

# Comparison of the black letter law law general essay

Law



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2. Second, how this works in practice; 3. Third, a principled comparison of three or four core issues in this area of law; and 4. Finally, a conclusion about how each jurisdiction can learn from the other.

## **INTRODUCTION**

India is a unique sub-continent with vast variations in geographic area, topography and climate. It has a great diversity of ecosystems from the cold and high Himalayan ranges to the seacoasts, from the wet northeastern green rainforests to the dry northwestern arid deserts. Different types of forests, wetlands, islands, estuaries, oceans, and plains endow the country combined with a rich blend of diversified natural settings. Natural and biological resources in the country being abundant, the kind of exploitation they had to undergo through the ages has also been awful, leading to the large-scale degradation of the environment in multifarious ways. Since time immemorial, the efforts of the people to conserve and utilize the natural resources in a sustainable manner have been quite exemplary. Many customary and community norms were evolved by the society to protect the environment. With changing times and scenario, these undocumented traditional doctrines took a back seat, paving the way to codified laws in India. Industrial development, increased population, urbanization, pollution, deforestation, mismanagement of water resources, etc., have resulted in a distraught state of India's pristine environment. It now becomes imminent for us to look into the evolution of environmental legislation in India during three epochs; environmental conservation during ancient and medieval periods; environmental regulation during British rule; and protection and improvement of environment in independent India.

## **I. ENVIRONMENTAL PROTECTION DURING ANCIENT AND MEDIEVAL PERIODS**

Environmental protection is not a new concept to Indians. It has been a 5000-year-old history and tradition for them. The efforts for environmental protection can be traced from early Indian history to the modern age. In early days, many religious and customary norms governed environmental conservation. The people gave utmost importance and reverence to every aspect of nature. They seemed to have understood the significance of environment for the sustenance of life on earth. It was the dharma[1] of each individual in the society to protect nature. The people worshipped the objects of nature. The trees, water, land and animals gained important position in the ancient time[2]. The five important elements of nature called the Panchaboothas[3] were divine incarnations to them. Moreover, natural resources management was given prime importance in ancient India. Conservation of water bodies and protection of forests and wildlife were considered to be important aspects of governance by the rulers and local people. Punishments were prescribed for causing injury to plants[4]. Sacred groves were the inherent feature of the ecological heritage and tradition. They were kept undisturbed since time immemorial[5]. According to evidences in Vedas[6] and Kautilya's Arthashastra[7], different dynasties accorded top priority to environmental protection and sustainable use of its components. All of the tree parts were considered important and sacred and Kautilya fixed punishments based on the destruction of the specific part of the tree[8]. Some of the important trees were even elevated to the position of God. Manu imposed a condition on mankind to protect forests[9]. The rivers also enjoyed a high stature in the society[10]. The Ashoka Edicts, <https://assignbuster.com/comparison-of-the-black-letter-law-law-general-essay/>

especially the 5th Pillar Edict, states that how animals and birds were protected in those days[11]. The major drawback of this period was that India was not a single political entity and consisted of many empires and small kingdoms. The result, there was no uniform agenda for environmental protection throughout the country and the priority for environmental conservation varied from time to time, ruler to ruler. The rural and tribal communities evolved unique rules to be followed by them. For instance, the customary laws prevailing in Arunachal Pradesh are so effective even today[12]. Though the customary and religious norms contributed tremendously to the conservation of environment, the right spirit was lost somewhere in between, both in thought and in deed, and a number of superstitious and unsustainable rituals crept into the religious practices that resulted in affecting the water bodies, flora and fauna in due course. The values of customary and community norms diminished considerably over time as the statutory instruments started encroaching the fields. In medieval period, though there have been instances of establishment of nature parks, gardens, and fruit orchards by the Mughal rulers around their palaces and along banks of rivers, they did not have any definite policy to protect the forests or wildlife. Rather they were merely considered to be a good source of revenue and pleasure. The notable feature of the Mughal regime was the growth of interest in natural history. Both Babar's account of Indian flora and fauna[13] and Jahangir's investigations in natural history are well known while Salim Ali, the celebrated ornithologist, drew attention to their contributions as naturalists long ago[14]. Adbul Qadir Badauni lists among sins and offences, the three sins, of cutting down a shady tree, making a

profession of killing animals, and selling away human beings, as heinous[15]. Akbar's efforts in promoting afforestation in common property resources, management of water bodies, and his disapproval of killing animals are legendary[16].

