there is tremendous significance of judicial decisions in the evolution of environmental jurisprudence in the country. Perhaps, no area or field of knowledge has seen such leap in terms of intellectual discourse than the field of environment. But the core concern as regards the imposition of criminal liability on polluters has been largely evaded.

The restrictions with regard to imposition of criminal sanctions in cases of corporations, the nature of liability determination, the strict mode of interpretation of penal provisions, standard of proof required to establish criminal prosecutions and the effectivity of punishments in matters of environmental pollution to bring the desired fruits have, possibly, kept the judiciary away from the 'penal' scoop.

Criminal liability cannot altogether be discarded; it is an effective and powerful tool in the hands of legislators and adjudicators to achieve the ends of a 'clean, pollution free' environment.

3.10 CLOSURE/ SHIFTING OF INDUSTRIES

It is a well established notion of environmental law that it is best to stop the pollution at its roots. The notion has successfully been applied by the courts of law in redressing the problem of pollution. In different cases, wherein the industries have violated the provisions of the law or where they have operated in thickly populated areas, the courts have ordered their closure.[68] However, while dealing with this sort of problem the court has kept in mind the developmental aspect and the economic burden resulting from the closure orders. They have therefore, on different occasions, reiterated that if these types of industries abide by the rules and regulations and observe the safety measures, the in such cases they must be allowed to operate in the process of production on conditional basis.[69]

[68] Ambica Quarry Works v State of Gujarat AIR 1987 SC 1073

[69] The court in some cases have emphasized upon the development process '…but that would not justify the passing of a prohibitory order which would operate from causing loss to the owner and have a serious consequence of paralyzing the industries affecting the livelihood of employed person; the consequence may be more hazardous than the air pollution. Therefore, the 'remedial measure' contemplated must be understood as such measure which mitigate the emission of air pollutants. Therefore, the harsh steps of

3.11 POLLUTER PAYS PRINCIPLE

An important off shoot of the principle of sustainable development is the 'Polluter Pays' Principle. It started as a principle of international environmental law where the polluting party pays for the damage done to the natural environment. This principle favours a curative approach which is concerned with repairing ecological damage and is not bothered with the idea of fault. Once a person is seen to be guilty, such person is liable to compensate for all such acts irrespective of the fact whether he was involved in the development process or not.

Remedying the damaged environment is a part of the process of 'sustainable development' and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. The judiciary in India recognized the principle in the judgment delivered in the case of Indian Council for Enviro Legal Action v Union of India[70]. The court held that the 'Polluter Pays' principle means that absolute liability of harm to the environment extends not only to compensate the victims of pollution, but also to the cost of restoring environmental degradation. Remediation of damaged environment is a part of the process of sustainable development. In this case a number of private companies, operating as chemical companies were creating hazardous wastes in the soil and polluting the village area situated nearby without the required licenses. The court ruled on the PIL that, "Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on."

Consequently, the polluting industries were held to be absolutely liable for the harm caused by them to the villagers in the affected area, etc and they were ordered to take all necessary measures to remove sludge and other pollutants lying in the affected areas. The "Polluter Pays" principle as interpreted by the court means that the absolute liability for

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prohibiting the working of the factory is neithet warranted nor has it the legal sanctity.' Chaitanya Pulvarising Industries v Karnataka State Pollution Control Board and others AIR 1987 Ker 82.

[70] Supra note 31, at p 27

harm to the environment extends not only to compensate the victims of pollution but also to the cost of restoring the environment.

CHAPTER 4: ENVIRONMENTAL LEGAL FRAMEWORK OF INDIA

4.1 CONSTITUTION OF INDIA AND PROTECTION OF ENVIRONMENT

The Supreme law of the land, the Indian Constitution, exhibits keen interest in conservation of the environment. It does not, explicitly, mention the word 'environment'; but the prolific document deals with every aspect of it.[71] The Constitution mandates in favour of equitable development in consonance with sustainable development. The State and the citizens are enjoined with a set of duties to protect the environment and to conserve the natural resources of the country. The chapter on Fundamental Duties imposes upon every citizen the duty to protect the natural resources of the country.[72] Article 48A,[73] incorporated in Chapter IV (Directive Principles) of the Constitution through the Constitution (Amendment) Act, 1976, prescribes responsibility on the state to preserve the environment of this ancient land. The Constitution also deals with certain environment- related problems like, 'public health'[74], 'organisation of agriculture and animal husbandry'[75] and 'protection of monuments and places and objects of national importance.'[76]

The procedural features of the Constitution pertaining to environment are envisaged in articles 252 and 253 of the Constitution. The first of these provisions authorizes the Union Government to adopt national legislation at the request of two or more states. Article 253 authorises it to claim competence over subjects in the state list in order to implement a decision taken by an international organization or a declaration adopted by an international conference. This provision has been invoked in 1981, when the Union Government adopted the Air (Prevention and Control of Pollution) Act, 1981.

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[71] Rahamatullah khan, Environment v Development Revisited: Contribution of Indian Judiciary to the Conflict Resolution', Asian Yearbook of International Law, vol 2, p 11.
[72] Constitution of India, article 51A (9), 'to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.'
[73] Ibid, article 48A, 'The state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.'
[74] Ibid, article 47
[75] Ibid, article 48
[76] Ibid, article 49

4.2 GENERAL SUPPORTIVE LEGISLATIONS

With the domain of pre- independent legislation, the most important and significant one was the Indian Penal Code, 1860. The word 'environment' no where appeared in the code; the reason might be that the concept of environmental preservation was unknown to the framers of this code. But several provisions of this Code effectively dealt with the conservation of environment.

