Environment and Corporate Responsibility

ENVIRONMENT AND CORPORATE RESPONSIBILITY

Gazala Sharif • Insha Hamid

The world today is economically richer and environmentally poorer than ever. Over the years, there has been an increasing consciousness and realisation that environmental quality and economic development are complementary and not mutually exclusive. This is because, with technological advancements, environmental challenges are also on rise. As a result, there is a need to bring about necessary changes in the industrial and agricultural production patterns, utility services, consumer behaviour and life styles of the people keeping in view our social and developmental priorities for conservation and sustainable use of natural resources. Hence, environmental regulations and standards have been set-up by environmental bodies around. Indian industry and business too are under increasing pressure of meeting these environmental standards and regulations.

Gazala Sharif: A lawyer by profession with B.A,LLB(Hon's) from University of Kashmir, a Masters Degree in International Environmental law from Amity University Noida, currently pursuing Ph.D. in Human Rights Law from University School of Law and Legal Studies, Guru Gobind Singh Indraprastha university,Dwarka,New Delhi, under the able guidance of Prof. M. Afzal Wani. Published various papers on Environment, Human Rights, Women Rights, Child Rights, Traditional Knowledge and Intellectual Property Rights in national and international journals, and also on web portals. Also co-authored a book on "Education for All". Presented papers in various international conferences. Genuinely devoted to do some concrete work for the conservation of Environment.

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PREFACE

The world today is economically richer and environmentally poorer than ever. Over the years, there has been an increasing consciousness and realisation that environmental quality and economic development are complementary and not mutually exclusive. This is because, with technological advancements, environmental challenges are also on rise. As a result, there is a need to bring about necessary changes in the industrial and agricultural production patterns, utility services, consumer behaviour and life styles of the people keeping in view our social and developmental priorities for conservation and sustainable use of natural resources. Hence, environmental regulations and standards have been set-up by environmental bodies around. Indian industry and business too are under increasing pressure of meeting these environmental standards and regulations.

The environment must be regarded as an enormously complex system, one that includes not only the interdependent oceans, air and land, but also all forms of life and energy. The environmental problems that are our concern today air and water pollution, waste disposal, conservation and renewal of natural resources and Lessing of the effects of natural disaster cross-geographical and political boundaries. They have legal and economic implications; they affect human lives; and they are characterized by enormous quantities of data.

With the emergence of environmental destruction as a major threat to human survival and development the scope of environmental law has emerged as the most important tool of promoting development without destruction.

Environmental law as a distinct system arose in the 1960s in the major industrial economics. While many countries worldwide have since

accumulated impressive sets of environmental laws, their implementation has often been woeful. In recent years, environmental law has been seen as a critical means of promoting sustainable development. Policy concepts such as the precautionary principle, public participation, environmental justice and the polluter pays principle have informed many environmental law reforms in this respect.

In this perspective, an effective environmental law would involve highly difficult and complex issues that require a multidisciplinary approach. It involves measures while taking into account the culture, the value system, worldwide, socio-economic conditions, political systems and religious belief of a specific community. In a country of great diversity like India, framing of effective environmental laws and policies would indeed cover wide fields of study, in-depth research and his high creativity. The Indian judiciary's innovation in this respect is indeed a step in the right direction.

In this age of industrialization and globalization, corporations are as much part of our society as are any other social institutions. They represent a distinct and powerful force at regional, national and global levels. They exert enormous economic powers. The development of society, at various points of time, has a direct connection with the structure and functions of the corporations. Therefore, corporations shoulder great economic and socio-environmental responsibility. At the same time, corporations all over the world are major contributors towards environmental hazards and toxicity that are potential threat to the very existence of man in the milieu of our times which remains marked by industrial culture. Unregulated dumping of industrial waste poses serious danger to environmental safety. Illegal, unscientific and indiscriminate mining in some parts of the country has damaged the environment beyond repair. This is accompanied by dispossession of land and community property, resulting in the ever widening of the gap between the rich and the poor. It is a constitutional mandate that " The state shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good," and "that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."

Leave alone looking at an environmental and ecological destruction as a crime-and the person responsible as an environment criminal- the

general public is, to a certain extent, helpless in tackling environmental issues that affect their lives particularly when the offender is a powerful corporation. A corporation cannot claim immunity from criminal prosecution under the criminal laws. The concept of corporate criminal liability is evolving at the same time as the vital functions in the society and the impact their activities have on the environment are recognized.

CONTENTS

ABBREVIATIONS

A.C.	Appeal Cases
ACLR	American Criminal Law Review
AIR	All Indian Reporter
All ER	All England Reporter
AJCL	American Journal Of Comparative Law
CFCs	Chlorofluorocarbons
CITES	Convention on International Trade in Endangered Species of Fauna and Flora
CJEL	Columbia Journal of Environmental Law
CLA	Corporate Law Advisor
CLS	Critical Legal Studies
Colo. Ct. App.	Colorado Court of Appeals
Cr.PC	The Code Of Criminal Procedure
CREP	The Charter on Corporate Responsibility for Environment Protection
CSR	Corporate Social Responsibility
DLR	Dominion Law Reports
EIA	Environment Impact Assessment
ELR	Environmental Law Review
EPA	The Environmental Protection Agency
EPW	The Economic And Political Weekly
EU	The European Union

F Ev.L.Rev.	Fordham Environmental Law Review
GTL	Gauhati Law Times
HDI	Human Development Index
IJEES	International Journal of Ecology and Environmental Sciences.
ILR	Indian Law Reports
IPC	Indian Penal Code.
IUCN	International Union For conservation of Nature
J.CRIM.L. &Criminology	Journal of Criminal law and Criminology
JBE	Journal of Business Ethics
JILI	Journal of The Indian Law Institue
KB	The King's Bench
Loy.L.a.Rev.	Loyola Of Loss Angeles Law Review
MLJ	Madras Law Journal
NESHAPs	National Emissions Standards for Hazardous Air Pollutants
NGT	The National Green Tribunal
NGTA	The National Green Tribunal Act
ODS	Ozone-Depleting Substances
OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner
Org. & Env	Orginisation &Environment
PIL	Public Interest Litigation
QB	The Queen's Bench
RCRA	The Resource Conservation and Recovery Act
SARA	Superfund Amendments and Regulations Act
SCC	Supreme court Cases
TADA	The Terrorist and Disruptive Activities (Prevention Act)
UCIL	Union Carbide India Ltd.
UL.Rev	Utah Law Review

WCED	World Commission on Environment and Development
WLR	weekly Law Reports
RMFOs	Regional Management Fisheries Organisations
MARPOL	Marine Pollution
MDGs	Millennium Development Goals

TABLE OF CASES

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Ufzired States v. Mac Doplued & Watson Oil Co, 933 F.2d 35 (1 CCirl.991).

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Chapter-1

INTRODUCTION

1. THE PROBLEM

The ecological wisdom and value system of our ancestors have had an invaluable contribution towards preserving the earth for our well-being today. However, it is ironical that our scientific and technological advancement that has re-awaken our sense of awe and wonder at the universe and our natural environment has enabled us to destroy this common heritage rapidly, thus leaving us with a big question: what kind of earth shall we leave for our future generations? It is a crucial issue of our very existence on this planet-a fundamental question about the meeting the needs of today at the same time as being responsibility for the future of the earth. In this perspective, an effective environmental law would involve highly difficult and complex issues that require a multidisciplinary approach. It involves measures while taking into account the culture, the value system, worldwide, socio-economic conditions, political systems and religious belief of a specific community. In a country of great diversity like India, framing of effective environmental laws and policies would indeed cover wide fields of study, in-depth research and his high creativity. The Indian judiciary's innovation in this respect is indeed a step in the right direction.

In this age of industrialization and globalization, corporations are as much part of our society as are any other social institutions. They represent adistinct and powerful force at regional, national and global levels. They exert enormous economic powers. The development of society,at various points of time, has a direct connection with the structure and functions of the corporations. Therefore, corporations shoulder great economic and socio-environmental responsibility. At

the same time, corporations all over the world are major contributors towards environmental hazards and toxicity that are " potential threat to the very existence of man in the milieu of our times which remains marked by industrial culture."[1] Unregulated dumping of industrial waste poses serious danger to environmental safety. Illegal, unscientific and indiscriminate mining in some parts of the country has damaged the environment beyond repair. This is accompanied by dispossession of land and community property, resulting in the ever widening of the gap between the rich and the poor. It is a constitutional mandate[2] that " The state shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good," and "that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."

Leave alone looking at an environmental and ecological destruction as a crime-and the person responsible as an environment criminal- the general public is,to a certain extent, helpless in tackling environmental issues that affect their lives particularly when the offender is a powerful corporation. A corporation cannot claim immunity from criminal prosecution under the criminal laws. The concept of corporate criminal liability is evolving at the same time as the vital functions in the society and the impact their activities have on the environment are recognized.

1.1 SCOPE OF THE STUDY

This work explores the models of liability of corporations in the environmental crimes in the background of human being's relationship with nature and society's response to environmental destruction. It attempts at a brief assessment of the jurisprudential aspects of the traditional criminal law principles and their applicability to environmental crime. Hence, the significance and scope of this research may be seen in the background of the human-environment inter-relationship vis-à-vis the activities of corporation in the community. It is in this background that the study examines and analyses the concepts of sustainable

1 Furqan Ahamad,Legal Regulation of hazardous substances I (Daya Publishing House,Delhi,2009)

2 Clauses (b) and (c) of Article 39 of the constitution of India.

development, environmental crime, corporate criminal liability and Corporate Social Responsibility(CSR).

The study touches upon the existing laws, environmental legislations, polices and the approach of the Indian judiciary towards environmental offences. Wherever relevant, the study examines the international scenario, conventions, treaties and agreements. Among other relevant issues, the study tries to look into the following basic questions, which are pertinent to the scope of the study:

- Whether our existing environmental laws and policies:

(*i*) Reflect the deeper aspect of the Indian ethos;

(*ii*) give incentives for environmental protection;

(*iii*) are effective in preventing environmental disasters, or

(*iv*) whether they are merely punitive in nature, in the sense that they penalize the offender but fail to prevent the damage;

(*v*) whether the traditional principles of criminal law mechanically fit into the concepts of environmental crime;

(vi) whether there are any advantages or disadvantages in labelling an offender corporation as an environmental criminal;

(*vii*) whether the technical difficulties associated with prosecution in environmental crimes should consequently eliminate the tag of criminality to environmental offences;

(*viii*) whether a sanction against a corporation by way of fine alone in lieu of imprisonment is feasible;[3]

(*ix*) whether a heavy compensation to the victims is feasible and effective as a deterrent against potential corporate environmental offenders.

Keeping in view the scope of the study, the chapters are devised accordingly. Chapter 2 deals with the jurisprudential aspects of human-environment relationship, while highlighting the environmental scenario in the context of India. Then it critically looks at the concept of sustainable development in the background of such relationship, the infringement of which creates disharmony, imbalance and harmfull consequences. Hence, the next chapter (i.e, chapter 3) attempts analysing the concept of environmental crime, at the same time as examining the relevant provisions of Indian laws, legislations, regulations, and policies. Chapter

3 In view of the relevant provisions of the Indian Penal Code.

4 focuses on the liability of corporations in environmental crimes. It examines the various models of corporate criminal liability in general and corporate liability in environmental offences in particular. The chapter also touches upon the feasibility of fine as a penal sanction against the corporate offender.

In the backdrop of human-environment relationship, corporations should also be thought of in terms of responsibility and not merely in terms of liability. Hence, the 5th chapter attempts at exploring the relational dimension of Corporate Social Responsibility (CSR). 6th chapter (i,e concluding chapter) deals with Corporate Responsibility and Environment Impact Assessment.

1.2 METHODOLOGY

The study adopts a multidisciplinary approach towards understanding of the human-environment relationship. Then the relevant provisions of the Indian environmental laws and judicial decisions will be examined in the light of the Indian context as well as in comparison with the development in other countries, especially England. Keeping in mind the time-frame, the most suitable method adopted is the doctrinal method, to be carried out by means of an analysis of a wide range of literature, reports, statutes and judicial decisions available in various labraries.

Chapter-2

PERSPECTIVE ON ENVIRONMENT AND DEVELOPMENT

The way human beings view the world influences, the way they behave toward the environment. Our actions are determined by our values. Our environmental world view and values are the basis on which we give answer to various environmental problems, including framing of environmental laws and policies. The present chapter attempts at highlighting some of the jurisprudential aspects of the environment in the context of India. It briefly examines the concept of development in relation to environmental protection. Thus it forms the basic framework for the next chapters.

2.1 ANTHROPOCENTRISM, ECOCENTRISM, AND THEOSCENTRISM

Today, we have an inclination to think about nature in terms of fulfilling human needs; that is, we put human beings at the centre and see nature in the lights of these needs. This is purely an anthropocentric approach to the environment. The other approach is ‘eco centrism’, which centres on the needs of the nature (emphasizing on its beauty and integrity) and views human beings in the light of these needs.[4] The concept stresses on the intrinsic value of nature even when it has

4 Andrew J. Hoffman and Lloyed E. Sandelands, “Getting right with nature: Anthropocentrism, Ecocentrism, and theocentrism”. 18/2 *Org. & Env.* 141(June 2005).

no human use.[5] Both these views do not reconcile human beings with nature, therefore, they are inadequate.[6] The third approach, that is, 'theo centrism', by and large receives religious sanctions and can offer us a fresh and deeper insight into human being's relationship with nature.