## **II. ENVIRONMENTAL PROTECTION DURING BRITISH RULE**

The advent of British rule significantly changed the nature of environmental governance in India. The early days of the British rule marked large-scale plundering of natural resources from India. The forest resources were the major casualties[17]. However, the British regime resorted to a legalized exploitation in due course. The exploitation of forest resources in a legitimate manner was included in the first forest law, the Indian Forest Act, 1865, passed by the Supreme Council in England. Subsequently, it was amended in 1878. The provisions of this Act established a virtual state monopoly over the forest in a legal sense on one hand and attempted to establish, on the other, the customary use of forest by the villagers as not a right, but a privilege that could be withdrawn at will[18]. The principles of ' eminent domain' and ' public purpose' were used to validate the acquisition of forestland by the government. In 1884, a Forest Policy was formulated by the British Government with the objectives of promoting the general well being of the people and, preserving climate and physical conditions of the country. The Indian Forest Act, 1927 was enacted to implement this Forest Policy. The 1927 Act was passed with an objective to consolidate the existing laws relating to forests, the transit of forest produce, and the duty leviable on timber. This Act also established reserved forests, protected forests, and

village forests. Another aspect of the British Rule is that, it marked the establishment of industries in coastal and other parts of the country. Through this process many enactments were made by them to deal with water, air, and land pollution. The then prevailing common law system viewed the environmental problems as public nuisance. The Shore Nuisance (Bombay and Colaba) Act 1853, was one of the earliest laws made by the British Regime to counter water pollution caused by industries[19]. The Oriental Gas Company Act, 1857 contained provisions to regulate pollution caused by the Oriental Gas Company. It recognized the compensation to the persons whose water was affected by the company's discharges. The North India Canal and Drainage Act, 1873 was another legislation which contained provisions prohibiting any interference with or alteration in the flow of water in any river or stream so as to endanger, damage, or render less useful any canal or drainage[20]. The Indian Easements Act, 1882, the Indian Fisheries Act, 1897, the Bombay Smoke Nuisance Act, 1912, and the Bengal Smoke Nuisance Act, 1905, was other enactments that dealt with different aspects of environment. The Indian Penal Code (IPC), 1860 in Chapter 14 (Sections 268 to 291) contains provisions relating to public nuisance, public health, safety, and convenience. The Criminal Procedure Code (Sections 133 to 144) also deals with abatement of public nuisance. On wildlife conservation, the British regime undertook two significant steps. They were the Elephants Preservation Act 1879 enacted by the Madras Government and the Wild Birds and Animals Protection Act 1912. The purpose of British rule in India was not to protect the nature's wealth and people's interests in India. Hence, one cannot expect that they would make laws for the betterment of the

country and environment. It is obvious that the content of their laws furthered their own intention of getting the best out of available resources for their benefit. However, their initiatives in making laws on every aspect paved the way for establishment of a formalized legal regime in the country and provided a platform for environmental jurisprudence in India.

### **III. ENVIRONMENTAL PROTECTION IN INDEPENDENT INDIA**

The aim of the independence movement was to release the people and country from the clutches of British regime and govern our country by our own people with our own laws. During the foreign rule, it was not only the people who suffered, but also the environment, which deteriorated in many ways. After independence, the hitherto people and environment unfriendly laws and policies have been attempted to be overhauled, modified and repealed with new provisions in tune with the Constitution of India. The Constitution empowered the Parliament of India and the State Legislatures to enact laws as per the entries found in List I[21] and II[22] of the Seventh Schedule respectively. List III[23] is the Concurrent List on which both the Parliament and State Legislatures can make laws. When a Central law conflicts with a State law on a Concurrent subject, the Central law prevails. However, if the State law enacted subsequent to the Central law, obtains the assent of the President, the State Law will prevail[24]. The Parliament can also make laws on the residual power[25], in the national interest[26], on any State subject based on the consent of the State Legislatures[27] or give effect to treaties and international agreements[28]. In order to curb water pollution, major steps were taken. The Factories Act, 1948 enacted to secure