Section 268 of the Indian Penal Code states that:

> *A person is guilty of public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general, who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.*

The post- independence legislations exhibit ardent concern for preservation of environment. Before the Stockholm period, several legislations were enacted which incidentally contributed to the protection of environment. The Factories Act, 1948; the Damodar Valley Corporation Act, 1948; the Merchant and Shipping Act, 1958; the Insecticides Act, 1968, etc., are examples of this kind. In the post Stockholm period, many regulations were amended and framed to suit the needs of the changing times, eg, the Wild Life (Protection) Act, 1972; the Code of Criminal Procedure (Amendment) Act, 1973; the Water (Prevention and Control of Pollution) Cess Act, 1977; the Forest Conservation Act, 1980; the Motor Vehicles Act, 1938 (amended in 1988); Public Liability Insurance Act, 1991, etc.

4.3 INDIAN LEGISLATIONS ON ENVIRONMENT

4.3.1 THE ENVIRONMENT (PROTECTION) ACT, 1986

In the wake of Bhopal gas tragedy[77], the Government of India enacted the Environment (Protection) Act of 1986 under Article 253 of the Constitution. The purpose of the Act is to implement the decisions of the United Nations Conference on the Human Environment

[77] Supra note 57, at p 36

of 1972, in so far as they relate to the protection and improvement of the human environment and the prevention of hazards to human beings, other living creatures, plants and property.

4.3.2 THE (AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981

To implement the decisions taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972, Parliament enacted the nationwide Air Act under Article 253 of the Constitution. The Act's statement of objects and reasons contains the government's explanation of the contents and the scope of the law, and its concern for the 'detrimental effect (of air pollution) on the health of the people as also on animal life, vegetation and property.'

4.3.3 THE WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974

The Water Act of 1974 was the culmination of over a decade of discussion and deliberation between the Centre and the states. The history and the preamble of the Water Act suggest the only state governments can enact water pollution legislation. The Act, therefore was passed by Parliament pursuant to enabling resolutions by twelve states, under Article 252 (1) of the Constitution. Article 252 empowers Parliament to enact laws on state subjects for two or more states, where the state legislatures have consented to such legislation.

4.3.4 THE WILDLIFE (PROTECTION) ACT, 1972

In 1972, Parliament enacted the Wildlife Act pursuant to the enabling resolutions of 11 states under Article 252 (1) of the Constitution. The Act provides for state wildlife advisory boards, regulations for hunting wild animals and birds, establishment of sanctuaries and national parks, regulations for trade in wild animals, animal products and trophies, and judicially imposed penalties for violating the Act.

4.3.5 THE PUBLIC LIABILITY INSURANCE ACT, 1991

This law was enacted to provide immediate relief to the victims of an accident involving a hazardous substance. To achieve this objective, the Act imposes 'no-fault' liability upon the owner of the hazardous substance and requires the owner to compensate the victims irrespective of any neglect or default on his part.

4.3.6 THE FOREST CONSERVATION ACT, 1980

Alarmed at India's rapid deforestation and the resulting environment degradation, the Central Government enacted the Forest (Conservation) Act in 1980. As amended in 1988, the Act requires the approval of the Central Government before a state 'dereserves' a reserved forest, uses forest land for non-forest purposes, assigns forest land to a private person or corporation, or clears forest land for the purpose of reforestation. An Advisory Committee, constituted under the Act advises the Centre on these approvals.

4.4 ISSUES RELATING TO FEDERALISM

On occasion, the division of power under India's federal structure has led to tensions between the Centre and the states in matters concerning regional development and the preservation of natural resources. The areas of stress include coastal development and the commercial exploitation of mineral resources around federally protected areas. In some instances, such as development in the Dahanu Taluka of Maharashtra, the state government has turned openly hostile to the imposition of central regulations.

Town planning, building regulations and local zoning are state subjects[78]. Consequently, provisions for development along the coast and foreshore are found in several municipal statutes and the land codes of the coastal states. These local laws however, proved inadequate to protect the coastal ecology, prompting the Central Government to impose stringent national coastal development norms in 1991. Several state governments are irate at the sweeping assumption of power by the Centre, particularly since the coastal norms are delegated legislation issued by the executive under the Environment (Protection) Rules of 1986 which, in turn, were framed under the Environment (Protection) Act of 1986.

[78] These topics fall under the heads 'Land' and 'Local government' which are items 18 and 5 of the List II in the seventh schedule to the Constitution.

In the Shrimp Culture Case,[79] the Supreme Court upheld the power of the Union Government to frame coastal regulations in view of Parliament's competence under Article 253 read with Entry 13, List I of the Seventh Schedule to the Constitution, to enact the Environmental Protection Act for implementing the decisions taken at the Stockholm Conference. The court went further and recognized that the coastal regulations 'shall have overriding effect and shall prevail over the law made by the legislatures of the states.'[80]

Another issue relates to the quarrying of mineral deposits in areas close to forest lands and wildlife reserves. Central status designed to protect forests and prevent the destruction of wildlife habitat are viewed by some states as a needless fetter on industrial activity and mining. Several state governments, notably Rajasthan and Gujarat are anxious to encourage the commercial exploitation of minerals and have worked hard to neutralize federal protection in these areas.