2.2 RELIGIOUS ENVIRONMENTAL ETHICS

Religion, philosophy and culture are fundamental in understanding the concept of nature and its relationship with human beings. Religious texts provide conceptual; foundation of environmental protections. In Judeo – Christian traditions, there are enormous passages in the Bible that have references to nature.[7] Nature reveals the eternal power, greatness and glory of God.[8] The New Testament abounds in events connected with nature, and stories, parables and symbolisms drawn from the natural environment. The Old Testament text referring to 'subdue' and 'dominion'[9] has often been misinterpreted as the supremacy of human beings over nature and the power, authority and license to exploit nature wantonly and irresponsibly This misunderstanding, besides the enormous influence of platonic dualism,[10] has done enough damage

5 Jim Moran, "Three Challenges For Environmental philosophy", available at: http://www.philosophynow.org/issues/88/Three Challenges For Environment Philosophy?ref=list(Visited on February 21,2012).

6 Satyajit Singh, "Environment and Justice: The 'Public' Purpose of Water ", in Rajeev Bhargava, Michael Dusche & Helmut Reifeld (eds.), *Justice: political, social, juridical* 223, 224 (SAGE Publications, New Delhi, 2008).

7 The creation story (the Genesis account of creation); the goodness of creation (Genesis 1:31); Daniel 3:57-90; Psalms 19, 24:1, 33:6-9,42:1,66:1,3,89"11,96:11-13,98:4-5, 104, 114:1-8, 118:24, 145,150; proverbs 8:22-31; Ecclesiastes 3:1; Isaiah 51:12-16; 55:8-13; 65:17-25; Jeremiah 10:13; Hab, 2:14; Mark 6:12; Mathew 5:44-45; 6:28-32,10:29-31; John 3:16, 10:10; Romans 8:18-25:

8 Romans 1:19-20

9 Genesis 1:28: God blessed them; a den god said to them" Be fruitful and multiply, and fill the earth and subdue it; and have dominion over the fish of the sea and over the birds of the air and every living thing that moves upon the earth." All biblical references in this paper are citied from the Holy Bible, the new RSV(theological Publications in India, Bangalore 1992)

10 John H. Hick, Philosophy of religion 120 (prentice Hall of India, new delhi,4th ed., 1997); J, Baird CALLICOTT, "conceptual resources for environmental ethics in Asian traditions of thought; A Propaedeutic",37 PHILOSPHY east

to the environment. However, the Hebrew expression of 'subdue the earth' in this text connotes a "tough emphasis" in the context of the cultivation of the 'row earth', which is a means to fruitfulness.[11] A more theologically sound interpretation of the passage is the emphasis on the absolute dominion of god over His creation[12] and human beings having been given a share in this dominion of god, because they are created in His image and likeness,[13] as one theologian, John Sachs puts it. "[T]o be God's image or representative on

earth, to share God's dominion, means that we receive a share in God's power for creation, not simply over creation. It does not give us a license to exploit it as we please."[14] In other words, it lays emphasis on human being's power to 'recreate' or're-make' the earth; that is, when applied to the environment, the expression echoes Amratya sen's positive reception of "the human power to enhance and improve the environment in which we live."[15] The Constitution of India has

AND west 115-30 (1987), platonic dualism views the physical world just as an image of the perfect world, the world of Forms. The body- soul dichotomy views of body, (for that matter the world) as essentially material, earthly and a prison house that enslaves the soul. Such a worldwide foes not mean to encourage responsibly for the care of the environment as much as we care for the well being of the soul. A number of philosophical schools and great religions of the world share such a view. For instance, the Vedanta material object, the body is merely a illusory appearance and not real {see satish Chandra chatterjee and dhitendramohan data, an introduction to Indian philosophy,379(Calcutta university press, Calcutta, 4th edn. 1984)].among the religious traditions, for instance, see the judeo- Christian religion and the Islamic religion discourse on the body- soul conflict in "Islamic concept of spiritually"

11 David harte, " A chairman approach to environmental Law", in paul r. Beaumont; (ed), Christian perspectives in law reform 61 (paternoster press, Cumbria, 1998).

12 In the old testament, absolute power and dominion belongs to God: e.g.; Pslam 22:28 –" for dominion belongs to the lord, and he rules over the nations"; Colossians 1:16; ownership of the earth belongs to God (Pslam 24:1-2; 1corinthians 10:26); Deuteronomy 6:4.

13 Genesis 1:27: so God created humankind in his image, in the image of the god he created them; male and female he created them

14 John Sachs, the Christian Vision Of Humanity ; basic Christian Anthropology 17(the liturgical Press, Collegville,1991)

15 Amartya sen, the idea of justice 249(penguin books ltd, London, 2009)

recognised his human power and responsibility to 'improve' the natural environment, which is incorporated as one of the fundamental duties of every citizen of India.[16] Thus the Biblical expression 'subdue the earth' brings out the concept of the responsible and accountable stewardship, guardianship or trusteeship of the earth.[17] Thomas Aquinas argues that human being's domination over nature includes a competence to use and manages the world's resources, not selfishly, but in the interest of all.[18] Some prominent figures in the history of Christianity are great environmentalists.[19] Christian teachings on environment are abounding today.[20]

16 Article 51a(g) of constitution of India.

17 Supra note11 at 21-24

18 Thomas Aquinas,summa theological as quoted by alendra kiss and Dinah Shelton, international environmental Law 12 (transactional publishers, New York,3rd edition 2004)

19 ***For instance,*** St Francis of Assisi_ patron saint of ecology: see www_britannica_ comIEBchecked/topic/.../Saint-Francis-of-Assisi (Visited on April 20, 2012).

20 Eco-theology has become a vibrant concern and commitment among Christians. For instance, liSted here are a few important Papal/Episcopal documents and messages relating to ecological concern among Catholics: *A Hospitable Earth for Future Generations* by Pope Paul Vito the Stockholm Conference on Human Environment, 1 June 1972; *The Ecological Crisis. A Common Responsibility* by Pope John Paul II on the World Day of Peace, 1990, *Joint Declaration on Articulating a Code of Environmental Ethics* (The Venice. Declaration) by Pope John Paul 11 and Eastern Orthodox Ecumenical Patriarch Bartholomew, 2002;
"God made man the steward of creation" by Pope John Paul II, 17 Jan 2001; *Message of John Paul II for the 23rd World Day of Tourism,* 24 June, 2002 (on being cautious about ecotourism); *Centesimus Annus* 37-38 (1991) by Pope John Paul 11 (humans must preserve both the natural and human environments); *Evangelium Vitae* 42 (1995) by Pope John Paul 11 (Humans are subject to moral laws to be responsible towards our environment); *Octogesima Adveniens* 21 by Pope Paul VI (1971) (Exploitation of the environment is a human social problem); *Ecclesia in America* 25 by Pope John Paul II, (1999) (A call to Americans for ecological preservation and reducing consumption); *Ecclesia in* ***Asia*** 41. by Pope John Paul 11 (1999) (A message to people of Asia to care for their environment); *Ecclesia in Oceania* 31. by Pope John Paul 11 (2001) (A call to the people of Oceania to work towards preserving their environment); *Statement of Archbishop Martino,* a Statement to the United Nations on Environment and Development, Rio de Janeiro. 4 June 1992 (A statement that calls for stewardship and solidarity in actions concerning development and the natural environment); "Environment and sustainable development: Protecting of global climate for present and future generations of mankind", 28 November 2001; "Pastoral Letter on the Relationship of Human Beings to Nature" by the Dominican Episcopal Conference, 21 January 1987; "What is Happening to our Beautiful Land?" 29 January 1988; "Celebrate Life: Care for Creation" by the Bishops of Alberta, Canada, 1998; A New Earth - The Environmental Challenge by the Australian Catholic Bishops, 2002.
The above documents and other related ones are also *available at:* http://faculty.theo.mu.edu/schaefer/ChurchonEcologicalDegradation/ CatholicChurchonEnvironmentalDegradati on.shtml (Visited on February 19, 2012).

Osman Bakar[21] writes that modern civilizations learns the wisdom of ecological equilibrium the 'bitter' and 'expensive' way; that is, only after experiencing the bitter fruits of their own technological culture, extravagant lifestyle and world wars, which all have given rise to environmental pollution and ecological disaster.[22] On the other hand, environmental and ecological consciousness among the Islamic civilizations is innate in the teaching of their religion. Such consciousness emerges from the Muslim's affirmation of the absolute oneness of God or the 'Unity of God' (al-tawhid), which encompasses the domains of cosmic existence of human life- the unity of the cosmos or the unity of the living species on earth. "Traditional Islamic science has made the necessary ecological inference from the idea of Divine Unity. It has termed the ecological principal in question the 'Unicity of Nature'."[23] The idea of the absolute oneness of God presents a "unified and integrated vision of reality in which God as the Creator has an intimate relationship with His creation."[24] This cosmological order, as Ibrahim Kalin comments, is "the unity between heaven and

21 Osman Bakar, "Environmental Health and Welfare as an important aspect of Civilizational Islam",
available at: http://www.iais.org.rny/en/publicati-ons/articles.html (Visited on February 26, 2012).

22 *Ibid.*

23 *Ibid.*

24 Ibrahim Kalin, "Religion, Unity and Diversity-, 37(4) *Philosophy and Social Criticism* 472 (2011).

earth that generates order, proportion, balance and harmony in the world,"[25] Therefore, "nature has a metaphysical significance on the other hand, and an order which maintains in itself on the other" as also manifesting or reflecting the power, beauty and wisdom of its Creator.[26] "Islam presents a way of life that encompasses an overall view of the universe, life, man and the inter-relationships existing between them and also combines conviction, belief, legislation and enforcement of this legislation."[27] The ecological and environmental wisdom Islam is significantly found in the passages of the Holy Qur'an.[28]

"all the religions that find their echo in India have environmental overtones for the observance of an ecological code of conduct and thus show reverence towards the nature and its creation."[29] Perhaps one cannot appreciate enough the place Hinduism gives to nature. Nature is where human beings encounter the divine. Hindu philosophy, literature, the sacred scriptures[30] and religious tradition became a wealth

25 *Mid.;* also see Eric Winkle & Karim Douglas Crow, "Recovering Tawhidi Integration of Science & Faith", *available at:* http://www.iais.org.myten/dirasat/faith-a-science/item/93-recovering-tawh%C4%AAd%C4%AA-- integration-of-science-faith-„html (Visited on February 26, 2012).

26 Ibrahim Ozdemir, "An Islamic Perspective of Environmental Ethics", *available at:* http://www.nur.org/treatise/articles/IslamicEnvironmentalEthics.html (Visited on January 18, 2012).

27 "Islamic Principles for the Conservation of the Natural Resources", IUCN Environmental Policy and Law, Paper No. 20, at p. 9 (1983), *available at:* http://books.google,co.in/books?id=AGotuefEsMC&pg----PA7&source-gbs selected_pages&cad-3#v-onepage&q&f=false (Visited on February 20, 2012).

28 For instance: 2:164; 3:140; 7:56; 21:107; 22:18; 23:18; 24:41. Extensive Quranic passages relating to the - environment have been quoted in "Islamic Principles for the Conservation of the Natural Resources", IUCN Environmental Policy and Law, Paper No. 20, at p. 9 (1983), *available at:* http://books.google.co.in/books?id-AGotuefEs MC&pg=PA7&source-gbs_selected_pages&cad---3#v=onepage&q&f-false (Visited on February 20, 2012); relevant passages in this paper are referred from Abdullah Yusuf Ali, *The Holy Quran (English Translation with Original Arabic Text),* (Madhur Sandesh Sangam Publication, New Delhi, 2009).

29 Furqan Ahmad, "Origin and Growth of Environmental Law in India", 43 *JILI* 359 (2001).

30 0ne outstanding example is found in *Rig-Veda,* 160.2; 6.51.5, which declares that the Sky is like the Father, the Earth like the Mother and the Space as their Son; the Universe consisting the three is like a family. Any kind of damage done to any one the them throws the Universe out of balance.
As quoted by K. Rama Joga Rao, "Use of Criminal Law Machinery for Environment Protection", 7 *SCC* 58 (2001).

of information on the deep aspects of harmony in human environment relationship.

"our ancient people learn to live with 5 elements of nature, the 'earth', the 'water', the 'air', the 'light' and the 'cosmos' and they worship them in reality and symbolically."[31] Environmental protection in the ancient traditions of India was evident in the warnings of rishis against deforestation. It was ingrained in the practice of the dharma and symbolise in the Vedic society's performance of yognas for purification of the environment.[32]

The concept of non-violence (ahimsa) in Buddhism encompasses compassion for living things. For the Buddhist the earth is our mother and we live in harmony with nature. The notion of 'man-in-nature' recognises land' river' forest' mountain and even the wild animal as HIS manifestation.[33] The Buddhist tradition of eco Buddhism puts emphasis on the right to livelihood and asserts the value of contentment, giving and "intellectual and moral support to the maintenance of ecology and environment."[34]

The world grew culture values, traditions, customs, religious beliefs and politics of the indigenous peoples are deeply rooted in nature. Tribal myths, folklore, stories, song, music, art, dances and other forms of cultural expressions are enormously drawn from the nature. They emphasise the need to care for the natural environment And preserve this intimate relationship and spiritual communion with their and the natural environment, which is basic to their existence.[35] This is particularly seen among the tribal communities of India. For

31 *Supra* note 26.