health, safety and welfare of the workers employed in factories, contained provisions dealing with disposal of trade waste and effluents[29]. The Damodhar Valley Corporation (Prevention of Pollution of Water) Regulation Act, 1948 authorized the Corporation to make regulations with previous sanction of the Central Government for prevention of water pollution. The prevention was extended to any person including local authorities and vessels. The Mines Act, 1952 contains provisions for health and safety of the employees by providing "cool and wholesome" drinking water[30]. The River Boards Act, 1956 established River Boards for regulation and development of inter-state rivers and river valleys. One of the functions of the Board is to advise the State governments on prevention of pollution of waters on the inter-state rivers. To give effect to the International Convention for the Prevention of Pollution of the Sea by the Oil, 1954, the Merchant Shipping Act, 1958 was enacted. This Act regulates and controls the discharge of oil or oil mixture by ships or tankers. Laws on atomic energy[31], insecticides[32], river pollution[33], noise pollution[34] and land management[35] were the other initiatives by the Central and State governments. The planning process in India responded to the problem at a snail's pace. It was only in the Fourth Five Year Plan the necessity of introducing environmental aspect into the planning process was clearly articulated[36]. The Fifth Plan (1974-79) stressed the need for environmental protection while pursuing development. The Sixth Plan (1980-85) devoted a complete section to "Ecology and Environment" and called for a bold new approach to development, based on techno-environmental and socio-economic evaluation of each developmental project. The Seventh, Eighth, and Ninth Plans also emphasized the need for



environmental planning. The Tenth Plan (2002-2007) proposed very vital environmental strategies for achieving sustainable development using key indicators such as (i) encouraging multi-stakeholder participatory process involving effective exchange of information; (ii) supplementing command and control regime with market based economic instruments and evolving environmental markets at least on experimental basis; (iii) evolving methodologies and apparatus for indicators/indices of sustainability, monitoring process, assigning responsibility, incentives and accountability; (iv) promoting sustainable consumption levels and patterns through effective classification and awareness programmes; (v) promoting sustainable production, transportation, clean technology, waste minimization, renewable energy, and energy efficiency; (vi) institutionalizing cross-sectoral and inter-disciplinary research and transparency in decision making; (vii) professionalising Pollution Control Boards with built-in accountability, etc[37].

11th Five year plan. Environment Increase forest and tree cover by 5 percentage points. Attain WHO standards of air quality in all major cities by 2011-12. Treat all urban waste water by 2011-12 to clean river waters. Increase energy efficiency by 20% Target growth: 8.33% Growth achieved: 7.9%

On the eve of the United Nations Conference on Human Environment in 1972, the Pitamber Committee was set up to prepare a report on the State of Environment in India. Based on its recommendations, a National Committee on Environmental Planning and Coordination (NCEPC) was constituted by the Government of India in the same year within the Department of Science and Technology, to plan and coordinate environmental programmes and policies and advice various ministries on environmental protection. In 1980, a high-

powered committee was set up under the Chairmanship of Mr. N. D. Tiwari. This committee suggested a number of legal and administrative measures for environmental protection. It has recommended insertion of a new entry on " environmental protection" in the Concurrent List to enable the Central government to legislate on environmental matters, which has still not seen the light of the day[38]. Subsequently, a Department of Environment was set up in the Ministry of Science and Technology, which was later elevated to form an exclusive Ministry of Environment and Forests in the Cabinet in 1985. The year 1972 also marked a watershed in the environmental conservation movement and development of environment regulation in India. The Stockholm Conference proclaimed that the man had the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that presented a life of dignity and well-being. The Stockholm Declaration mandated all the countries to approach environmental problems with a new vigor by enacting fresh laws and policies in their countries. India responded to the Declaration to a great extent and new special legislations have been enacted besides upgrading the existing ones.

## **Constitutional Mandate**

The Constitution contained provisions such as Articles 39 (b)[39], 47[40], 48[41]and 49[42]which provided an indirect and tangential reference to environment, they did not prescribe a comprehensive national agenda to protect and conserve the environment in its totality. This prompted the eminent jurist, Prof. Upendra Baxi to comment that the Constitution of India was " environmentally blind". The Constitution of India was amended in

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1976[43]to incorporate two important provisions on environment in the Constitution. Article 48-A was inserted into the Part IV of the Constitution making environmental protection a part of Directive Principles of State Policy. Article 48-A directs the State " to protect and improve the environment and to safeguard forests and wildlife". Article 51-A(g) declared that it shall be the fundamental duty of every citizen of India " to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures". This is a significant leap forward in the environmental management in India. Article 48-A mandated the State to make new laws and policies for the protection of environment. Taking cue from the fundamental duty under Article 51-A(g) and ' Right to Life' under Article 21, many Public Interest Litigations (PIL) were filed by the Indian citizenry to assert their environmental rights. The Forty Second Amendment inserted a new entry " Population Control and Family Planning"[44]into the Concurrent List, while " Forests"[45]and " Protection of Wild Animals and Birds"[46]were moved to the Concurrent List from the State List enabling the Parliament and the State Legislatures to enact suitable laws. Part IX and IX-A were added into the Constitution by 73rd and 74th Amendments in 1992 to give constitutional sanction to democracy at the grass root level through panchayats[47]and municipalities[48]. The local bodies are assigned with the powers to perform various environmental matters as enumerated in Eleventh and Twelfth Schedule of the Constitution.