The picturesque Dahanu Taluka, one of the richest horticulture districts in India, has strained Centre- state relations. In June, 1991, the Union Ministry of Environment and Forests notified a scheme of restrictions under the EPA limiting industrial activity in this ecologically sensitive area. Maharashtra has decried the Central Scheme claiming that it stifles legitimate development activity in a part of its territory and has lobbied hard for lifting the restrictions.

The division of authority between the Centre and the states has also prompted some central agencies to resist compliance with state town planning regulations. In Maharashtra, for instance, until the 1981 decision of the Bombay High Court in the Sassoon Harbour case[81] (implicitly settling the issue against the central agencies), several central authorities resisted regulation under the local town planning laws.

[79] S. Jagannath v Union of India AIR 1997 SC 811, 846
[80] Ibid
[81] Shyam Chainani v Board of Trustees of the Port of Bombay, Appeal No. 151 of 1980 in Misc. Pet. No. 58 of 1980, Bombay High Court, April 30, 1981.

CHAPTER 5: REDRESSAL OF ENVIRONMENTAL POLLUTION THROUGH SPECIALISED BODIES

Environmental pollution is a complex phenomenon. It involves convoluted issues relating to science and technology and the problems concerning the economy and society. So, this problem demands ardent care and ardous efforts. In M.C Mehta v Union of India,[82] the court referred to the complexity of this aspect and expressed that there is need for neutral scientific expertise which would provide essential input to inform judicial decision making. To cope with this problem, it suggested that government of India take steps to set up independent centres, viz, ecological science research groups, with professionally competent and public spirited experts to provide the much needed scientific and technological input. This body would act as an information bank for the court and government and generate the information according to the particular requirements of the court and the concerned government departments.

The apex court of the country, in subsequent cases, has felt that issues like environmental pollution should be dealt with expeditiously, as delay in adjudication leads to more pollution. But, it is difficult for the regular courts of law to give such speedy justice, as it lacks the necessary time and expertise. To solve this problem, the Supreme Court requested the chief justices of the concerned high courts[83] to constitute a 'Green Bench' to deal exclusively with the problems concerning environment.

In another case,[84] the Supreme Court has pointed out that the prosecutions launched in ordinary criminal courts of the country, under the Water Act, Air Act or Environment Act never reach the conclusion, either because of the workload or their lack of concern regarding environment matters. Moreover, orders passed by these courts are challenged by the industries in higher judiciary. These proceedings take years to come to conclusions, and meanwhile, interim orders are passed, which restrain the implementing authorities from enforcing their orders. And all these result in irreversible harm being

[82] Supra (AIR 1987 SC 965)
[83] Supra (AIR 1996 SC 2715)
[84] Supra (1996) 3 SCC 212

caused to the environment. The court suggested that these aspects lead to the one valid conclusion- that there is the need for environmental courts which, alone, should be empowered to deal with civil and criminal matters concerning the environment. The persons who should man this sort of institutions should be legally trained or judicially experienced and should be well acquainted with the technicalities involved in it. The Indian epilogue insisted the Parliament of India to frame laws to set up Environmental Tribunals. To this effect, the Parliament of India in the forty sixth year of its independence legislated the National Environment Tribunal Act, 1995[85]. The object of the Act reads:

> *An Act to provide for strict liability for damages arising out of any accident occurring while holding any hazardous substance and for the establishment of a National Environment Tribunal for effective and expeditious disposal of cases arising from such accident, with a view to giving relief and damages to persons, property and the environment and for matter connected there with as incident thereto.*

The Preamble of the Act also recalls the international obligation of India, as a participant of the United Nations Conference on Environment and Development held at Rio de Janerio in 1992, to develop national laws regarding liability and compensation for the victims of pollution and other environmental damages. The passing of the Act has led to the foundation of the National Environmental Tribunal at New Delhi and 'such other places as the Central Government, by notification, may specify.'[86] The Tribunal comprises the Chairman, Vice Chairperson, Judicial and Technical members.[87] The chairman and Vice Chairman are members of the higher judiciary or Secretary of government departments, having experience in dealing with matters relating to legal, administrative, scientific or technical aspects relating to environment. The Act also emphasizes that the technical members must have experience in or capacity to deal with administrative, scientific or technical problems relating to environment. It clearly mandates that the persons who manage the Tribunal should be experts in the field of

[85] Act 27 of 1995
[86] Ibid, section 9(5)
[87] Ibid

environment and should have the capacity and capability to deal with the complex problems and give remedies at the earliest opportunity. The tribunal has been vested with civil and criminal jurisdiction; it also functions as an investigating authority. On the receipt of an application, it may hold an inquiry, and if it deems fit, may reject an application summarily or after giving proper notice to the owner,[88] may give opportunity to the parties of being heard[89]. It may determine the compensation to be awarded to the affected persons of environment pollution. Regarding the procedural aspect or the proceedings before it, the Tribunal is not bound by the Code of Civil Procedure 1908, but must follow the principles of natural justice and the other provisions of the Act.[90] It has the power to regulate its own procedure. The present Act clearly lays down that the Tribunal has been vested with all the powers of the civil court. The Act also restricts the jurisdiction of the other civil courts to entertain disputes relating to environment.[91]