32 P. Leelakrishnan, *Environmental Law in India* 6-7 (LexisNexis, Butterworths, 2002).

33 M. G. Chitkara, "Environment and Buddhism" *Encyclopedia of Environment* Vol. III (APH Publishing Corporation, New Delhi, 1998).

34 *Id.* at 73.

35 Alexandre Kiss and Dinah Shelton, *International Environmental Law* 13 (Transnational Publishers, New York, 3rd edn., 2004).

For instance the khasis of Meghalaya perceive nature and their land as the abode of the gods *(ka Rib a shang ki blei),* the hearth of the khasi home *(ka ri ba tympang*),[36] a Mother Earth who naturishes and maintain frsh and tender everything that is in Her bosom (*ka mei ri-lung ri-san, ka mei ramew)*. Their 'sacred groves' are "repositories of biological wealth of the nation."[37] Their conservation and protection, which is a traditional practice by the indigenous communities across the globe, has been recognise and protected by law.[38] Today, the elderly lement the fact that "people's changing attitude, erosion of tradition beliefs, and human impact have caused deh=gradation sacred groves over the year."[39]

2.3 POSTMODERNISM AND ENVIRONMENT

Postmodernism (a term difficult to define) generally represents the rejection of 'metanarritives' - universality, peranality, certainty – claim of modernity. It is collective reaction against modernity's assertion of a universal morality/ethics, universal truth, universal culture, universal religion, universal law etc.[40] it questions the objective knowledge of the world, truth and morality; it's most radical from being 'deconstruction'. In the field of jurisprudence, postmodernism is echoed is critical legal studies (CLS). CLS theory questions the exalted idea of liberal society, social justice, equality and the rule of law, and rejects "what is taken to be the natural order of things."[41] "Postmodernist critics of the law

36 T. Nongseij, *Khasi Cultural Theology* 4 (ISPCK, Delhi, 2002).

37 K. C. Malhotra, Yogesh Gokhale, Sudipto Chatterjee and Sanjeev Srivastava, *Cultural and Ecological Dimensions of Sacred Groves in India,* from the preface (Indian National Science Academy, Bhopal, 2001); also *available at:* www.ces.iisc.ernet.in/biodiversity/.../.Yogesh. CEdimensions.pdf (Visited on February 18, 2012).

38 For instance, in India we have The Biological DiversitiAct, 2002.

39 M.L. Khan, Ashalata Devi Khumbongmayum and R.S. Tripathi, "The Sacred Groves and Their Significance in Conserving Biodiversity An Overview", 34 *I JEES* 279 (2008); Bengt G. Karlsson, *Unruly Hills* ***Nature and*** *Nation in India's Northeast* 4 (Orient BlackSwan Pvt. Ltd., New Delhi, 2011).

40 Johnson J. Puthenpurackal (ed.), *The Postmodern...A Siege of the Citadel of Reason* 8 (Media House, Delhi, 2002).

41 Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* 337 (Oxford University Press, New York, **2nd** edn., 2009).

generally proceed from the starting point that all claims of truth are questionable. No particular reading of text is 'privileged' or authoritative. It is merely one of any number of possible interpretations."[42] From the point of view of environment, one aspect of the movement is that it looks at the environment more from a critical social and cultural prospective than from

a purely scientific viewpoint. Postmodernism also reflects the particular significance of eco- feminism, which is one of its important features.[43]

2.4 ENVIRONMENT PROTECTION AND THE CONSTITUTION OF INDIA

Environment values and justice can be deric=ved from the preamble of the constitution of India, and the some permeate through the fundamental rights.[44] Specific provisions for environmental protection are contained in the directive principles of state policy[45] and the fundamental

42 *Ibid.;* see also Sun i Ratnapala, *Jurisprudence* 217 (Cambridge University Press, New Delhi, 2009).

43 "Postmodernism and Environment", *available at:* http://stmarys.caP-evanderveen/wvdvienvironment/postmodernism_and_environment.htm. (Visited on January 5, 2012); "Postmodernism and Environmental Ethics", *available at:* http://www.bookrags.com/research/postmodemism-and-environmental-eth-enve-02/ (Visited on March 12, 2012); Works on this aspect can also be found in Arran E. Gare, *Postmodernism and the Environmental Crisis* (Rutledge, New York, 2006); J. Baird Callicott (ed.), *Earth Summit Ethics: Toward a Reconstructive Postmodern Philosophy of Environmental Education (SUNY Series in Constructive Postmodern Thought)* (State University of New York Press, 1996); Max Oelschlaeger (ed.), *Postmodern Environmental Ethics* (State University of New York Press, Albany, 1995); Anal Salleh, *Ecofeminism As politics: Nature, Marx and the Postmodern* (Zed Books, London, 1997).

44 Articles 14, 19 and 21. Right to life under Article 21 has been remarkably interpreted by the Supreme Court in a number of landmark cases to include life lived in dignity and in a healthy and pollution-free environment.

45 Article 48-A: The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country; article 47 relates to public health.

duties.[46] In addition, article 253 has been widely used to implement the international environmental obligation imposed by imposed by international trearies, agreements and conventions.

2.5 ROLE OF THE INDIAN JUDICIARY IN ENVIRONMENTAL PROTECTION

THE HIGHER JUDICIARY

Over the years the higher judiciary in India has been playing a significant role in evolving an Indian environmental jurisprudence, particularly through the device of public interest litigation, which is a Supreme Court innovation. "In order to improve access to justice for poor and disadvantaged sections, the traditional rules of *'lous standi'* were diluted and a practice was initiated whereby public – spirited individuals could approach the court on

Behalf o such sections."[47] Spirited individual citizens have moved the supreme court through article 32(or the high court through article 226) of the constitution to seek reliefs against several human acgtivites affecting the environment.[48] Further, dispute relating to environment are treated as cases of fundamental rights violation instead of tort claims. In a landmark decision, *M.C.Mehta v. Union of India,*[49] the Supreme

46 Article 51A(g): It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

47 Speech by Hon'ble Mr. K.G. Balakrishnan, Chief Justice of India on "The role of the Judiciary in Environmental Protection" (Bilaspur, March 20, 2010).

48 45Innumerable landmark environmental decisions have been pronounced by the Supreme Court of India in keeping with the-ideals 'envisaged by the Indian Consitution; for the purpose of this chapter, some of those worth mentioning are: *Municipal Council Ratlam v. Vardichan,* (1980) 4 SCC 162; *Francis Coralie V. Union Territory of _India,* Al2.1981 SC 746; *MC. Mehta v. Union of India,* AIR 1987 SC 1086; *T.N. Godavarman Thirumulkpad v. Union of India,* W.P. No. 202 of 1995; *MC'. Mehta v. Union of India,* AIR 1992 3 SCC 256;
MC. Mehta v. U ion of India (1998) 8 SCC 206; *MC. Mehta v. Union of India* (1999) 6 SCC 12.

49 (1987) 1 SCC 95. These principles will be highlighted in chapter 4 of this paper.

Court departed from the Common Law doctrine of 'Strict Liability' (rule in *rylands v. Fletecher)* and evolved the principle of "Absolute liability" in the context of India.

2.6 ENVIRONMENTAL DISPUTE SETTLEMENT MECHANISM

Civil remedies like tort action against the offender, writ petition, citizen suit for enforcement of statutory compliance, remedies under the *Cr P.C*. and the collector (under the *Public Liability Insurance Act 1991)* are the means available ti the citizens to tackle the environment pollution.[50]

The National Environment Tribunal was establish in 1995 under the *National Environment Tribunal Act, 1995* according to its Preamble, the Act seeks to provide for strict liability for damage arising out of accident caused from the handling of hazardous substances. The National Environment Appellate Authority (NEAA) was setup by the ministry of environment and Forest, Government of India, under the *National Environment Appellate Authority Act 1997* "to hear appeals with respect to restriction of areas in which any industries, operations or processes or class of industries or operations op processes shall or shall not be carried out or shall be carried out subject to certain safeguard under the *Environment (protection) Act 1986"*[51] the authority became non operational with the establishment of the National Green Tribunal in October 2010.

The National Green Tribunal (NGT) was established under the *National Green Tribunal Act, 2010* for effective and expeditious disposal of cases relating to environmental protection and conversation 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.[52] The

50 Furqan Ahamad, *Legal Regulation of Hazardous Substances* 13 (Daya Publishing House, Delhi, 2009).

51 See Preamble 10 the Act; Ministry of Environment and Forests, Government of India, "National Green Tribunal (NGT)";, *available at:* http://www.moefnic.in/legis/others/envapp97.html (Visited on April 10, 2012).

52 Preamble to the act

Tribunal shall not be bound by the procedure laid down under the Code of Civil Procedure, 1908, but shall be guided by principles of natural justice. The Tribunal seeks to provide speedy environmental justice and help reduce the burden of litigation in the higher courts.[53] The Tribunal, however, faces crucial hurdles in dispensing environmental justice. A case in point is its superfluous role as a regulator in environmental clearance under the Environmental Impact Assessment (ETA) notification 2006. Its expert members are unnecessarily pre-occupied with pinpointing the flaws in the ever increasing faulty and fraudulent documents relating to the Environmental Impact Assessment (ETA) that come before it.[54] Regardless of the hurdles, the National Green Tribunal shoulders the responsibility to deal with "the diverse cultures of impact assessment that exist in the different state-level and central level expert committees, authorities and ministries. These cultures of impact assessment, at the centre of which are very subjective notions of how to 'balance environment and development', will have to be understood and • commented upon. by the NGT."[55]

2.7 THE RIGHT TO DEVELOPMENT—A HUMAN RIGHT

In her speech in Berlin in 2011, the United Nations High Commissioner for Human Rights said that "the constituent elements of the right to development are rooted in the provisions of the Charter of the United Nations, the *Universal Declaration of Human Rights*

and the International Covenants of Civil and Political Rights and Economic, Social andcultural rights as well as other united Nations Instruments."[56]

53 Ministry of Environment and Forests, Government of India, "National Green Tribunal (NGT)", *available at:* http://moefnic.in/modulesirecent-initiatives/NGT/ (Visited on April 10, 2012).

54 Kanshi Kohli and Manju Menon, "The Nature of Green Justice", 47 *EPW* 20 (2012);
Infra note 68, Chapter IV.

55 *1d.* at 22.

56 Statement by Navi Pillay, United Nations high Commissioner for: Human Rights, (Berlin, February **24, 2011)**
"25 years of the right to development - Achievements and Challenges: Statement by the United Nations High Commissioner for Human Rights-, *available at:* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10759&LangID=E (Visited on April 16, 2012).

The *UN Declaration on the Right to Development* describes development as "a comprehensive, economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in fair distribution of benefits resulting there from."[57] Human development should be understood not only from the material aspect of growth but the holistic well-being and integral development of an individual human person. It should take into account the concept of equity and justice.

The concept of the right to development is of recent origin and has become an "academically and politically contested concept"[58] at the game time as efforts had been made by the United Nations to recognize it as a human right. It is one of the many rights being introduced as the 'third-generation human rights'. It is notable that the Declaration of Philadelphia (1944) contains the germ of the right to development when it declares that "all °human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic • security and equal opportunity."[59]

57 UN *Declaration on the Right to Development,* para 2, *available at:* http://www.un.org/documentsfga/res/41/a41r I 28.htm (Visited on March 01, 2012).

58 Laure-Helene Piron, "The Right to Development: A Review of the Current State of the Debate for the Department for International Development", *available at:* http://www.odi.org.uk/resources/does/2317.pdf (Visited on February 27, 2012); see also controversies surrounding the right to development in Arjun Sengupta, "The Right to Development as a Human Right-, *available at:* http://www.harvardfxbeenter.orviresources/working-papers/FXBC_WP7--Sengupta.pdf (Visited on March 01, 2012).

59 The 26th Session of the International Labour Conference held in Philadelphia in 1944 adopted, by unanimous approval, a solemn Declaration Of the ain-1 and purposes of the International Labour Organization (ILO), and of the principles which should inspire the policy of its Members. This "Declaration of Philadelphia" was incorporated in the 1LO's Constitution, which is *available at:* http://www.ih.org!ilolex/english!iloconst.htm (Visited on March 01, 2012).

It was in the early 1970's that Judge M'Baye[60] strongly advocated the recognition of the right to development as a human right as it is essential to the exercise of other human rights. On 4 December 1986, the UN General Assembly adopted a Declaration on the Right to Development, which defines it as an "inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[61] The right includes:[62]

- Full sovereignty over natural resources;
- Self-determination;
- Popular Participation in development;
- Equality of opportunity;
- The creation of favourable conditions for the enjoyment of other eivil, political, economic, social and cultural rights.

In the same voice, Navi Pillay, United Nations High Commissioner for Human Rights, in her speech in Berlin in February 2011, stated that the logic the right to development, as expressed in the Declaration, is unassailable: that "everyone has the right to participate in, contribute to and enjoy economic, social, cultural and political development."[63] She further stated that the Declaration sets out the particular requirements of the right to development itself, and, by extension, human rights-based development; the requirements are:[64]

60 Justice Keba M'Baye of Senegal, in his speech to the United Nations Commission on Human Rights in I972, expressed his vision for a right to development: as referred to in a statement delivered by the UN High Commissioner for Human Rights, available at: http:/[www.0hchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10759&LangID=E(Visited on April*16, 2012)*.

61 *Article 1, 1 of the UN Declaration on the Right 10 Development (1993)*.

62 OHCHR, "Development — Right to Development", available at: http://WWWZ.0hchr.0rg/eng1ish/issues/developmfint/index'htm (Visited on March 01, 2012).