## **I. Pollution Related Laws**

The earlier legislative efforts were piecemeal and inadequate until the 1970s when the central government began to enact comprehensive environmental

laws[49]. As far as environmental laws are concerned, they can be classified into two categories: laws dealing with pollution and laws pertaining to the conservation of nature such as forests and wildlife. Among the laws dealing with pollution, the Water (Prevention and Control of Pollution) Act, 1974, the Water (Prevention and Control of Pollution) Cess Act 1977, the Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986, the Public Liability Insurance Act, 1991, the National Environment Tribunal Act, 1995, and the National Environmental Appellate Authority Act, 1997, require special mention. These are special enactments to deal with the problems posed by industrial activities.

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

The Water Act of 1974 represented one of India's first attempts to deal comprehensively with an environmental issue. As water is a State subject under the Constitution, it was enacted under Article 252 (Clause 1) that empowers the Parliament to make laws on any entry found in the State List if two or more State Legislatures consent to a Central Law. The Act provides for the prevention and control of water pollution and maintenance and restoration of wholesomeness of water. It establishes a Central Pollution Control Board[50] at the national level and State Pollution Control Boards[51] in every State in order to administer and implement the Act. Before the establishment of an industry which is likely to discharge sewage or trade effluents, the project proponent should get prior consent of the State Pollution Control Board and comply with the conditions laid down by the Board[52]. Any violation of the provisions of the Act will attract penal

provisions[53]. The State Pollution Control Board and citizens[54] can launch prosecution against the polluting industry.

### **The Water (Prevention and Control of Pollution) Cess Act, 1977**

The purpose of the Water Cess Act is to levy and collect cess on water consumed by persons carrying on certain industries and by local authorities with a view to augment resources of Central and State Boards constituted under Water Act 1974. According to the Act, the industries and local authorities are subject to the cess if they use water for (a) industrial cooling, spraying in mine pits, or boiler feed, (b) domestic purposes, (c) processing which results in water pollution by biodegradable water pollutants, or (d) processing which results in water pollution by pollutants which are not easily biodegradable or are toxic[55]. A rebate of 25% is available for the person or local authority for installing plants for the treatment of sewage or trade effluents[56]. The rebate will not be available for persons who consume water in excess of the maximum prescribed quantity or fail to comply with the Water Act, 1974 and the Environment (Protection) Act, 1986[57].

### **The Air (Prevention and Control of Pollution) Act, 1981**

The Air Act was enacted for the prevention, control and abatement of air pollution. The Central and State Pollution Control Boards were envisaged by the Act, and for the purpose of this Act, the Boards constituted under the Water Act, 1974 shall be deemed to be the Boards for the Prevention and Control of Air Pollution[58]. The State Governments are empowered to declare air pollution control areas[59]. Consent of the State Pollution Control

Board is required to establish or operate any industry in an air pollution  
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controlled area[60]. The State Pollution Control Boards can launch prosecutions against the industries violating the conditions laid down in the consent orders or other provisions of the Act. An Amendment made to the Act in 1987 empowered the citizens to file cases against polluting industries after giving sixty days' notice to the State Pollution Control Board[61].

### **The Environment (Protection) Act, 1986**

The Environment (Protection) Act was the response to a widely felt need for a general legislation for environment protection. Under the Act, the Central Government is empowered to take all measures to protect and improve the environment[62]. It is a comprehensive legislation, which covers not only industrial pollution, but also all aspects of environmental degradation. It does not create any permanent authority like Central or State Pollution Control Boards as established by the Water Act or Air Act. The Central Government is empowered to take all measures, as it deems necessary for protecting and improving the quality of environment, and preventing, controlling, and abating environmental pollution[63]. Such powers include coordination of State actions, planning and execution of a nationwide programme for the prevention, control, and abatement of environment pollution; laying down standards for quality of environment and emission discharge; restriction of areas in which industrial operations shall not be carried out; standards for hazardous wastes; etc. The Act gives powers to the Central Government to make Rules or Notifications or creation of any authority to deal with specific environmental problems in the country[64]. Some of the notifications and rules made under the Act are the Hazardous Waste (Management and Handling) Rules 1989; the Manufacture, Storage and Import of Hazardous <https://assignbuster.com/comparison-of-the-black-letter-law-law-general-essay/>

Chemicals Rules 1989; the Coastal Regulation Zone Notification 1991; the Scheme of Labeling of Environment Friendly Products (Ecomarks) 1992; the Notification on Environmental Statement 1992; the Notification on Environmental Impact Assessment 1994; the Notification on Public Hearing 1997; the Bio-medical Waste (Management and Handling) Rules 1998; the Recycled Plastics Manufacture and Usage Rules 1999; the Notification on Dumping and Disposal of Fly ash 1999; the Noise Pollution (Regulation and Control) Rules 2000, the Municipal Solid Waste (Management and Handling) Rules, etc.