This Act vests immense powers in the hands of the tribunal. Its functions are two fold-

(1) First, as an investigator, of accidents arising out of operation of hazardous industries and,
(2) Secondly, as an adjudicatory machinery for payment of compensation. The appeals from the order of the Tribunal lie to the Supreme Court.[92]

The Parliament has also enacted the National Environment Appellate Authority Act, 1997[93] which provides 'for the establishment of a National Appellate Authority to hear appeals with respect to restriction of areas in which any industrial operation or process or class of industrial operation or process shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act, 1986, and for

[88] Ibid, section 2 (o) states, 'Owner means a person who owns, or has control over handling, any hazardous substance at the time of accident and include-
(i) In the case, of a firm, any of its partners,
(ii) In the case of an association, any of its members,
(iii) In the case of a company, any of its directors, managers, secretaries or other officers who Is directly in charge of, and is responsible to, the company for the conduct of the business of the company.'
[89] Ibid, section 5
[90] Ibid
[91] Ibid, section 19
[92] Indian Penal Code, section 24
[93] Act 22 of 1997

matters connected therewith or incidental thereto'. Any person, who is aggrieved by a clearance given for setting up of an industry, or class of industries, can apply within 30 days of the order.[94] The appellate authority is not bound by the Code of Civil Procedure 1908 but must follow the principles of natural justice and the other provisions of the Act.[95] The proceedings before the court are to be treated as judicial proceedings, within the meaning of sections 193, 219 and 228 of the Indian Penal Code 1860. The Act also provides that after its passing the civil court or other authorities shall not have any jurisdiction to entertain appeals. The core emphasis of this Act is to ensure that proper impact assessment is carried out with regard to the upcoming industries and the latter abide by the required anti pollution measures.

Apart from these, the Public Liability Insurance Act, 1991[96], has also been passed which provides for mandatory public liability insurance for installations handling hazardous substances. The objects are to secure payment of compensation to the victims and enable the industries to discharge their liabilities to settle large claims arising out from major environmental disaster.

The Supreme Court, in Andhra Pradesh Pollution Control Board v MV Nayedu[97] has referred to the abovementioned and contended that it is of paramount importance to establish environmental courts. Appellate authorities and tribunals are needed for providing adequate judicial and scientific inputs, instead of leaving these complicated issues in the hands of officers drawn from the executive.

ESTABLISHMENT OF NATIONAL GREEN TRIBUNAL

The National Green Tribunal replaced the National Environment Appellate Authority (NEAA). There were two existing laws, the National Environment Tribunal Act, 1995, and the National Environment Appellate Authority Act, 1997 which provided for creating specialised courts for environmental matters. However, the National Environment Tribunal Act, 1995 was never notified, and the National Environment Appellate

[94] Ibid, section 11
[95] Ibid, section 12
[96] Act 6 of 1991
[97] Supra (AIR 1999 SC 812)

Authority had a very limited task to look into complaints regarding environmental clearances. The National Green Tribunal Act enabled the government to establish Green Tribunals at various centres throughout the country, and repeal the National Environment Tribunal Act, 1995 and the National Environment Appellate Authority Act, 1997.

The National Green Tribunal has been established on 18.10.2010 under the National Green Tribunal Act 2010 for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto. It is a specialized body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues. The Tribunal is not be bound by the procedure laid down under the Code of Civil Procedure, 1908, but is guided by principles of natural justice. While passing Orders/decisions/awards, the NGT will apply the principles of sustainable development, the precautionary principle and the polluter pays principles. However, it must be noted that if the NGT holds that a claim is false, it can impose costs including lost benefits due to any interim injunction.

Under Rule 22 of the NGT Rules, there is a provision for seeking a Review of a decision or Order of the NGT. If this fails, an NGT Order can be challenged before the Supreme Court within ninety days.

Following the enactment of the said law, the Principal Bench of the NGT has been established in the National Capital – New Delhi, with regional benches in Pune (Western Zone Bench), Bhopal (Central Zone Bench), Chennai (Southern Bench) and Kolkata (Eastern Bench). Each Bench has a specified geographical jurisdiction covering several States in a region. There is also a mechanism for circuit benches. For example, the Southern Zone bench, which is based in Chennai, can decide to have sittings in other places like Bangalore or Hyderabad.

The Chairperson of the NGT is a retired Judge of the Supreme Court, Head Quartered in Delhi. Other Judicial members are retired Judges of High Courts. Each bench of the NGT

will comprise of at least one Judicial Member and one Expert Member. Expert members should have a professional qualification and a minimum of 15 years experience in the field of environment/forest conservation and related subjects.