63 "25 years of the right to development - Achievements and Challenges: Statement by the United Nations High Commissioner for Human Rights", a speech by Navi Pillay, available at: iittp://Www.0hchr.org/en/NewsEvents/Pages/DisplayNews.aspx?Newle=10759&Lanng=E (Visited on April 16,2012).

64 *Ibid.*

- Putting the human person at the centre of development;
- To ensuring active. and meaningful participation;.
- Securing non-discrimination;
- Fairly distributing the benefits of development;
- Respecting self-determination, and sovereignty over natural resources; and
- Informing all processes that advance other civil, political economic, social and
  Cultural rights.

The human person is identified as the beneficiary of the right to development, as of all human rights. The right to development can be invoked both by individuals and by peoples. It imposes obligations on individual States to ensure equal and adequate access to essential resources and on the international community to promote fair development policies and effective international cooperation.[65] The UN Charter envisions the promotion of "higher standard of living, full employment, and conditions of economic and social progress and development."[66]

Then the World Conference on Human Rights in Vienna (1993) adopted the Vienna Declaration and Programme of Action, which recognizes that democracy, development and respect for human rights-and fundamental freedoms are interdependent and mutually reinforcing. The Conference reaffirmed the right to development as "a universal and inalienable right and an integral part of fundamental human rights."[67]

2.8 DEVELOPMENT AND THE ENVIRONMENT

It is striking that both the Rio Declaration and the Vienna Declaration in the 'same language asserts: "The right to development must be fulfilled so as to equitably meet developmental and environmental

65 Supra note 59.

66 Article 55(a) of the Charter of the United Nations, available at: http://www,un.org/en/documents/charter/chapter9.shtml (Visited on March 01, 2012).

67 "Vienna Declaration and Programme of Action", available at: http://www2.0hchr.org/english/law/viennabtm (Visited on March 01, 2012).

needs of present and future generations."[68] Right to environment may be found implied in the basic principle of the Stockholm Declaration on the Environment (1972) which declares:[69]

"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing, and he bears a solemn responsibility to protect and improve the environment for present and future generation." The African Charter on Human and Peoples' Rights (1981) explicitly declares right to environment as a collective/group right at the same time as linking it to development:[70]

"All peoples shall have the right to a general satisfactory environment favourable to their development."

2.9 RICH COMMUNITY RESOURCE POOR PEOPLE: THE 'RESOURCE CURSE'

It has been observed that low and middle income economies are highly dependent the exploitation of natural resources.[71] At the Stockholm Conference, the Indian Prime Minister Indira Gandhi said that poverty is the greatest polluter', referring to the situation that the poor exploit the environment to meet their immediate needs.[72] But one is also reminded of

68 Principle 1 of The Rio Declaration on Environment and Development (l992), available at: http://www.unep.org/education/information/nfsunesc0/pdf/RIO_E.PDF (Visited on February 29, 2012); article 1 l of the Vienna Declaration and Programme of action (1993), available at: http://www2.ohchr.org/english/law/vienna.htm (Visited on February 29, 2012).

69 Principle 1 of the United Nations, "Declaration of the United Nations Conference on the Human Environment", the Stockholm Conference (1972), available at: http://WWW.unep.org/Documents.Multilingual/Default.asp?documetid=97&articleid=1503

70 Part 1, Chapter 1, Article 24 nmie African Union, "African Charter on Human and Peoples' Right" (1981), available at: http://www.hrcr.org/docs/Banjul/afrhr.html (Visited on March 05, 2012).

71 Edward E. Barbier, "Natural Capital, Resource Dependency, and Poverty in Developing Countries: The Problem of 'Dualism within Dualism'" in Ramond Lopez and Michael Toman, (eds.), Economic Development and Environmental Sustainability 25 (Oxford University Press, Great Claredon Street, 2006).

72 "An Environment and Sustainability Chronology", available at: http://www.sustrepofl.0rg/resource/es_timelinehtm (Visited on February 29, 2012).

Mahatma Gandhi's statement that the 'Earth provides enough to satisfy every man's need, but not every man's greed."[73] George W. Bush once stated that 'developed nations have a duty not only to share our wealth, but also to encourage sources that produce wealth: economic freedom, political liberty, the rule of law and human rights.'[74] Poverty alleviation and development can take place without environmental destruction. Linking development and the right to a safe and healthy environment sets the scene for the sustainable development concept, which has gained impetus at the Stockholm Conference.[75]

The present era is marked by 'industrial culture' whose 'chemical' and 'technological' revolution',[76] are unaccompanied by proper approach towards environment."[77] In this context, "...the scenario of environment in India yet remains appalling."[78] Taking a closer look at our context, it is commonly believed that most land, forests and the rich natural resources of the indigenous people are owned and controlled by the community that manages the same on an equitable and environmentally sustainable basis. At present this proposition seems to be far from the truth as privatization of land by a few powerful local elites to the exclusion of the helpless and poor masses has been taking place on a rampant basis. It leads to crude, unscientific and mindless exploitation of natural resources resulting in serious environmental crises. One need not be a scientist to see the deplorable conditions of the environment in

73 Equity and justice is at the heart of sustainable: development. It is Gandhi's philosophy that the capitalists should function as trustees for the poor and that-they should keep all surplus wealth in trust and this would guarantee_ both 'economic solidarity and economic equality. See Besant Kumar Lal, Contemporary Indian Philosophy 1.44 (Motilal Banarsiclass Publishers Pvt. Ltd.,'Delhi, 2nd edn., 1978).

74 President George W. Bush's remark at the International. Conference on Financing for Development in Monterrey, Mexico, (Mar. 22, 2002), available 'http://www.un.org/ffd/statements/usaE.htm (Visited on February 29, 2012).

75 "Declaration of the United Nations Conference can the Human Environment", the Stockholm Conference (1972), available at: http://www.unep.org/D0cume§1ts.Multilingual/Default.asp?documentid=97&articleid=1503 (Visited on February 29, 2012).

76 supra note 47 at xvii

77 Id. At 1

78 Id at 328

some of the charcoal industry, unscientific coal and limestone6 mining areas of our tribal states in India.[79] Bengt Karlsson has captured the crux of the environmental issues and conflicts[80] in the State of Meghalaya

79 Examples can be cited, which is only a iip of iceberg: "Lunar-Lukha contaminated...", The Telegraph, February 25, 2012, also available at: http://wwwtelegraphindia.com/1 120225/jsp/n0rtheast/srory_15175524.jsp (Visited on February 28, 2012); 'IUnseientific mining led to water crisis in State', The Shillong Times, February 25, 2012; "Kyiia bih kynsan ka um ha Wah Lukha, iap ki dohkha da ki phew hajar tyili", U Mawphor, February 23, 2007, also available at:
http://mawphor.com/?module=displayst0ry8¢st0ry_id=15478&f0rmat=html&editi0n_id=974' (Visited on February 28, 2012); 'fDa ki hajar per iap ki dohkha ha wah Lyngiong, shah kdew kti ka PHE", U Mawphor, Friday December 9, 20L]; H. H. Mohrmen "Jaintia Hills: Calamity waiting to happen", The Shillong Times, October 03, 201 I, aim available at: http://theshillongtimes.c0m/2011/10/03/jaintia-hills-calamity-waiting-tohappen/ (Visited on February 28, 2012); see also Patricia Mukhim's write-up in The Northeast Echoes, supplementary issue of The Telegraph, March 12, 2007, also available at:
http://www.telegraphindia.c0m/10703 l2/asp/n0rtheast/story_749700l.asp (Visited on February 28, 2012); HE. Mohrmen, "Mining Policy 100 late to save Jaintia Hills rivers", available 0!: http://nealliance.net/news/miningpolicy-too-late-to-save-jaintia-hills-rivers/ (Visited on 14.01, 2012); Editorial, "Jot ka mariang na ka jingthang mga ha Jylla" U Nongsaifi Hima, April 08, 2012. These rcports/write-ups — and more — narrate the burning issues of deforestation, soil erosion, disappearance of cultivated land, pollution, water crisis, resource depletion and the resulting crime scenes, One of the prominent subjects being water pollution; as the main rivers and adjacent streams of Jaintia Hills DiStriet, Meghalaya, have become highly polluted by acidity that they are unfit even for domestic use, and are unsuitable to support any aquatic life forms, leave alone fishes — the main source of livelihood of the local communities surrounding the rivers. The rivers downstream of coal mining areas and cement plants have been poisoned and turned blue in colour, resulting in the killing of tens of thousands of fishes at a time — a phenomenon baffling even environmental scientists of the State.Anther glaring example in the context of India is the mining activity by a company in the Niyamgiri Hills: see Geetanjoy Sahu, "Mining in the Niyamgiri Hills and Tribal Rights", EPW 19-21 (April 12, 2008).

80 *Bengt G. Karlsson, Unruly Hills Nature and Nation in India's Northeast 15 (Orient BlackSwan Pvt. Ltd., New Delhi, 2011).*

and attributes it to the notion of 'neo tribal capitalism' to "stress the internal process of capital accumulation that has given rise to an A flame indigenous elite that dominates the economic and political life in the state."[81] Poverty Amidst prosperity has become paradox of human existence in such a situation. In this

context, Chhatrapati Singh argues that "[T]he basic reason for rural and tribal poverty...is nothing but the privatization of common property resources in a non-equitable manner";[82] and further, the state "becomes merely a medium through which the process of privatization is facilitated."[83] The thing speaks for itself: the Autonomous District Councils, the traditional democratic institutions as well as the state government have failed in their duty and responsibility to put restrictions on these illegal and environmentally destructive activities and to protect the lives, property and natural resources.[84]

2.10 THE BRUNDTLAND REPORT

The above observation takes us back to the concept of sustainable development. The tern; is popularly defined by the Brundtland Report as "development that meets the-needs of the present without compromising the ability of future generations to meet their own needs."[85] Some of the basic principles of sustainable. development derived from this definition are;[86]

- Inter-Generational Equity;

81 1d. at 69, 309.

82 *Chhatrapati Singh, Common Property and Common Poverty:India 's Forests, F ores! Dwellers and the Law 4*
(Oxford University Press, Delhi, 1986).

83 *Ibid.*

84 Supra note 77 at 309; Naba Bhattacharjee, "Missing the Woods, Trees & Forests....?", The Shillong Times; -
April 03, 2012; Editorial, "Jot ka mariang na ka jingthang Jylla" U Nongsaifi Hima, April 08, 2012;
Patricia Mukhim, "Traditional Institutions: Anachronistic and.1ncongi'uohs", The Shillong Times, April 2012.

85 World Commission on Environment and Development (WCED), Ozir Common F ulure 43 (Oxford University Press, Oxford 1987).

86 P.S. Jaswal and Nishtha Jaswal, Environmental Law 120 (Allahabad Law Agency, Faridabad, 3rd edn., 2009). Applying the principles of sustainable

- Use and Conservation of Natural Resources;
- Environmental Protection;
- The Precautionary Principle;
- The-Polluter Pays Principle;
- Obligation to Assist and Co-operate;
- Eradication of Poverty; and
- Financial Assistance to the Developing Countries.
- The Delhi Declaration of 2002[87] recognised the following seven key principles of the international law on sustainable development:
- Duty of states to ensure sustainable use of natural resources;
- Equity and the eradication of poverty;
- The precautionary approach to human health, natural resources and ecosystems; -
- Public participation and access to information and justice;
- Good governance;
- The principle of common, but differentiated obligations; and
- Integration and interrelationship, in particular in relation to human rights and Social, economic and environmental objectives.

The Supreme Court of India, in a number of environmental cases, reiterates the importance of adherence to the principle of sustainable development. In N. D. Jayal v; Union of India,[88] the apex court states that "the adherence to sustainable development is a sine qua non for maintenance of symbiotic balance between the right to developmefit

development, the Supreme Court of India has played a praiseworthy role in environmental protection in a number of landmark judgments.

87 See Government of India, Report: Sustainable development in India: Stocklaking inv the run up to Rim-20 (Ministry of Environment and Forests, 2011). In 2002, "the International Law Association's Committee on the. Legal 'Aspects of Sustainable Development brought out the Delhi Declaration as a Resolution of the 70th Conference of the International Law Association held at New Delhi, based on previous work of the UNCSD and that of many legal experts. These principles were subsequently reaffirmed and recognized at the 2002 World Summit on Sustainable Development (WSSD) at Johannesburg."

88 (2003) 6 SCC 572, at p.586.

and *development." In T. N. Godavarman Thirumulpad (through K. M. Chinnappafv. Union 0f* India,[89] the Supreme Court observes that there are "two salutary principles which govern the a law of environment: (i) the principle of Sustainable Development; and (ii) the Precautionary Principle." The Court goes further to describe sustainable, development as "essentially a policy and strategy for continued economic and social development without detriment to the environment and natural resources on the quality of which continued activity and further development depend." The Court remarks that "We owe a duty to future generation and for a bright today bleak tomorrow cannot be countenanced."

In Vellore Citizens Welfare Forum v. Union of India & ors.,[90] *the Supreme Court* explains the Precautionary Principle in the following words:

The "Precautionary Principle" in the context of the municipal law — means:

(*i*) Environment 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 and irreversible, damage, lack of scientific certainly should not be used as the reason for postponing measures to prevent environmental depredation.

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

The Supreme Court further observes that the 'Polluter Pays' principle "means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is 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."