### **The Public Liability Insurance Act, 1991**

This Act was enacted to provide for public liability insurance for the purpose of providing immediate relief to the public affected by accidents occurring while handling hazardous substances. The owner of the industry is obligated to compensate the victims irrespective of any negligence or default on their part. Where any death or injury has occurred to any person, other than a workman, or any damage to any property has resulted from an accident, the owner of the industry will be liable to give relief as specified in the Schedule. The maximum compensation for injury or death is Rs. 25, 000 and the compensation in respect of any damage to private property is restricted to Rs. 6, 000. Every industry must carry liability insurance against claims arising from potential accidents. This Act does not apply to workmen of the industry covered by the Workmen's Compensation Act.

### **The National Environmental Appellate Authority Act, 1997**

This Act established a National Appellate Authority to hear appeals against orders granting environmental clearance in areas where restrictions are imposed on setting up of any industry, operation or process, subject to certain safeguards as provided under Environment (Protection) Act, 1986.

### **The National Environmental Tribunal Act, 1995**

This Act has been enacted to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance. A national environmental tribunal was to be set up under the Act for effective and expeditious disposal of cases arising from industrial accidents with a view to giving relief and compensation for damages to persons, property, and environment. This Act is not brought into force yet.

## **II. Nature Conservation Laws**

The enactments relating to conservation of nature such as forests and wildlife include the Wildlife (Protection) Act 1972, the Forest (Conservation) Act 1980, the Protection of Plant Varieties and Farmers' Rights Act 2001 and the Biological Diversity Act 2002.

### **The Wildlife (Protection) Act, 1972**

This Act provides for the protection of wild animals, birds and plants and constitutes authorities such as Director of Wildlife Preservation, Wildlife Wardens, and Wildlife Advisory Boards for that purpose. According to the Act, wildlife means and includes any animal, bees, butterflies, crustacean, fish and moths and aqua or land vegetation, which form part of any habitat.



An amendment made to the Act in 1986 and 1991 prohibited all kinds of trade of wild animals and animal articles.

### **The Forest (Conservation) Act, 1980**

This Act is a significant piece of legislation that seeks to conserve forests from any sort of developmental activity. The underlying spirit of this legislation is that it prohibits the use of forestland for any non-forest purpose, except with the prior approval of Central Government. According to the Act, ' non-forest purpose' means breaking up or clearing of any forest land for cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticulture crops or medicinal plants and any purpose other than reforestation. The Protection of Plant Varieties and Farmers' Rights Act, 2001 and the Biological Diversity Act, 2002, though enacted to achieve many other objectives, contain provisions to protect and conserve the plant genetic resources and biological diversity as their cardinal principles.

### **Environmental policies**

In India, policies do not coincide with the laws. The usual practice is that whenever the government is convinced that a problem persists and has to be solved, a policy will be formulated describing the strategies to solve the problem. The next step eventually leads to enactment of a law to implement such a policy. But in India, it is the other way round. First, a law will be enacted either to fulfill the commitments made in international fora or to satiate the public outcry relating to certain problems within the county. Later realizing the fact that the law does not have a policy back up, a policy is hurriedly brought out to fill the vacuum. Furthermore, these policies are

primarily the brainchild of bureaucrats leaving negligible scope for equitable participation of the public in the whole process. Of late, however, the trend is changing, and a more participatory approach is being emphasized in evolving policies[65]. However, in India, the policies pertaining to environment are the National Ocean Policy, 1983; the National Water Policy, 1987; the National Forest Policy, 1988; the Policy Statement for Abatement of Pollution, 1992; the National Conservation Strategy and Policy Statement on Environment and Development, 1992; the Wildlife Conservation Strategy, 2002 are in force while the National Biodiversity Strategy and Action Plan is on the anvil. Role of Judiciary in environmental protection Any discussion on environmental law without taking into account the role of judiciary in India will be incomplete. If there is any aspect of environment, which is protected or any provision of environmental law that has been implemented in the country, it is largely due to the lead role, played by the judiciary. The Indian judiciary has always been responsive towards environmental protection and conservation. In fact, the higher judiciary has created a new environmental jurisprudence in the country over the years by delivering many landmark judgments, which changed the state of environment in a significant way. Before the enactment of special environmental laws such as the Water Act, the Air Act, and the Environment (Protection) Act, the common law principles enshrined in the Law of Torts, and the Indian Penal Code 1860, the Code of Criminal Procedure, and the Code of Civil Procedure 1908, were the major legal instruments which dealt with environmental cases as the judiciary viewed the environmental problems as public nuisance cases. Lately, the judiciary, though continue using the common law principles, take cognizance