The NGT has the power to hear all civil cases relating to environmental issues and questions that are linked to the implementation of laws listed in Schedule I of the NGT Act. These include the following:

The Water (Prevention and Control of Pollution) Act, 1974;

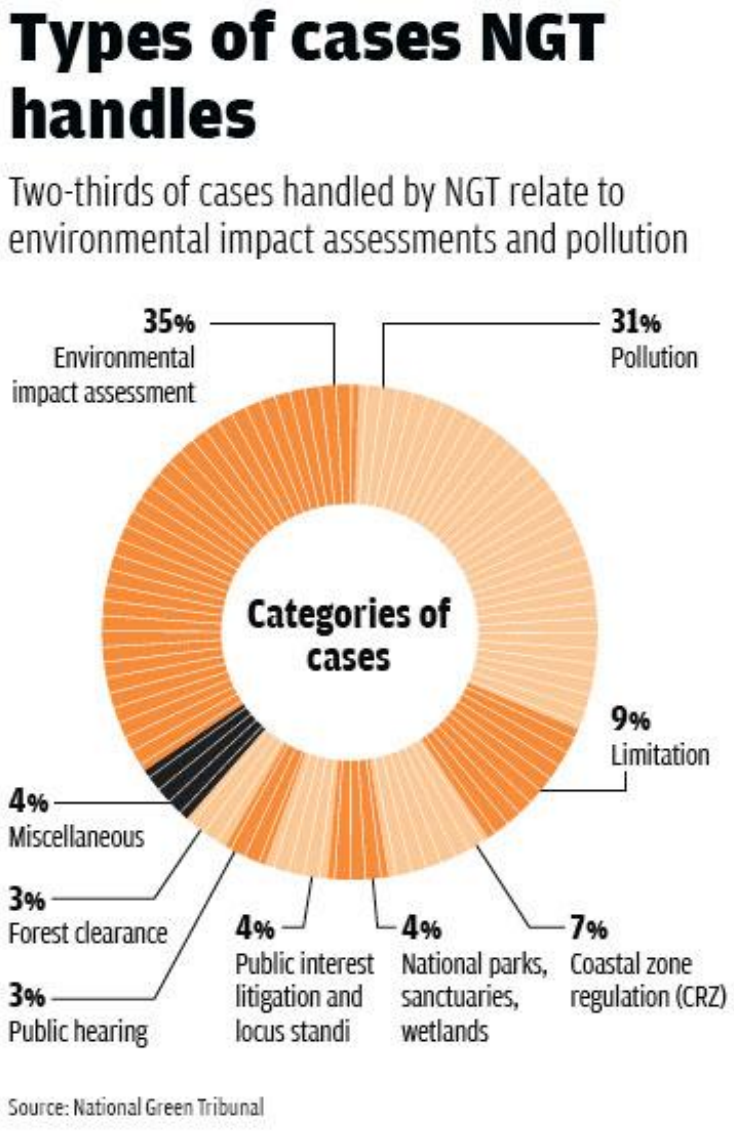
1. The Water (Prevention and Control of Pollution) Cess Act, 1977;
2. The Forest (Conservation) Act, 1980;
3. The Air (Prevention and Control of Pollution) Act, 1981;
4. The Environment (Protection) Act, 1986;
5. The Public Liability Insurance Act, 1991;
6. The Biological Diversity Act, 2002.

This means that any violations pertaining only to these laws, or any order / decision taken by the Government under these laws can be challenged before the NGT. Importantly, the NGT has not been vested with powers to hear any matter relating to the Wildlife (Protection) Act, 1972, the Indian Forest Act, 1927 and various laws enacted by States relating to forests, tree preservation etc. Therefore, specific and substantial issues related to these laws cannot be raised before the NGT. You will have to approach the State High Court or the Supreme Court through a Writ Petition (PIL) or file an Original Suit before an appropriate Civil Judge of the taluk where the project that you intend to challenge is located.

The Tribunal's dedicated jurisdiction in environmental matters shall provide speedy environmental justice and help reduce the burden of litigation in the higher courts. The Tribunal is mandated to make and endeavour for disposal of applications or appeals finally within 6 months of filing of the same. Initially, the NGT is proposed to be set up at five places of sittings and will follow circuit procedure for making itself more

accessible. New Delhi is the Principal Place of Sitting of the Tribunal and Bhopal, Pune, Kolkata and Chennai shall be the other 4 place of sitting of the Tribunal.[98]

The tribunal has been deprived of powers exercised by the High Courts under articles 226 of the Constitution and also 'criminal jurisdiction' has been excluded from the court's purview.



Source: Ministry of Environment, Forest and Climate Change, government of India

[98] Available at http://envfor.nic.in/rules-regulations/national-green-tribunal-ngt , last accessed on April 2, 2015.

CHAPTER 6: SENTENCING IN CASE OF ENVIRONMENTAL OFFENCES

Sentencing for environmental offences poses a challenge to the legislature and the judiciary alike. While the legislature finds it difficult to reinforce the regular principles of sentencing in case of environmental offences, the judiciary fails to perceive it as an 'offence' and impose the most efficacious punishment apt for the same. This is particularly so in view of three aspects:

(1) Environmental offences do not fit in the regular category of crimes. It is an offence peculiar to itself where the notion of traditional crimes, *actus non facit reum, nisi mens sit rea* does not apply. To illustrate further, while an offence of murder can be easily made out on the basis of the harm caused, i.e., the death of the victim and the mental culpability of the offender, environmental offences are devoid of any 'guilt principle' but are rather manifestations of reckless or negligent conduct and fall within the category of strict liability offences.

(2) The second problem here is, where the harm caused may or may not be perceivable. In other words, while an industrial pollution may have immediate effects on the health and safety of people, there may be degradation of environment for future generations because of an act committed at present. The injury is thus, invisible or not perceivable instantaneously.