In M. C. Mehta v. Union of India,[91] A. P. pollution control board (ii) v. prof m. v. nayudu',[92] and in the vellore citizens case,[93] the supreme

89 (2002) 10SCC 606, at p 613

90 (1996) 5 SCC 647.

91 (1997) 2 scc 353.

92 (2001) 2 scc 62.

93 Supra note 87.

court confirms that these two principles have become part of the environmental law of the land.

Besides these principles, the Supreme Court of India also recognizes the 'Public Trust' doctrine where the "State is not an absolute 'owner, but a trustee of all natural resources, which are by nature meant for public use "and enjoyment, subject to reasonable conditions, necessary to protect the legitimate interest of a large number of people, or for matters of strategic national interest."[94] In MC. Mehta v. Kama] Nath,[95] the Supreme Court held that the State and its instrumentalities have the duty to protect and conserve the natural resources.

2.11 CRITICAL ASSESSMENT OF THE BRANDT/AND REPORT'S DEFINITION

The key concepts of 'needs' and the idea of 'limitations' imposed by the state of technology and social organization on the environment's ability to meet present and future needs are contained in the above definition of sustainable development as given and land Report. Human beings certainly do have 'needs'; they also have 'values'. Amartya Sen argues that understanding sustainable development in terms of human needs alone gives us a "meagre view of humanity."[96] He examines Robert Solow's reformulation of the definition[97] and holds that the Brundtland-Solow approach "provides an immediate motivation for environmental preservation", but it gives us a very inclusive, very anthropocentric and too aggregative concept.[98] It is neither living standard nor sustaining need-fulfilment, but our sense of values, fiduciary responsibility and the freedom that we enjoy as

94 (1996) lSCC 3s.

95 The National Environment Policy, 2006.

96 *Supra note 12 at 250.*

97 Sustainability as the requirement that the next generation must be left with whatever it takes to achieve a whatever it takes to achieve a 'standard of living at least as our own and to 100k their next generation similarly.' (As quoted by Amartya Sen); see also.Robert_Solow, "An almost Practical Step toward Sustainability", available at: http://dionysuspsych.wisc.edu/Iit/T0pics/Environment/Sustainability-Solow.pdf

98 Amartya Sen, "sustainable Development and Human Freedom", available at: http://www.institut.Veolia.org/en/documents/CDBOMg3X1p6§0TGJthq.aspx (Visited on February 29, 2012).

free agents that should be considered. "[W]hat has to be sustained is not just our living standards, but rather our freedoms, including the freedom (in line with Solow) 'to achieve a standard of living at least own and to look after next generation similarly."[99]

For Amartya Sen, there is need for, clarity in deciding how to think about environmental challenges in the contemporary world; and "focusing on the quality of life can help in this understanding and throw light not only on the demands of sustainable development, but also on the content and relevance of environmental issues."[100] Further, Sen argues that the assumption that the least possible. interference with the 'state of nature' to the extent that this pre- existing nature will stay undamaged appears 'superficially plausible' for two reasons: one, the value of the environment is not a matter of what "there is" but also of the "opportunity it. offers to people.-"'[101] lts impact and enhancement upon the quality of human lives must be one of the primary considerations. In this background, the query is "of what to sustain is exactly right." [102]Secondly, since the environment is a matter of "active pursuit" not merely of "passive preservation", human activities accompanying development may have some damaging results; but, by way of "constructive human intervention", it is also within the human power to enhance, improve the environment and stop environmental destruction by

the process of development itself.[103] Therefore, Sen argues that we should think of the environment not exclusively in terms of conserving pre-existing natural conditions, since the environment can also include the results of human creation. On the whole, "seeing development in terms of increasing the effective freedom of human beings brings the constructive agency of people engaged in environment-friendly activities directly within the domain of developmental achievements."[104] Besides, Sen perceives development as fundamentally an empowering

99 lbid

100 Supra note 12 at 248.

101 *Ibid.*

102 1d. at 249.

103 *Ibid.*

104 *Ibid.*

process that can be used to preserve and enrich the environment.[105] In a similar vein, Joseph E. Stiglitz argues that transformation of society is one feature of development in which increase in GDP per capita forms only an integral part.[106] "Development enriches the lives of individuals by widening their horizons of choice and reducing their-sense of isolation. It reduces the afflictions brought on by disease and poverty and environmental degradation, not only increasing life spans, but improving the quality and vitality of life."[107]

2.12 INTERNATIONAL TRADE AND THE ENVIRONMENT

In this era of globalization, the link between trade and the environment has shown various areas of concern. Environmentalists assert that industrial trade adds to environmental degradation across the world, particularly/ in the developing countries.[108] Business lobbyists in developed countries fear that strict environmental laws and regulations would hamper their "competitiveness and shift pollution intensive industries to developing countries."[109] Policy makers in developing countries fear that the link between trade and environmental policies would become a means used by the developed countries to create barriers to imports.[110]

Without doubt, trade affects the environment. For Brian R. Copeland and Sumeet Gulati, trade changes the overall level (a scale effect) and the type (a composition effect) of economic activity; it can also lead to change in the environmental intensity of production (a technique effect).[111] Each of these "is affected by the interaction between market

105 *Ibid.*

106 Joseph E. Sti glitz, "Towards a New Paradigm of Development", available at: http://cgt.columbia.edu/files/papers/2003_New_Paradigm_f0r_Devel0pment_stiglitz.pdf (Visited on February 27, 2012).

107 *Ibid*

108 Brian R. Copeland and Sumeet Gulati, "Trade and the Environment in the Developing Economies", in Ramond Lopez and Michael Toman, (eds), Economic Development and Ennvironmental Sustainablility 178 (Oxford University Press, Great Claredon Street, 2006).

109 *Ibid.*

110 *Ibid.*

111 Id. at 180.

forces and 5 country's policy regime?"[112] However, these authors, while laying emphasis on the interaction between the pattern of trade and the institutions well in place to manage environmental policy, argue that "increased international trade between rich and poor countries is not incompatible with improvement in environmental quality."[113]

2.13 INTERNATIONAL TRADE AND THE ENVIRONMENT

The socio-religious and cultural traditions of India manifest imprints of sustainable6 development, which has, in fact, been embedded in the country since the 19905. The Ninth FiVe-Year Plan (1997—2002) "explicitly recognized the synergy between environment, health and development and identified as one of its core objectives the need for ensuring environmental sustainability of the development process, through social mobilization and participation of people at all levels.[114]

Sustainable Development policies fundamentally cover economic, environment, and social development, which form 'the three 'interdependent end mutually reinforcing pillars'.[115] There have been

112 *Ibid.*

113 *Id. at 208; see also Thomas Anderson, Carl Folke and Stefan Nystrom, Trading with the Environment: Ecology, Economics, Institutions and Policy (Earthscan Publications Ltd, London, 2006). These authors discuss the conditions under which international trade could contribute to ecological sustainable economic development and propose certain changes in the current regulations to promote such a course.*

114 Supra note 84

115 Ibid. where the Report outlines the framework programmes for sustainable development. Programmes for sustainable economic development include agriculture and food managemztnt, industry, investment, tradq,. technology upgradation, banking and finance and infrastructure. Social development covers interventions for poverty eradication, urban housing and livelihoods, urban transport, empowerment of women, health policy,. population control measures, welfare and development of weaker sections, financial inclusion, rural support; education and skill development, traditional knowledge and practices, rehabilitation and resettlement and disaster management, e-govemance. Programmes for environmental sustainability include, forestry, biodiversity, pollution control, land degradation, water management, climate change, marine and coastal environment, clean energy. The key Indian Policies and Programmes aimed at Sustainable Development are shown in Appendix-1.

attempts made and initiatives taken, through policies, legislations, and programmes to achieve this goal. The National Environment Policy, 2006 (NE?) in its Preamble states that "the present national policies for environmental management are contained in the National Forest Policy, 1988, the National Conservation Strategy and Policy *Statement on Environment and Development, 1992; and the* Policy Statement on Abatement

of Pollution, 1992. SOme sector policies such as the National Agriculture Policy, 2000 National Population Policy, 2000; and National Water Policy, 2002; have also contributed towards environmental management."[116] "All of these policies have recognized the need for sustainable development in their specific contexts and formulated necessary strategies to give effect to such recognition."[117]

2.14 LEGAL PROVISIONING

The Ministry of Environment and Forests, Government of India, in its Report,[118] identifies four phases of legal provisioning on sustainable development in the Indian context, each phase being characterized by distinct priorities and policy goals. The first phase (1972— 1983) focused: ion protection.'- Its key highlights amendments to protect the environment and-the enactment of legislation on wildlife and to arrest pollution of air and _vi/after following the requirements of the Stockholm Conference (1972). Post Stockholm witnesses the 42nd amendment to the Constitution of India in l976 in which Article 48A was incorporated in the Directive Principles of State Policy, at the same time as emphasizing upon the Fundamental Duty under Article 51A (g). The Supreme Court, too, in several cases[119] upheld the principles enshrined in these Constitutional provisions. During this phase, the country also enacted many primary environmental legislations Iike the *Wildlife (Protection) 461,1972, the Water (Prevention and Control of Pollution) Act, 1974, the Water (Prevention and Control of Pollution)*

116 See Preamble to the National environmental Policy, 2006.

117 *Ibid.*

118 *Supra note 84*

119 *For instance, M c Mehta v. Union] of India, AIR 1988 sc 103 7; Somprokash Rekhi v, Union oflndia AIR 1981 sc 212; State of Tamil Nadu v.2Hind Store, AIR 1981 so 711.*

Cess Act, 1977, the Forest Conservation Act 1980, and (Prevention and Control of Pollution) Act, 1981.

The Second phase (1984—1997) reflects the proactive steps taken by the country in the aftermath of the Bhopal disaster of 1984, increasingly focusing on issues of social justice and equity. The Public Liability Insurance Act, 1991 is a key legislation in this phase. The Third phase (1998—2004) strongly focused on reconciling the economic with the environment and social imperatives. The fourth phase (2005 and beyond) is marked by positive 'rights-based approach to social welfare, justice and equity and a high degree of integration between the different pillars of sustainable development.' The Right to Information Act, 2005 is a landmark legislation during this phase, with its scope wide enough to enhance transparency in

matters pertaining to the environment as well. The National Green Tribunal Act, 2010 iS another important legislation during this phase.

According to the Indian Economic Survey 2011 — 2012, sustainable development and climate change are becoming central areas of global concern and India too is equally concerned and engaged constructively in global negotiations. Climate change challenges ahead are large and India is doing more than its fair share in reducing its energy-intensity of growth. The Survey shows that "India's faster Gross Domestic Product (GDP) growth over the last two decades has been unprecedented; but at the same time India's rankings in terms of the Human Development Index (HDI) as well as indices measuring environmental sustainability are yet t0_fully reflect this growth?"[120]

120 Government of India, Report: Economic Survey 2011-2012 277 (Ministry of Finance, Department of Economic Affairs, Economic Division, 2012), as published by Oxford University Press, New Delhi, 2012.

Chapter-3

ENVIRONMENTAL CRIMES - AN ANALYSIS

Environmental statutes by and large provide for both civil and criminal enforcement. According to Robert I. McMurry and Stephen D. Ramsey, earlier than 1981, "the government's approach to judicial enforcement of environmental statutes and regulations was almost exclusively to seek civil sanctions, penalties and injunctive relief. Little thought was given to using the criminal provisions of environmental statutes or traditional criminal law."[121]

Environmental laws contain penalties for violation of their provisions and the consequent harms such violation causes to human beings and the environment. These statutes and regulations are often complex and thus a question arises whether criminal enforcement was appropriate for their violations. Another area of concern regarding the mental state requirements for environmental crimes which were minimal and bordered on strict liability, particularly when corporate officials were prosecuted under the {responsible corporate doctrine for environmental crimes.[122] Those arguing for criminal enforcement are of the view that "the exercise of prosecution discretion would filter out cases that were too technical or Where evidence of criminal environmental was weak." Nevertheless as in England, "the criminal provisions of the environmental laws were too broad", and that too much

121 Robert I. McMurry, Stephen D. Ramsey, "Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws", 19 Loy. L.A. L. Rev. 1134 (1986).

122 David M. Uhlmann, "Environmental Crime Comes of Age: The Evolution of Criminal Enlargement 'in the Environmental Regulatory scheme", 4 ULrRev. 1224 (2009).

discretion has given to the prosecutors to decide which environmental violations were criminal.[123]

3.1 ENVIRONMENTAL CRIME

The concept 'Environmental Crime' has been defined variously from different perspectives. The term has been used "almost indiscriminately and without any universally

accepted definition."[124] It has been classified as a sub-set of White-collar crime.[125] Mary Clifford and Terry D. Edwards[126] offer a few definitions of environmental crime from different perspectives. One definition includes the functions of the environmental law enforcement agencies as well as the statutory provisions pertaining to it area of - operation. Thus: "An environmental crime is an act of violation of an environrnental protection statute that applies to the area in which the act occurred and that has clearly identified criminal sanctions for purposes of police enforcement." This definition is also for the purpose of those practitioners who need a legal framework.[127] From a broader philosophical perspective, these authors offer the following definition:[128] "An environmental crime is an act committed with the intent to harm or with a potential to cause harm to ecological and/or biological systems and for the purpose of securing business or personal advantage."

For Y. Situ and D. Emmons,[129]an environmental crime is an unauthorised act or omission that violates the law and is therefore subject to criminal prosecution and criminal sanction. This offence harms or endangers people's physical safety or' health as well as the environment itself. It serves the interests of either organizations — typically corporations – or individuals."