of the newer laws and policies in dealing with environmental cases. The Ratlam Municipality Case[66]for the first time gave a human rights dimension to Section 133 CrPC. When the municipality failed to discharge the statutory duties such as cleaning the roads and drains, and thereby affecting a large community in the guise of insufficiency of funds, the Supreme Court held that when an order is given under Section 133 CrPC by the Executive Magistrate, the municipality can not wish away its duties by pleading financial inabilities. The code of criminal procedure operates against the statutory duties and agencies regardless of the cash in their coffers because human rights have to be respected by the State regardless of budgetary provisions. The statutory agencies should not defy their duties by urging in self-defense, a self-created bankruptcy of perverted expenditure budget[67]. The Ratlam judgement illustrates how an activist court can transform a seemingly dull legislation into a powerful mandate to protect environment[68]. The level of education and awareness among the people towards environmental issues enhanced the quantity and quality of cases filed before the courts. The environmental justice delivery in the country witnessed a sea change, thanks to the interest evinced by the visionary Supreme Court judges like Justice V. R. Krishna Iyer, Justice P. N. Bagawathi, Justice Kuldeep Singh, etc. Around 1980, the Indian legal system, particularly in the field of environmental law, underwent a sea change in terms of discarding its moribund approach and, instead, charting out new horizons of social justice[69].

## **Era of public interest litigation and judicial activism**

The concept of public interest litigation, propounded by the US Supreme Court and effectively imported into India in the 1980s, has been utilized by many social workers to fight against various maladies faced by the society. Individuals, non-governmental organizations and advocates extended the concept to environmental cases also. Very often the courts have encouraged public interest litigation for the purpose of protecting environment. Public interest litigation is primarily judiciary-led and even to some extent judiciary-induced and a product of juristic and judicial activism in the Supreme Court[70]. The concept of 'right to life' enshrined in Article 21 of the Constitution assumed a new meaning after Maneka Gandhi's case[71], wherein the Supreme Court held that the right to life and personal liberty, guaranteed under Article 21 can be affected only by a just, fair and reasonable' procedure. The scope of Article 21 was widened, and the Supreme Court ruled that the right to life is not confined to mere animal existence, but extends to the right to live with basic human dignity[72]. The late 80s and 90s is considered to be the golden era of environmental litigation in India. The Courts came forward to encourage public interest litigations to redress environmental injustices. Many procedural formalities have been waived. The doctrine of locus standi has been considerably relaxed. In a public interest litigation (PIL), anybody who is having genuine concern for the public may file public interest litigations before the High Courts and the Supreme Court under Article 226 and 32 of the Constitution of India respectively. Right to live being the most important of all human rights implies the right to live without the deleterious invasion of pollution,

environmental degradation and ecological imbalances[73]. The higher judiciary in India has extended the scope of Article 21 to include the right to live in a healthy environment. In *Rural Litigation and Entitlement Kendra Vs. State of Uttar Pradesh*[74] the right of people to live in a healthy environment with minimal disturbance to ecological balance was upheld. In the following *M. C. Mehta cases*[75], the Supreme Court, though did not clearly spell out the right to healthy environment, it has indirectly approved the human rights of the people to live in a clean environment. In *M. C. Mehta vs. Union of India*[76], otherwise called the Ganga Pollution Case, the environmental crusader, Shri. M. C. Mehta, filed a public interest litigation before the Supreme Court about the water pollution in the river Ganges caused by the tanneries in the Kanpur area. The Supreme Court ordered the tanneries functioning in Uttar Pradesh to set up effluent treatment plants or otherwise close them. In *Chhetriya Padushan Mukti Sangarsh Samiti Vs. State of Uttar Pradesh*[77], the Supreme Court for the first time hinted that the right to environment is contemplated in Article 21 of the Constitution. In *Subash Kumar Vs. State of Bihar*[78], Justice K. N. Singh categorically declared that, "the right to life enshrined in Article 21 includes the right to enjoyment of pollution free water and air for full enjoyment of life". In *Vellore Citizens Welfare Forum case*[79], the Supreme Court was approached by the petitioner to issue directions against the tannery pollution caused by the discharge of untreated effluents in Vellore area in Tamilnadu. The untreated effluents affected the agricultural lands, groundwater and health of the local people. The Court delivered a landmark judgment in this case and directed the tanneries to set up effluent treatment plants. About 200 tanneries, which