(3) Thirdly, environmental offences are rarely traceable to an individual or a group of individuals. While individual polluters may be responsible for environmental pollution, it is generally the corporations and large industrial houses which, in the process of their operations, violate environmental standards of safety and precaution, resulting in environmental pollution. Liability of corporations is definitely possible and lot of development has occurred in this area; nevertheless the fact remains that it becomes almost impossible to impose criminal sanctions on such violators with effectiveness. Fine remains the only options in such cases.

Thus, environmental offences continue to be a challenge. Nevertheless, a possibility of creating more effective means remain within the traditional sentencing patterns and goals. Deterrence, denunciation, prevention and reformation of the environment should largely be the aims of sentencing when it comes to the area of environmental offences. Fine, as finds predominance in the compensatory theory, has a dominant role, though it should not remain the one and only mode of punishment.

6.1 THE LEVEL OF FINE

The level of fine should be fixed in accordance with the normal principles, taking account of the seriousness of the offence and the financial circumstances of the individual defendant.

As a general principle, individuals and companies should not profit from their offences. It is important that the sentence takes full account of any economic gain achieved by the offender by failure to take the appropriate precautions; it should not be cheaper to offend than to prevent the commission of an offence. Conversely, the expense of any remedial action already taken by the defendant might lead the court to reduce the level of fine it would otherwise have imposed.

The level of fine should reflect how far below the relevant statutory environmental standard the defendant's behavior actually fell. The assessment of seriousness requires that the court should consider the culpability of the defendant in bringing about, or risking, the relevant environmental harm. This needs to be balanced against the extent of the damage which has actually occurred or has been risked. The level of the fine should be high where the defendant's culpability was high, even if a smaller amount of environmental damage has resulted from the defendant's actions than might reasonably have been expected. Such a case might arise where damage (or more extensive damage) has been avoided through prompt action by the authorities, or through some fortuitous element, such as helpful weather conditions. Conversely, in a case where much more damage has occurred than could reasonably have been expected, the sentence, while giving weight to the environmental impact, should primarily reflect the culpability of the offender.

The fine which is imposed should reflect the means of the individual or company concerned. In the case of a large company, the fine should be substantial enough to have a real economic impact which, together with the attendant bad publicilty resulting from prosecution, will create sufficient pressure on management and shareholders to tighten regulatory compliance and change company policy. It should be recognized that where pollution on a substantial scale has been occasioned by a large company, it is only the company itself (rather than individual directors) which will have the financial means to meet a fine proportionate to the degree of damage which has occurred.

For smaller companies, the courts should bear in mind that a very large fine may have a considerable adverse impact. A crippling fine may close down the company altogether, with employees being thrown out of work, and with the repercussions on the local economy. Alternatively, a large fine may make it even more difficult for the company to improve its procedures in order to comply with the law. Similar considerations apply to non- profit making organizations, which do not have share holders. In such cases the court may reduce the level of the fine and/ or spread the payment of the fine over a longer period of time.

When vehicles, plant or equipment are used in the commission of environmental offences, confiscation of such assets might be an appropriate response.

While recognizing that the great diversity in the scale and nature of companies would make it difficult to find a simple measure of fine which would be applicable across this range, it might be possible to express the fine as a percentage of one or more of the following measures:

(i) Turnover (the sales revenue of the company over, say, the last three years);
(ii) Profitability (the scale of net profits before tax and dividends over the last three years);
(iii) Liquidity (the value of current short- term assets set against short- term liabilities)

In the case of corporations, disclosure and non indemnification of directors may be some other patterns of sentencing. In the case of the former, the court may require a company

to disclose its environmental records in public. A bad record, on the face of it, would discredit the goodwill of the company and pose to be a sanction in itself as well as in the running of the business.

6.2 COMPENSATION

Compensation orders are rarely used in this category of cases. However, where there is a specific victim (such as a landowner who has incurred expense in cleaning up their property, or in re- stocking a watercourse polluted by the defendant's actions) the court should always consider making a compensation order. The court should fix the level of the fine first, and then consider the issue of compensation.

6.3 DISQUALIFICATION

In an appropriate case, the court may wish to exercise its power to make an order disqualifying the defendant from acting as a company director for a specific period.

6.4 IMPRISONMENT

Imprisonment, as a mode of punishment, should continue to remain for individual offenders. The efficacy of imprisonment for the purposes of deterrence, prevention and/or reformation cannot be negated. As opined by JA Mc Pherson:[99]

> *An actual period of prison custody is likely to have a real deterrent effect on others minded to commit like offences over and beyond that in other cases. If offenders consider that they might succeed in escaping with nothing more than a financial penalty, it may be that they would take the risk of doing so for the profit that appears to be recoverable for acts like this.*

It may further be observed that 'major environmental offences, particularly when there is a high degree of criminality involved because of the repetitive nature of the conduct, will call for the imposition of custodian sentences.'[100]

[99] Judge Marshall Irwin, 'Environmental Offences, Sentencing Principles and Evidentiary Issues', Australian Environmental Law Conference, October 28, 2005.
[100] Ibid

In conclusion of this chapter, it may be emphasized that sentencing is a critical process which ensures the reduction and cessation of a particular criminal behavior of persons. Hence, the legislature and judiciary should sketch out the appropriate limit and mode of sentencing. No one theory of sentencing can be paramount. It has to be the combination of all so that safety of the environment is assured, the damage or degradation caused therein is reduced to the extent possible and individuals are able to sustain their work or industrial processes with ease. The concept of sustainable development may thereby succeed and attain its peak, reaping benefits for the environment as well as the inhabitants thereof.