123 *Ibid*

124 M. Clifford and Terry D. Edwards, "Defining Environmental Crime", in Mary Clifford (ed), Environmental Crime: Enforcement, Policy and Social Responsibility 6 (Aspen Publishers 1116., Gaithersburg, 1998)

125 1d.at12.

126 Id. at 27

127 Id. at 26.

128 *Ibid.*

129 *Y. Situ and D. Emmons, Environmental C rime: The Criminal Justice System 's Role in Protecting the Environment 3 (Sage Publications, Thousand Oaks, 2000).*

Another definition of environmental crime includes activities such as littering, abandoned vehicles, graffiti, fly-posting, dog fouling, fly-tipping, dumped business waste, vandalism, abandoned shopping trolleys and noise nuisance.[130]The House of Commons Environmental Audit Committee, in its report, gives a statutory meaning of environmental crime in the following words:[131]

"Environmental crime includes all offences either created by statute or developed under the common law that relate to the environment. The environment is, in simple terms, the surroundings in which we live. Section 1 of the Environmental Protection Act 1990 defines the environment as 'all, or any, of the following media, namely the air, water, and land'_ That Section also defines pollution of the environment as pollution 'due to the release, into any environmental medium from any process of substances which are capable of causing harm to man or any other living organisms supported by the environment.' Successive governments have legislated to give powers to executive agencies to protect the environment and enforce environmental legislation. International environmental law and principles have been transposed into national law to ensure compliance with state commitments. Environmental crime has not been codified or consolidated into a single Act but is found in a range of separate pieces of legislation. Some of the most frequently used criminal sanctions are found in the Environmental Protection Act 1990 (as amended) and the Water Resources Act 1991. "

According to the Royal Institute of International Affairs,[132] environmental crime can be broadly defined as illegal acts which directly harm the environment, which include illegal trade in wildlife, smuggling of ozone-depleting substances (ODS), illicit trade in hazardous waste,

130 House of Commons Environmental Audit Committee, 9th Report on Environmental Crime: Fly—tipping, Fly— Rosting, Litter, Graffiti and Noise (July, 2004).

131 Houge of Commons Environmerltal—Audit Committee, Report on Environmental Crime and the Courts (May, 2004).

132 Royal Institute of lntemational Affairs, Report on International Environmental Crime: The Nature and Control of Environmental Black Markets (10 St James Square, London, 2002), available at: http://ec.europa.eu/environment/docum/pdf/OZS44_environmental_crime__workshop.pdf (Visited on January 23, 2012).

illegal, unregulated, and unreported fishing; and illegal logging and the associated trade in stolen timber Environmental. crimes involve the breach of international treaties designed to curb trade in substances harmful to the environment or to restrict trade in endangered species.

These illegal activities have direct impacts the environment and the society. For example illegal logging results in large scale deforestation. lt deprives forest communities of their livelihoods; causes ecological problems like flood, soil erosion, and contributes to climate change. Illicit trade in Ozone Depleting Substances (ODS), like the refrigerant chemicals chlorofluorocarbons (CFCs), contributes to a thinning ozone layer, which causes human health problems like skin cancer and cataracts.[133]

The above definitions reflect various aspects of environmental crime, ranging from moral and philosophical, to legal and local perspectives.[134] These definitions are important in view of many considerations such as the nature of the activities against the environment, liability for environmental crimes, extent of criminality of offenders, attitude towards enforcing the law and the sanctions that should be imposed for breach of the law.[135]

3.2 THE LEGAL DIMENSION OF THE DEFINITIONS

The legal dimension includes, "only those actions or omissions that are directly or Indirectly damage the and which are by law."[136] This approach advantageous because it is value-free and objective. However, this legalistic and positivist approach has a number of problems. First, there exists a problem and uncertainty in the definition of environmental law; therefore, it raises the question of 'where the outer boundaries of environmental crime are located.' Secondly, a legal definition is uncertain because 'there is such a wide range of activities and offenders to which the phrase could be applied.' 'Thirdly, a legalistic approach to the definition 'has jurisdictional and geographical Limitations.'[137]

133 *Ibid.*

134 B211 and Donald McGillivray, En'vi'rpnmentai Law 254 (Oxford University Press, New York, 2008).

135 1d. at 255

136 *Ibid*.

137 *Ibid*.

3.3 THE MORAL DIMENSION ENVIRONMENTAL CRIME

One underlying principle for criminal enforcement arises due to the failure of the civil or administrative law to sufficiently deter violations; another possibility is that "society prefers to-eall certain actions 'criminal' in order to express its moral outrage and to prohibit the 'activity unconditionally."[138] Criminal law punishes unacceptable behaviour that harms the society and its environment the concepts of 'harm', 'culpability' and 'deterrence' are central to traditional criminal law theory. Criminal statutes address the concept of social harm caused by the prohibited act or omission. Theft or murder is considered inherently immoral. However, harm to the environment, -in-many situations, is considered inevitable, even

acceptable. Few would question the morality of polluting a small stream. Emission of smoke from an industrial factory is permitted to a controlled and a licensed limit. What if the environment is highly polluted on account of accumulation of smoke emitted from many industrial units operating within their permitted license limit? There is need of a framework that determines whether the benefits outweigh the harm caused. One of the main purposes of criminal law is "prevention of unjustifiable harm, however proximate the actor is to actually causing it."[139]Environmental standards should be maintained and damage minimized. There is an increased public awareness of human beings' special relationship with the environment and the human capacity of improving it.

Responsibility/1'er causing harm is not a sufficient predicate for imposing criminal liability. The criminal. law, besides the illegal act or 'omission, also requires a mens rea; this brings in a measure of blameworthiness, which largely depends on the offender's state of mind. *In the United States, the case of Babbitt v. Sweet Home Chapter of Communities. for, a. Great Oregon*,[140] gives an example of the essential part mens rea plays in defining which environmental violations call

138 Mark A. Cohen, "Environmental Crime andiPunishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutels", 82 J. Crim. L. Criminology 1057 (1992).

139 *Kathleen F. Brickey, Environmental Crime: Law, Policy, Prosecution 14 (Aspen Publishers Inc., New York, 2008).*

140 115 s. Ct. 2407 (1995).

for criminal sanction. In *Ufzired States* v. *MacDopluEd* & Watson Oil C0.,[141] a corporate president, along with others, was convicted of violating the Resource Conservation arid Recovery Act (RCRA) of 1976, (for knowing disposal of hazardous wastes without, a. permit) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 19802 (knowing failure to report the release of a hazardous substance).

One who intentionally/willingly, knowingly, negligently and recklessly exposes another to unreasonable risk of serious harm is deemed by society to be morally blameworthy. The degree of blameworthiness depends on what level of culpability the statute prescribes.[142]

Owing to notorious environmental damages caused by pollution, environmental crimes should be dealt with severely —'strictly_ 'and absolutely. The prospect of jail, fine and the stigma of criminal conviction will act as deterrence for individuals as well as corporations

that do business at the cost of the environment. However, "criminal sanctions should reserved for the more culpable subset of offenses and not used solely for their ability to deter."[143]

3.4 INTERNATIONAL ENVIRONMENTAL CRIME

The Environmental Investigation Agency, London, for the purpose of its report[144] defines International Environmental across five broad areas of offences, which have been recognised by bodies such as the G8, Interpol; EU, UN Environment programme and the UN lnterregional Crime and Justice Research Institute. These are:

141 933 F.2d 35 (1 CCirl. 991).

142 Supra note 19 at 16-17.

143 Richard J. Lazarus, "Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime" 27 Loy. LA. L. Rev. 867 (1994).

144 Debbie Banks, Charlotte Davies, Mary Rice, 61.01., "Environmental Crime: A Threat to our Future" l (Environmental Investigation Agency, London. 2008); see also a workshop report by the Royal Institute of International Affairs on "International Environmental Crime: The Nature and Control of Environmental Black - Markets" (10 St James Square, London, 2002), available at:. http://eceuropa.eu/environment/docum/pdf/OZ544_environméntal_crime_workshop.pdf (Visited on January 23, 2012).

- Illegal trade in Wildlife in contravention to the '1973 on International Trade in Endangered Species of fauna and Flora (CITES); i
- Illegal trade in ozone-dctpleting substances (ODS) in contravention, to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer;
- Dumping and illegal transport of various kinds of hazardous waste in contravention of the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Other Wastes and their Disposal;
- Illegal, unregulated and unreported (IUU) fishing in contravention. to controls imposed by various regional fisheries management organisations (RMF Os);
- Illegal logging and trade in timber when timber-is harvested, transported, bought or sold in violation of national laws (Them currently no binding international controls on the international timber trade with the exception of én endangered species, which is covered by CITES).
- Other environmental offences having similar features of the above category include:[145]
- Bio-piracy and transport of controlled biological or genetically modified material (a possible offence under the 2000 Cartagena Protocol on Bio-safety to the Biodiversity Convention);
- Illegal dumping of oil and other wastes in oceans [i.e. offences under the 1973 International Convention on the Prevention of Pollution from Ships (MARPOL) and the 1972 London Convention on Dumping];
- Violations of potential trade restrictions under the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

145 Gavin Hayman and Duncan Brack, "International Environmental Crime: The Nature and Control of '- - Environmental Black Markets" (Royal Institute of International Affair-5,10 St James Square, London, 20%)2), a workshop report, available at: v http://ec.europa.eu/environment/docum/pdfl02544_environmental_crime_workshop.pdf (Visited on january 23)

- Trade in chemicals in contravention to the 2001 Stockholm Convention on Persistent
- Fuel smuggling to avoid taxes or future controls on carbon emissions.

3.5 TRANS-BOUNDARY NATURE OF ENVIRONMENTAL CRIME

Environmental crimes by their very nature are trans-boundary and involve cross border criminal syndicates. In this age of globalization and free trade, the easy mode of communication and of goods and money facilitate the illegal business group involved in environmental crimes. For instance, a tiger skin or an ivory tusk passes through many hands from the poaching site to the final buyer; a tree that has been illegally cut down can pass through around the world from the forest via the factory to be sold on the market as a finished wood product.

Environmental crime generates tens of billions of dollars in profits for criminal enterprises every year, and it is growing partly due to the "proliferation of international and regional environmental agreements, leading to more controls on a range of commodities. It is also due to mutations in the operations of criminal syndicates, which have been diversifying their operations into new areas like counterfeiting and environmental crime."[146]

Environmental crime is grave, transnational and organised. According to report environmental crime."[147]

"[1]s currently one of the most profitable forms of criminal activity and it is no surprise that organised criminal groups are attracted to its high profit margins. Estimating the scale of environmental crime is problematic but Interpol estimates that global wildlife crime is worth billions of dollars a year; the World Bank states that illegal logging costs developing countries $15 billion in lost revenue and taxes. In the mid-19905 around 38,000 tonnes of CF Cs were traded illegally every year - equivalent to 20 per cent of global, trade in CFCs and worth $500 million; and in 2006 up to 14,000 tonnes of 2 CFCs were smuggled into developing countries. The 'raw materials' which live or grow freely can be harvested or poached at minimal cost. Organised I criminals are adaptable and resourceful; they thrive in conditions where others would fail. By definition, they build networks and cast their

146 Supra note 12.

147 Supra note 24 at 2

nets wide to avoid detection. With the collusion of corrupt officials, certification, concealment and transportation are easily facilitated. With this combination of huge profits, low risk of detection and ineffective penalties, environmental crime is extremely lucrative."

3.6 EXTENT OF ENVIRONMENTAL CRIMES

The main motive for environmental crime is financial gain. The United Nations Convention on Corruption seeks to identify the links between corruption, organised crime, money laundering and economic crime.[148] Its characteristics are: organised networks, porous borders, irregular migration, money laundering, corruption and the exploitation of disadvantaged communities. Wildlife felons are just as ruthless as any other, with intimidation, human rights abuses, impunity, murder and violence the tools of their trade. The indicators of environmental crime are evident in many areas of international development activities. Significant global threats, including the challenges addressed through the Millennium Development Goals (MDGs) are connected to, and exacerbated by;

environmental crime, affecting development, peace, security and human rights. Increasingly, illegal logging and wildlife-trafficking are driven by organised groups who exploit natural resources and destroy habitats: robbing communities of their livelihoods, compromising the wider economy and further endangering threatened species and ecosystems.[149]

3.7 NATURE OF ENVIRONMENTAL LAW VIS-A-VIS CRIMINAL LAW

For R. J. Lazarus, environmental law has assimilated so poorly into criminal law for two reasons: one, "policy makers have not yet directly faced the difficult issues presented by such an assimilation, but instead have just assumed by them away by criminalising virtually all environmental violations. Policy makers in both the legislative and executive branches need to focus more carefully on the purpose

148 For instance, Article 14 of the United Nations Convention against Corruption, available at: treaties.un.org/doc/source/Recent Texts/Corruption_E.doc (Visited on March 12, 2012).