failed to establish effluent treatment plants, were closed in the interest of the public. The court directed the Central government to constitute an authority under Environmental (Protection) Act, 1986 to deal with polluting industries. The result, the Loss of Ecology Commission was set up to assess the quantum of compensation to be awarded to the affected people in the area. The court has for the first time invented 'pollution fine' against the tanneries. In this case, the Supreme Court adopted the international principles such as, precautionary principle; polluter pays principle; and the concept of sustainable development as part of law of the land. The Supreme Court also directed the Madras High Court to set up a Green Bench to deal with environmental cases exclusively. In the Taj Mahal case[80], the Supreme Court dealt with many foundries, chemical industries and the Mathura refinery that damaged the splendor of the Taj through air pollution. In this case, the Court ordered the local authority to establish the Taj Trapezium Zone (TTZ) by creating a green belt around the Taj. It ordered about 292 hazardous industries to either switch over to natural gas as an alternative fuel or relocate themselves as per the directions of the court. Justice Kuldip Singh observed that the old concept of "development and ecology cannot go together" is no longer acceptable and opined that "sustainable development" is the answer. In M. C. Mehta vs. Union of India[81], the Supreme Court ordered the Delhi Transport Corporation to withdraw buses over 15 years old and directed them to switch over to compressed natural gas (CNG) instead of diesel in order to prevent air pollution. The Court also prescribed a quota regime for registration of private non-commercial vehicles in the National Capital Territory. Godavarman's

case[82] was a significant case as far as forest protection is concerned. This was the first judicial intervention in forest administration in India. The Supreme Court gave wider interpretation to the term 'forest' to mean even the private forest areas. In relation to seven northeastern states, the Court banned felling and transportation of trees and timber from the forest. Directions have been issued to the State governments to the effect that no patta should be issued with regard forestland to anyone on any grounds. In Banwasi Ashram case[83], the question was whether the adivasis living within the forest area have any claim over the land and related rights. The Supreme Court held that with regard to the land that forms part of the reserve forest, the tribals could claim rights. In Ambica Quarry's case[84], the issue was whether exploitation of mining resources in the forest area could continue in the light of Forest Conservation Act, 1980. The Supreme Court ruled that the renewal of license for mining in the forest area could be claimed as a matter of right. Besides the Supreme Court, the High Courts have also elicited interests in solving environment-development paradox in critical situations. In Damodar Rao vs. S. O. Municipal Corporation, Hyderabad[85], the High Court of Andhra Pradesh held that the State government's decision to alter the public park into a residential block could not be sustained and observed that protection of the environment is not only the duty of the citizens but also the obligation of the state. Similarly, in V. Lakshmi pati vs. State[86] and Attakoya Thangal vs. Union of India[87], the Karnataka and Kerala High Courts upheld the environmental rights of people over the developmental plans of respective states. In L. K. Koolwal vs. State of Rajasthan[88], the Rajasthan High Court ordered the municipal authorities

of Jaipur to clean the city and observed that maintenance of health, sanitation, and environment falls within Article 21 of the Constitution, which renders the citizens the fundamental right to ask for affirmative action. In the process of judicial activism, many new doctrines and principles such as polluter pays principle, precautionary principle and sustainable development principle[89]; public trust doctrine[90] and the principle of absolute liability[91], principles of inter-generational and intra-generational equity, etc., have been imported by our courts into the Indian legal system. Though the public interest litigation movement provided new vistas of environmental litigations, it also gave room for frivolous cases in the courts, which prompted the Supreme Court to formulate guidelines to entertain public interest cases.

### **State of implementation**

Notwithstanding the heights achieved in environmental litigations, thanks to the extraordinary gesture exhibited by the higher judiciary, there have been many shortcomings in the system due to the lack of enforcement and implementation of environmental laws. Access to information and justice are still a distant dream for millions of people. The legislature is quick to enact laws regulating most aspects of industrial and developmental activity, but chary to sanction enforcement budgets or require effective implementation. Across the country, government agencies wield vast power to regulate industry, mines, and other polluters but are reluctant to use their power to discipline violators. The judiciary, a spectator to environmental despoliation for more than two decades, has recently assumed a pro-active role of public educator[92], policy maker[93], super administrator[94], and more