CHAPTER 7: CRITICAL ANALYSIS

'By destroying nature, environment, man is committing matricide, having in a way killed Mother Earth. Technological excellence, growth of industries, economical gains have led to depletion of natural resources irreversibly. Indifference to the grave consequences, lack of concern and foresight have contributed in large measures to the alarming position.[101] *'*

7.1 FINDINGS

Ever since the inception of mankind, man has shared an intimate relation with the environment. It is in the lap of the mother earth that man has taken birth, nourished himself and grown into a strong being, capable of meeting the needs of life. The entire physical, intellectual and spiritual development of man has been actualized in the backdrop of a peaceful and harmonious environment. Its contribution and dedication in the upliftment of human kind is priceless.

However, with the growth of civilized society, man has felt the urge to transform his surroundings to meet his increasing material needs and desires. A transformation was witnessed in the ideology of man- from 'preserver' to 'destroyer'. He exploited the resources of the earth, restructured them to fulfill his demands, created new scientific technologies to smoothen the path of life and hasten the development process. But, in his endeavor to conquer the earth and establish his supremacy, unfortunately, he lost sight of the need to protect and conserve the natural resources. The resultant effect was the unprecedented depletion of the ecology posing serious threat to the existence of 'life' on earth.

Today, pollution and degradation of the environment has become a burning problem. It has invited serious attentions of the entire world. Different countries have come together to chalk out global plans to put an end to the disaster, and thereby safeguard the lives of the present and coming generations. They have acknowledged that the roots of this problem lie in the development process. The fervor for rapid industrialization,

[101] Supra note 26, at p 25

urbanization, unscientific use of natural resources, increasing use of chemicals, nuclear tests to establish worldwide pre eminence, etc, have significantly contributed to the deterioration of the fragile environment. It has resulted in concentration of green house gases and carbon dioxide in the atmosphere, depletion of the ozone layer, desertification, deforestation, rising of sea level and change in seasonal cycles. States have, therefore, entered into several conventions and declarations to make a consolidated effort to protect the environment, at the international and national levels.

The above cited judgments of the Supreme Court of India will show the wide range of cases relating to environment which came to be decided by the said Court from time to time. The Court has been and is still monitoring a number of cases. It will be noted that the Court constantly referred environmental issues to experts, and the Court has been framing schemes, issuing directions and continuously monitoring them. Some of these 52 judgments of the Supreme Court were given in original writ petitions filed under Art. 32 while the others were decided in appeals filed under Art 136 against judgments of the High Courts rendered in writ petitions filed under Art 226. These cases have added tremendous burden on the High Courts and the Supreme Court. The proposal for Environmental Courts was intended to lessen this burden, as already stated. But that as it may, the Supreme Court has, in the various cases referred to above, laid down the basic foundation for environmental jurisprudence in the country.[102]

7.1.1 LEGISLATIVE ENDEAVOR

India, being a party to the global environment consciousness, has hitherto enacted three anti pollution legislations, namely, the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981 and the Environment Protection Act, 1986. These Acts have included persons, natural as well as legal, as the potential polluters of the environment, and subject them to criminal liabilities for failing to adhere to the prescribed environmental standards. However, it may be contended that, while the quantum of liability imposed on individuals appears to be appreciable and

[102] 186th Report, Law Commission of India, Available at http://www.prsindia.org/uploads/media/Green%20Tribunal/Proposal%20to%20Constitute%20Environments%20Courts.pdf , last accessed on March 31, 2015.

adequate to curb their activities injurious to the environment, in cvase of corporations, it is not so. The liabilities fixed by law, are grossly inadequate to bring the desired changes. They have failed in their basic task of deterring the big enterprises and transnational corporations, preventing them from causing further harm and restoring the damage caused to the environment.

The environmental laws in India have provided for the establishment of Central and State Pollution Control Boards to, inter alia, prosecute the environmental delinquents (individuals and corporations) and to take preventive steps to check further degradation and deterioration of the water, air, land, etc. These Boards are constituted of experts in this field and are expected to carry out their tasks efficiently. But the expectations are far from reality. Very often, these Boards are restrained from discharging their functions due to political interference. Political big shots are often reluctant to prosecute the multinational and domestic corporations from which the country receives huge taxes and are, therefore, inevitable for the economic development of the nation. They, most of the times, escape liability for flagrant violations of the pollution laws.

Another significant aspect of the above Acts is that few provisions overlap leading to conflicting outcomes. The presence of such a conflict poses great difficulty. It hinders the proper functioning of the laws. Moreover, these laws prescribe different punishments for similar environmental pollution and lay down that the benefit of it shall go to the accused. This operates as a negative factor as it facilitates the corporations to flee with minor or no penalties. The policy of sentencing in anti pollution laws is not very clear and is unambiguous

7.1.2 JUDICIAL OPINION

The legislative response to environmental problems has, thus, been inadequate in India. It has failed to restrict or desist corporate bodies from their deleterious activities because of sentencing policy for environmental offences. The judicial contribution, however, has been comparatively praiseworthy. It has led to ‘life’ as encompassing the right to ‘wholesome environment’. It has consistently emphasized upon the Constitutional responsibility of man and state towards ‘sustainable environment’.