149 *Supra note 24 at 2.*

of criminal law and the design of environmental laws in defining the types of conduct warranting criminal sanctions. Moreover, without a shared definition of what constitutes such conduct, the current environmental crimes controversy will continue to plague and hinder effective enforcement. More environmental criminal enforcement is therefore needed, but more than additional resources are required to make that happen." Secondly, according to the author, "prosecutor's in leadership positions lack expertise in both environmental and criminal enforcement policy. Assimilation will only occur once individual prosecutors_ gain expertise in both areas of the law."[150]

Whether it is desirable or appropriate to incorporate the general principles of criminal law into environmental law or whether a different approach is needed.[151]In order to appreciate this point we should know the nature of environmental lavvy and juxtapose it with criminal law. In the context of the United States, the author Brickey (in agreement with other environmental scholars) outlines the following characteristics of environmental law:[152]

1. Aspirational Qualities: Environmental law has aspirational qualities, in the sense that "It seeks to bring about radical change." For instance, the United States' *Clean Air* Act of 1970 directs the States to achieve ambient air quality standards which could only be achieved by radical changes.[153] However, the aspirational qualities of environmental law "make criminal enforcement less appropriate."[154]
2. Evolutionary Nature: Environmental law is in a "constant state of flux." Constant change in environmental regulation is inevitable, which is a response to prevailing scientific, political and social norms. Public opinion and political conflict over competing values and interests are reflected in the environmental policy-making. This characteristic of environmental law is in contrast with the relative stability associated with traditional criminal law.

150 Supra note 23 at 890

151 Supra note 23 at 890

152 Id. at 9-13.

153 Id at 10

154 Id. At 11

3. High Degree of Complexity: Environmental law is highly complex; it involves "highly making it all the more technical scientific, engineering and economic jargon,"[155] difficult to ascertain what conduct "will be deemed to be in compliance."[156] The relevance of criminal enforcement amidst such uncertainty is thus in question.

3.8 MODELS OF CRIMINALISATION OF ENVIRONMENTAL HARM

Environmental criminal law is not found integrated in penal codes of many legal systems, as 'fthe major part of environmental criminal lavv simply consists of provisions incorporated in environmental statutes' an, administrative nature (for example, a Clean Water Act) and have as their main function the enforcement of compliance with administrative obligations."[157] Nevertheless, we find the interweaving of administrative and criminal environmental law in many countries in the administrative control of pollution. Environmental laws function to help ensure that control. However, this model punishes only administrative disobedience while "other types of pollution may go unpunished, thus limiting the ability of the criminal law to protect ecological values."[158] As a matter of fact, "actual harm to the environment- and the threat of such harm—is more serious than mere

administrative disobedience."[159] While focusing on the act element of a crime, Faure proposes the following four models of criminalization of environmental harm on the basis of which a "graduated punishment approach" (depending upon the degree of seriousness of the crime) is advocated:

1. Abstract Endangerment: A model that criminalises disobedience to administrative rules and requirements per 'se. Crimes under this model may be classified into three categories: (i) operating without

155 Ibid

156 1d. at 13

157 Michael Faure, "Environmental crimes", in Nuno Garoupa (ed.) Criminal Law and Economics 320 (Edward Elgar Pub., Cheltenham, 2009); also available at: http://ssm'com/abstracF1498471(Visited on March 02, 2012).

158 Susan F. Mandiberg and Michael G. Faure, "A Graduated Punishment Approach to Environmental Crimes: Beyond Vindication of Administrative Authority in the United States and Europe" 34:2 CJEL 448 (2009).

159 *Id*. At 450.

a required license or permit; (ii) violating paperwork, monitoring, or inspection requirements; (iii) other regulatory violations that do not involve harm or threat of harm to the environment. Most western countries have ample examples of crimes that fit this model. For example, in the United States, storing hazardous Waste without a permit is an environmental crime that fits the Abstract Endangered Model.[160]

2. Concrete Endangerment Crimes with Administrative Predicates ("Concrete Endangerment'); Concrete Endangerment crimes involve behaved that both violates regulatory law and poses a threat of harm to the environment; thus, on the surface, these crimes target two social harms. This model differs from the first model in that the crimes also either presume or require proof that the unlawful activity involved a threat of harm to the environment.[161] The model assumes two variations: (i) "presumed endangerment", where statutes criminalise per se the unlawful contact of some quantity of pollutant with the environment on the assumption that such Contact necessarily causes at least some threat of harm; (ii) "demonstrated endangerment", where these require affirmative proof of a threat to the environment beyond the mere fact of an unlawful emission or release. "Presumed endangerment" crimes are easiest to prove and thus allow earlier and more frequent governmental intervention. Further, 'presumed endangerment" statutes provide the greatest protection for ecological values because the government can obtain a conviction with the least amount of proof.[162] In contrast, "demonstrated endangerment" statutes require affirmative proof of a threat to the environment beyond the mere fact of an unlawful emission or release.[163]

3. *Concrete Harm Crimes With Administrative Predicates:* the third model is similar to the second one in that the crimes in both require proof of violation of administrative rules. But these crimes go beyond threats and require proof of actual environmental harm. Hence it requires a definition of the concept of "environmental

160 *Id*. At 457.

161 *Id*. At 460

162 *Id*. At 461

163 Id at 465.

harm", which is a tricky issue. [164]Secondly, the issue causation, which requires proof of actual harm, is another problem commonly faced by the prosecution.

4. *'Serious Environmental Pollution*: Eliminating the Administrative Link: This model punishes very serious environmental harm regardless of whether there is any underlying regulatory violation, that is, even if the activity at issue was not otherwise unlawful; these appear to be aimed at preventing or punishing only harm to the environment- itself. _It- involves environmental crimes of magnitude beyond that contaminated:' the administrative' which the entity complied.[165] This model differs from the third one in that it severs the connection between the criminal law and existing administrative decisions: crimes fitting this model are independent in the sense that the criminal law can intervene irrespective of administrative law.

3.9 USE OF TRADITIONAL CRIMINAL LAW TO ADDRESS SERIOUS ENVIRONMENTAL POLLUTION

In the United States, the number of criminal prosecutions increased considerably during 1980's and 1990's, after Congress amended the environmental statutes and elevated most environmental crimes to felonies. [166]In cases involving very serious environmental pollution that has caused the loss of lives and property, "a prosecutor might charge

164 Id. at 470

165 Id. at 480

166 See David M. Uhlmann, "Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme", 4 UL. Rev. 1227 (2009); in the words of the author, "The 1984 RCRA amendments created-felonies for knowingly treating, storing, or disposing of hazardous waste without a permit from the EPA or an authorized state and for knowingly transporting hazardous waste without a manifest or to a 'facility that was not authorized to receive hazardous vvaste. The 1987 Clean Water Act amendments included _ _ felony provisions for knowingly discharging pollutants from a point source into waters of the United States 9 Without a permit or in violation of a permit, for knowingly making a false statement on a discharge monitoring report (DMR), and for knowing tampering with or rendering inaccurate a Clean Water Act monitoring method.24 The 1990 Clean Air A t amendments contained numerous felony provisions, the most significant of which historically has been the wing release of hazardous air pollutants in violation of National Emissions Standards for Hazardous Air Pollutants (NESHAPs).

the responsible parties with assault, homicide, property destruction, or some other traditional ' crime."[167] For instance, in the *United States, People v ' Roth,[168] and People v. Thorn Products Co.*[169] can be cited as examples of the use of traditional homicide law. In India, in *State of Madhya Pradesh v. Warren Anderson and Others*,[170] ***(the Bhopal gas leak criminal case)*** the magistrate convicted eight persons including the then chairman of Union Carbide India Ltd (UCIL) and other senior officers for offences under Section 304A of the Indian Penal Code (IPC) and imposed the maximum penalty of two years. Originally, the main charge had been under section 304 (Part ll) of the IPC. On a plea by UCIL, a two-judge bench of the Supreme Court in 1996 held that the offence under Section 304 was not made out, and the accused could only be charged under Section 304A of the IPC.[171]

3.10 CRIMINAL LAW BY ADMINISTRATIVE LAW?

Faure highlights a few points, from the economic perspective, in favour of public regulation rather than criminal lavvy enforcement in cases of environmental pollution. One argument is that private law remedies will not adequately deter potential offenders. The arguments are familiar:[172]

"Environmental pollution often has no individual victim that could file a liability suit; causation may be difficult to prove and the long time lapse may make it impossible to recognize that, for example, health damage has been caused through environmental pollution, let alone that a tort claim could still successfully be brought"

The main argument (again from the economic point of view) in favour of public regulation is from the viewpoint of low probability of detecting environmental crime. However, this problem could well be

167 Supra note 38 at 485.

168 604 N.E.2d 92 (N.Y. 1992)

169 45 P.3D 737 (Colo. Ct. App.2002).

170 Cr. Case No. 8460/ 1996; the judgment was delivered by the Chief Judicial Magistrate, Mohan P. Tiwari, 0n June 7, 2010

171 Keshub Mahindra v. State ofMP. (1996) 6 SCC 129; II (1996) ACC 292, I996 VIAD SC 657; (Criminal Appeals Nos.l672-75 of 1996, decided on 13.9.1996

172 Supra note 37 at 322-323

compensated by imposition of heavy fine on the polluter. Fines would add to public budget as well. "Monetary sanctions can, in principle, have both a criminal and an administrative nature." [173]"For optimal deterrence, a higher

sanction has to be imposed in order to compensate for this low detection rate. This cannot bé 1 provided through private law, and hence explains the need for public sanctions which permit compensation for the lower detection rate."[174]

In the opinion of Michael G. Faure and Hao Zhang:[175] "Enforcement through criminal law is preferred when the harm to society, or benefit to the offender, is large, the probability of detection is low, and when criminal law can provide additional stigma and/or an educative role (expressive function). In these circumstances, administrative law might not suffice. In addition, enforcement through administrative law could give rise to problems of capture (collusion between the regulator and the regulated) and to high error costs (as the standard of proof much lower than under law). Most importantly, administrative be too low to provide Sufficient deterrence."

3.11 ENVIRONMENTAL CRIME: AN OVER-CRIMINALIZATION?

Over-criminalization generally presents the following characteristics[176]

- Enacting criminal statutes lacking meaningful mens rea requirements;

173 Michael Faure, "Criminal Liability for Oil Pollution Damage: An Economic Analysis", in Michael Faure, Han *Lixin and Shan Hongjun (eds.), Maritime Pollution Liability and Policy: China, Europe, and the US 166 (Kluwer Law International, The Netherlands, 2010).*

174 *Supra note 37 at 322-323. Michael Faurp, "Environmental crimes", Nunb Ga'rdupa (cd.) Criminal Law and Economics 320 (Edward Elgar Pub.,-Cheltenham, 2009); also available an,* hnp://ssrnvcom/ abstract=149847.1(V1sfteki 6n March 02, 2012).

175 Michael G. Faure and Hao Zhang, "Envir0nmental Criminal Law in Chinag'A Critical Analysis", 41 ELR 10025 (2011); see also Michael Faure, "Environmental crimes", in Garlbupa (ed.) Criminal Law and Economics 324 (Edward Elgar Pub., Cheltenham, 2009); also available at: http://ssm.com/abstract=l498471(Visitcd on March 02, 2012).

176 "Overcriminalization", available at: http://www.nacdl.org/overcrim/ (Visited on March 18, 2012).

- Imposing vicarious liability with insufficient evidence of personal awareness or neglect;
- Expanding criminal law into economic activity and regulatory and civil enforcement areas; _
- Creating mandatory minimum sentences un-related to the wrongfulness or harm of the Underlying crime;
- Federalizing crimes traditionally reserved for state jurisdiction; and
- Adopting duplicative and overlapping statutes.

The criminalization of environmental violations poses at least two theoretical problems: one, "the moral content of the proscribed conduct is not as well established as it is for common law crime, which has prompted concerns about over-criminalization"; two, "the complexity of environmental law raises issues about whether it can be integrated effectively with traditional approaches to criminal liability."[177] As regards the first issue, it has been argued that criminalization of environmental violation presents the danger of over Criminalisation or over-deterrence;[178] criminal law may have been dragged beyond its proper role. But considering the seriousness of the harm caused by environmental offenders and where environmental protection has become a pressing national and international concern, the issue of over-criminalization in environmental violation should not come into the picture. India is one country that takes the environmental offences seriously by departing from the strict liability model to develop the absolute liability model that suits its Context.[179] However, 'a clear framework is needed to categorise various environmental offences and to prescribe penalties according to the degree of their seriousness. Further, "the sanctioning mechanisms have to aim at preventing the harm from the sources causing the occurrence of such tragedies rather than emphasizing on mitigation of injuries after the occurrence of the harm."[180]

177 Supra note 2 at 1228.

178 Supra we 18 at 1103.

179 The Indian Supreme Court departed from the strict liability doctrine in Rylands v. Fletcher and applied the new doc ine of absolute liability developed in MC. Mehla v. Union of India, AIR 1987 SC 965.

180 *FurqanEAhamad, Legal Regulation of Hazardous Substances 194 (Daya Publishing House, Delhi, 2009).*

For Richard Lazarus, "relaxing mens rea can dramaticale improve the prosecutor's chance of success. This is true for crime in general. Indeed, it is especially so for environmental crime, at least where those violating environmental regulations are large corporations where individuals making decisions may seek to remain Wilfully ignorant"[181]

3.12 ENVIRONMENTAL CRIMES AND THE MAJOR INDIAN CODES

The Indian Penal Code (IPC) gives provisions relating to public nuisance. In addition to the provisions of the IPC, violation of the provisions of specific environmental statutes attracts criminal liability. Civil liability in India is based on the English law. The Code of

Civil Procedure, 1098[182] governs the classical suit for damages in tort. The Specific Relief Act, 1963 provides for claims for injunction.

3.13 PUBLIC NUISANCE

Under the common law, the law of public nuisance was invoked for penalizing the environment offender and protecting the environment. In the U.S, public nuisance actions played an important role in the development of environmental law.[183]

181 *Supra 23 at 873.*

182 Section 910f the Code reads: 91. Public nuisances and other wrongful acts affecting the public.

[(1)in the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,(a) by the Advocate General, or

(b)with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act} (2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist i W, Momma -...s, independently of its provisions.