generally, amicus environment. The flurry of legislation, lax enforcement, and assertive judicial oversight have combined to create a unique implementation dichotomy; one limb represented by hamstrung formal machinery comprised of the pollution control boards, forest bureaucracies, and state agencies; the other consisting of a non-formal, ad hoc citizen, and court driven implementation mechanism.[95] Whatever may be the quality of the law and the trend of judicial activism, if the level of implementation shows no improvement, nothing can be achieved towards environmental protection. We cannot run a country with only courts and judgments. India has achieved legislative and judicial activism. What lacks is administrative activism. Laws are observed not in compliance but in breach. In India, the peculiar phenomenon is that one has to file a case for solving an environmental problem. After obtaining judgment, in order to enforce or implement the directions made in the judgment, another case has to be filed in the Court. Lack of clear-cut implementation protocols have led to the erosion of the system. Administrative agencies created under environmental statutes are required to implement legislative mandates. Frequently, for lack of staff, money, or will, these agencies fail to implement the laws under which they operate and ecological degradation continues to be unabated[96]. As the executive failed to discharge its statutory duties, the public-spirited individuals and voluntary organizations were compelled to move the courts. When the legitimacy of judicial activism was called into question, the Supreme Court minced no words and observed, " Even though, it is not the function of the court to see the day-to-day enforcement of the law, that being the function of the executive, but because of the non-

functioning of the enforcement agencies, the courts as of necessity have had to pass orders directing the enforcement agencies to implement the law for the protection of the fundamental rights of the people passing of appropriate orders requiring implementation of the law, cannot be regarded as the court have been usurped the functions of the legislature or the executive"[97].

## **The Need for Capacity Building**

Though the higher judiciary has pioneered in environmental justice delivery, the lower judiciary fell short by not responding adequately despite the fact that most of the environmental laws give jurisdiction to the lower courts at the first instance[98]. The reason for this can be traced to the legal educational system that was prevalent during the times of our present judges and advocates, as the same did not advocate topics relating to environmental law within the curriculum compulsory. Unlike the case then, the present situation has improved tremendously and environmental law was included as a compulsory subject in most law colleges and universities in the country. Furthermore, environmental law appreciates the scientific evidence. In order to adjudicate environmental cases, it is essential for judges to be well aware of scientific nuances[99]. In India, in several cases[100], the Supreme Court indicated that the judges are finding it difficult to decide environmental cases, as they are complicated. In USA, the competency of generalist judges to decide upon the scientific matters were called into question, which resulted in establishment of the Carnege Commission in 1993 to probe into the matter. This warrants that adequate capacity building should be provided to the judicial officers on the legal and scientific aspects of environmental protection and degradation. The Australian model of

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incorporating scientific members into the judicial bench while deciding environmental cases may also be taken into consideration. The need for establishment of Environmental Courts or constitution of an Ecological Sciences Research Group to help the court and the government as an information bank as suggested by Justice P. N. Bhagawati[101] may be taken into consideration. In context, capacity building for the bench and bar becomes imperative to achieve better environmental justice delivery system. Capacity building is a continuous process in any activity and more so in environmental law because of the nature of the subject and diversity of actors involved. Capacity building, after all, is not just about education only. It includes motivation, information management, skill development, monitoring, and coordination and ability to accommodate varying perceptions keeping the goals of environmental law[102]. Capacity building in environmental law must include dissemination of information on strengthening environmental policy, policy planning process, environmental administration, environmental justice delivery system, encouraging participatory process, equipping enforcers of environmental law, and promoting environmental education. In a diverse country like India, the contribution of people's participation in effective environmental management can be phenomenal if they are made aware of their responsibilities as laid down in the legal and policy framework. The need for better environmental capacity building strategies grows with the increasing magnitude of environmental problems and the progressive nature of threats to environmental resources. While growth is a very compelling priority, the moot question is how to speed economic growth without affecting the

environment on which the growth itself sustains. Bringing together the industry, government and non-government organizations will help a lot in creating an environmentally sound and sustainable industrial development. Capacity building will also enhance compliance with environmental laws and standards. It should be viewed as complimentary to the efforts aimed at environmental enforcement and not as a substitute for that. It will also provide fora for consensus building and help develop institutions within government and industry to improve voluntary compliance with environmental statutes and standards. A healthy environment is indicative of a healthy nation. Capacity building is the key to solve many environmental problems and issues. In India, the judiciary, industrial managers, policy makers, enforcement agencies and voluntary organizations are the key players involved in the process of environmental governance, management and implementation. Effective and strategic capacity building programmes for these target groups will go a long way in creating a deeper understanding on their respective roles, besides substantially opening avenues for environmental information and easy access to environmental justice. This will eventually result in expanding the length, breadth, and depth of comprehension and appropriate implementation of environmental laws in the country.