To that end, it has formulated diverse principles, ordered the closure/ shifting of industries, imposed liability on directors of erring corporations, and directed them to pay compensation to the helpless victims of environmental disasters. The Indian judiciary has also called upon the legislators to frame laws providing for the establishment of specialized environmental forums.[103]

Also, the apex court in Vellore citizens Welfare Forum case,[104] propounded the following principle:

> *We are ... of the view that "The Precautionary Principle" and the "Polluter Pays Principle" are essential features of "Sustainable Development". The "Precautionary Principle" in the context of municipal law means:*

(i) Environmental measures- by the State Government and the statutory authorities- must anticipate, prevent and attack the causes of environmental degradation.

(ii) Where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The "onus of proof" is on the actor or the developer/ industrialist to show that his action is environmentally benign.

In a case of the Orissa High Court[105], the latter categorized the liabilities under the Indian environmental laws as follows:

(a) Criminal Liabilities:

[103] The Parliament has responded to this call promptly and enacted the National Environment Tribunal Act, 1995 and the National Environmental Appellate Authority Act 1997. The former seeks to impose strict liability on the owner of an industrial establishment for damages arising out of environmental accidents and payment of compensation to the victims. To that effect, it has made provisions for the establishment of environmental tribunals. The latter mandates the establishment of environmental appellate authority to give speedy remedy to the aggrieved person.

[104] Supra note 61, at p 38

[105] Centre For Environmental Law World Wide Fund for Nature India v State of Orissa MANU/OR/0005/1999

The number of criminal offences for non compliance with environmental legislation is immense, and in recent years the regulating agencies have shown an increased willingness to resort to prosecution. Private prosecution is also a possibility. Fines will be the normal penalty, though in a number of cases, sentences of imprisonment have been imposed (there is normally a potential personal liability for directors and senior managers). Maximum fine levels have risen in recent years, as have actual levels of fines imposed.

(a) Administrative Sanctions:

In most regulatory systems, there is a range of options available to the regulator, including variation, suspension or revocation of license. Since these steps may lead to the closure of a plant, they are of great importance.

(b) Clean up costs:

In most environmental legislations, there is a power to clean up after a pollution accident and receive the cost from the polluter or (in some case) the occupier.

(c) Civil Liability:

There is growing interest in toxic torts,[106] although many of the actions have in fact been around for a long time. Many environmental actions rest upon strict/ absolute liability. Although the liability may be often difficult to establish, the size of claims may be very high indeed.

7.2 SUGGESTIONS:

In light of the analysis of the cases and relevant provisions cited above, the following would be suggested:

- The definition of 'environment' in the code should be generic in nature and inclusive in approach. 'Pollution' in the code should be categorized from the point of its impact over the environment, and it should also categorise the sources of

[106] The concept of 'toxic tort' is specifically used in cases of environmental pollution, wherein the polluter is liable to pay unliquidated damages.

pollution. That would help in the formulation of appropriate sanctions for environmental offences.

- The legislature, based on the German Environmental Code[107], should frame one consolidated environmental code, instead of enacting various laws dealing with diverse environmental aspects. It would prevent the overlapping of provisions, environmental policies and eco management. The code should enumerate the constitution, powers and functions of all the agencies, so, that functional and jurisdictional overlapping can be avoided. In constituting all these agencies, special care should be given on choosing the human resources for these agencies. People from different fields of knowledge, who are, directly or indirectly involved with the environment, should be appointed, instead of political and preferencial appointment.
- Whenever any environmental crime is perpetrated by a company, its officials must be held liable.[108] It would have the effect of increasing the responsibility of the management. The code should provide stringent punishments for industrial corporations violating the environmental policies. The present laws prescribe fines which are meager, compared to the huge profits earned by them. It is necessary to enhance the quantum of fines, so that it has a deterrent effect on the large corporate bodies. It is equally necessary that the code should direct the transnational corporations to follow the same standards of safety which they are expected to observe in the host country. Special incentives should be bestowed on corporations which abide by the prescribed environmental regulations. Such benefits may be in the form of tax exemptions, etc.
- Reversing the harm caused and compensating the victim are not possible by imposing the pre- determined fines under the statute; so, the courts are required to be given liberty regarding the quantification of compensation on set parameters for the purposes of calculation of compensation for the victims.[109]

[107] German Environmental Code is an umbrella legislation which covers almost every aspect of the environment.
[108] The present anti- pollution laws impose liability on officials, subject to certain exceptions. These may be deleted in the suggested code, but care should be taken that the innocent should not be punished.
[109] There is a need to revisit the Public Liability Insurance Act, 1991.

- An environment assistance fund may be set up which would include the contributions of the Central and state governments, mega corporations, environmental and the general people of the country. Such a fund would facilitate immediate payment, in case of environmental disasters, to the victims to avoid the long term effects of the trauma. The minimum amount of compensation may be mentioned by the code, which may vary, according to the intensity of the injury suffered by the victims.

The environmental justice scenario in India presents a picture of near anarchy except for the rare interventions by the Supreme Court itself. The irony is that more than at any other time, India now needs clarity of thinking, farsighted policies and an efficient regulatory and judicial framework in the area of environment as the Indian economy is growing at a rate of 8 to 9 per cent annually and is evolving as one of the fastest growing Emerging Market Economies of the world riding on wave of extensive industrial growth. The need for effective, powerful and technically expert 'superior' Green Courts is too obvious to be distinctly emphasised.

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