183 Tracy D. Hester, "Private Claims for a Global Climate: An Essay on US. and Indian Litigation Approaches to Climate Change and Environmental Harm", in a seminar volume entitled: International Seminar on Global Environment & Disaster Management: Law & Society, organised by The Indian Law lnstitute,'_The Supreme Court of India, The Delhi High Court, Ministry of Environment and Forest, Govt. of India and Ministry 'of Law and Justice, Govt. of India (New Delhi, 22-24, July, 2011).

"The law regarding public nuisance can be appreciated with the help of two maxims:[184].

- *Sic tari tuo alienum nan lecdus*: enjoy your own property in such a manner as not. to injure the right of another; and
- *Sic utari tuo utrem publican non laedas*: enjoy your property in such a manner as not to injure the right of the public.

Under the common law, nuisances are of two types: public nuisance and private nuisance. Private nuisance is a civil wrong while a public nuisance is generally considered a crime. This position is different in Japanese law where environmental pollution is considered a public nuisance no matter if it is caused by a private enterprise.[185] Most instances of environmental harms fall within the purview of public nuisance, and it appears that it, is inadequate[186]

3.14 PUBLIC NUISANCE UNDER THE INDIAN PENAL CODE, 1860

The law of public nuisance forms the doctrinal basis of environmental offences recognised by the Indian Penal Code. The Code gives elaborate provisions defining and penalizing the crime of public nuisance. Chapter XIV (sections 268 — 294A) of the Code deals with offences affecting the public health, safety, convenience, decency and morals. Section 268 defines public nuisance, while Section 290 prescribes punishment for public nuisance in cases not provided for in the Code. [187]Section 277 and

184 K.D. Gaur, The Indian Penal Code 344 (Universal Law Publishing Co. Ltd., New Delhi, 3rd edn.; 2004, reprinted and updated in 2008).

185 CM. Abraham, Environmental Jurisprudence in India 40 (Kluwer Law International, London, 1999).

186 1d. At 38.

187 Section 268 defines public nuisance as under: -

"268. Public nuisance, — A person is guilty of a 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. A common nuisance is not excused on the ground that it causes some convenience or advantage."

Section 290 reads:

section 278 have direct relevance to protection of the environment as these sections deal with water pollution and air pollution respectively.[188]

However, the effective application of these-penal provisions is doubtful even in obvious cases of air and water pollution, "because the technicalities of Indian criminal law require a complete satisfaction of the ingredients-of the offence as stipulated in the penal provisions."[189] Likewise, in the United States, "while the exact scope of public nuisance doctrine remains ill-defined and controversial, 'many US. Courts have turned to the Restatement of Torts (Second) for one broadly accepted formulation: 21 public nuisance is 'an unreasonable interference with a right general to the common public.'"'[190] Secondly, public nuisance litigation requires that While asserting their claims in the courts, the plaintiffs should prove standing by showing that they had suffered injury, which is a daunting challenge faced by them.[191] In any case, for the benefit of the poor and vulnerable segments of the society, this particular requirement is relaxed in the innovative Public Interest Litigation (PIL) in India.

"290. Punishment for public nuisance in cases not otherwise provided for. — Whoever commits a public'nuisa'nee in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees."

188 Section 277 reads:

"277. Fouling water of public spring or reservoir. — Whoever voluntarily Commits or fouls the water spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both."

Section 278 reads:

"278. Making atmosphere noxious to health. Whoever voluntarily vitiates the atmosphere in any place go as m-it noxious to the health of persons is general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees."

189 Supra note 65 at 38

190 Tracy D. Hester, "Private Claims for a Global Climate: An Essay on U.S. and Indian Litigation Approaches to Climate Change and Environmental Harm", in a seminar volume e titled: International Seminar on Global Environment & Disaster Management: Law & Society, organised by The Indian Law Institute, The Supreme

191 1d. at 97.

In a nuisance case, *Bibhuti Bhusan Biswas v. Bhuban Ram*,[192] three proprietors and the manager of a mill were convicted by District trial Magistrate under Section 290 of the Indian Penal Code. The proprietors did not live in the premises. The Sessions Judge was of opinion that the conviction of the proprietors was 'bad in law', and he recommended that their conviction should be set aside. However, he held that there was nothing wrong in the conviction of the manager. The Calcutta High Court, while upholding the conviction of the manager;"'set: aside the conviction of the proprietors as they were not living on the premises and held that the general rule is that a principal is not criminally answerable for the acts of his agent. Speaking generally, the person liable, where the user of premises gives rise to a nuisance, is the occupier for the time being whoever he may be. The occupier in the present case is the servant of the proprietors.

3.15 PUBLIC NUISANCE IN THE CODE OF CRIMINAL PROCEDURE (1973)

Chapter X! Of the Code of Criminal Procedure (1973) gives elaborate provisions for maintenance of' public order and tranquillity. Part B (sections 133 — 143) of the chapter specifically deals with the provisions relating to removal of public nuisance. Section 133[193] is,

192 (1919)1LR 46 Cal 515

193 Section 133 reads: 133. Conditional order for removal of nuisance.- (1) Whenever a District Magistrate or a Sub divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) that the conduct of any trade or Occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

(c) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

the most relevant section concerning removal of public nuisance that harms the environment. It empowers the District Magistrate to pass conditional orders for removal of nuisance.[194]

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of, such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or' occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order

(i) to remove such obstruction or nuisance; or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or

(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order;

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at 21 time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order ' should not be made absolute. (2) N0 order duly made by a Magistrate under this section shall be called in question in any Civil Court. Explanation.- A "public place" includes also property belonging to the State, camping grounds and left unoccupied for sanitary or receptive purposes

194 Ratanlal & Dhirajlal, The Code ofCriminaI Procedure 190 (Wadhwa & Company, Nagpur, 17"" edn., 2005).

Chapter-4

CORPORATE LIABILITY AND SANCTIONS IN ENVIRONMENTAL CRIMES — AN INDIAN PERSPECTIVE

Corporations are juristic persons. They are artificial persons capable of having rights and duties. They can sue and be sued in a court of law. This recognition of corporations as persons lays the foundation on which their liability is established. Many of the serious cases involving environmental pollution have been committed corporate persons. The question is whether the corporation, the employee or both held liable. Some environmental offences apply directly to corporations. For instance, breach of license conditions where the corporation is the license holder. Other offences are committed by the individual employee. This raises the question of corporate criminal liability. In what circumstances should a corporation be held criminally liable for the illegal acts or omissions of its employees? While A dealing with corporate criminal liability, this chapter highlights the problems of prosecuting guilty corporations. Then it particularly examines the feasibility of fine as a sanction against environmental offenders.

4.1 BASIC PRINCIPLES OF CRIMINAL LAW AND CORPORATE LIABILITY

Culpability In this age of globalization and economic liberalization, corporations are the world over, wielding enormous power and wealth and have great influence on almost every aspect of our lives. At the same time, corporations, too, have become dangerous criminals. However,

being artificial persons, their criminal culpability[195] as well as their criminal prosecution has been a tricky issue. Following the established principles-in tort law, English courts began sentencing corporations for statutory offenses in the middle of the twentieth century. Then again, a large number of European continental law countries have been either unable to or have not been Willing to incorporate the concept of corporate criminal liability into their legal systems.

It is a general principle of modern criminal jurisprudence that criminal liability revolves around the Latin maxim *actus non facit reum nisi mens sit rea*. Further, there cannot be any criminal liability without a violation of the criminal law that prohibits certain acts and omissions (*nullum crimen sine lege*). The earlier view was that a corporation, being a juristic person, could not be guilty of a crime, because criminal guilt requires intent; and since a corporation does not have a mind, it could not form intent. Besides, a corporation does not have a body that could be imprisoned. In the course of time this view has been changed. The present position 'in England, the U.S.A, Canada and France is that corporations can no longer claim immunity from criminal prosecution on the ground that they neither have the necessary mens rea nor the-body to be subjected to imprisonment. The present legal position in India is that corporations can be prosecuted for offenses which involve mens rea.

Viewed in this perspective, the issue of imposing criminal liability to a corporation for offences committed by directors, managers, officers and other employees has gained importance in criminal law jurisprudence.

Sentencing

Legal punishment defines the domain of criminal law.[196]In India,' the issue of sentencing a corporate body has been extensively dealt

195 Criminal culpability stands for the mental states of purpose, knowledge, recklessness and non-mental states of negligence and strict liability. See Larry Alexander, "The Philosophy of Criminal law" in Jules Coleman, Scott Shaphiro (eds), Jurisprudence and Philosophy oflaw 826 (Oxford University Press, Great Claredon Street, 2002).

196 Larry Alexander, "The Philosophy of Criminal law" in Jules Coleman, Scott Shaphiro (eds), Jurisprudence and Philosophy of law 815 (Oxford University Press, Great Claredon Street, 2002).

with by the Supreme Court in its recent judgments.[197]In *Velliappa's case,* the majority view was that a company cannot be prosecuted for offences which require mandatory imprisonment with fine. It was further held that where punishment is imprisonment, the court cannot impose a fine only. However, this ratio was overruled in *Standard Chartered Bank's case* when the Supreme Court held that there is no immunity for a company merely because punishment is mandatory imprisonment. Thus the decision in this case makes it clear that, as far as guilty juristic persons are concerned, where the punishment prescribed is mandatory imprisonment and fine, the court has 'the discretion to impose a sentence of fine alone because it is impossible to imprison a company. In the most recent Iridiun'z/Motorola case, the Supreme Court merely reiterated the" "" *position held in the Standard Chartered Bank's case.*

Issues Involved

The question of sentencing a corporate body is still faced with unresolved issues. Since a guilty corporate body cannot be imprisoned, would sentencing it to fine alone in lieu of imprisonment serve the purposes of punishment? Keeping in mind that corporate crimes can cause severe damage to the environment and the whole community would fine alone suffice? If heavy fine is imposed, then we face another intricacy: it would affect the normal functions of the company, which would consequently affect the innocent shareholders and employees. What amount of- fine or for that-matter, what. Kind of punishment would be imposed on the corporation?

4.2 THEORIES OF CORPORATE CRIMINAL LIABILITY

A corporate crime may be described as "an illegal act of commission or commission, punishable by a criminal sanction, which is committed by an individual or group of individuals in the course of their work as employees of a legitimate organization, and which is intended to contribute to. the achievement or goals or other objectives thought to be

197 *For instance, Assistant Commissioner, Assessment-II, Bangalore and Others v. Velliappa Textiles Ltd and Another (2003) 1] SCC 405; Standard Chartered Bank v. Directorate of Enforcement (2005) 4 SCC 530; Iridium India Telecom Limited v. Motorola Incorporated and Others (2011) 1 SCC 74.*

important to the organization as whole or some unit within it, and which has a serious physical or economic impact on employees, the general public, consumers, corporations organizations and government."[198] The issue of corporate criminality has undergone tremendous change over the last few centuries. Generally, there are two ways in which a corporation can be held criminally liable: one, a corporation can commit a crime that requires no intent *or mens rea*; two, where the crime requires intent. In the first case, mere acts of commission or omission without any intent is sufficient to attribute liability.

VICARIOUS LIABILITY AND STRICT LIABILITY

Vicarious Liability crimes and Strict Liabilities crimes are those which are punished even without legal fault having been committed. In vicarious liability, the wrong is committed by another person; nevertheless the accused is punished. In strict liability, the

offence has been committed by nobody; nevertheless the accused is Punished. A person is punished for an offence although 'no fault' has been committed by anyone. Strict liability offence is one in which "some element does not require proof of fault."[199]

Under this theory, corporations are held criminally liable for the crime of its officers, employees or agent if such persons have committed it within the scope of employment and with the intention to benefit the corporation.

Criminal law accepts this attribution of blame in a limited range of strict liability offences.[200]*In Queen v. the Birmingham and Gloucester Railway Company*, [201]the corporation 1 was held liable for nonfeasance. In *The Queen v. Great North of England Railway Ca,*[202] Lord :Deriman ruled that corporation could've held criminally liable for misfeasance.

198 Katherine S. Williams, T exlbook 0n Criminology 66 (lilniversal Law Publishing Co. Ltd, New Delhi, 3rd edn., 2001).

199 Glanville William, Text Book of Criminal Law 927 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2nd ed., 1983).

200 "Criminal Responsibility of Legal Persons in Common Law Jurisdictions" Paper prepared for OECD AntiCorruption Unit Working Group on Bribery in International Business transactions Paris 4th October 2000. available at: www.coe.int/t/dghl/monitoring/grec0/.._/Wells_revised.pd£ (visited on 12.11.2011).

201 [184213 QB 223.

202 [1846] 115 All ER 1294.

These two cases could be attributed to the early development of the theory of vicarious liability in England in the nineteenth century.

Vicarious liability has been criticised "for including too {little (in demanding that liability flow through an individual, however great the fault of the corporation), and for including too much (in blaming the corporation whenever the individual employee is at fault, even in the absence of corporate fault)!"[203] Secondly, the theory of vicarious liability basically involves public offences and non-requirement of *mens rea*. A difficulty arose regarding offences that require mens rea. Until the 1900's corporations could 'not be liable for crimes requiring mens rea.[204] However, the concept of 'strict liability' for corporate crime seemed to have developed when it was observed in *Pearks GunSton and Tee v. Ward*[205]

"Where certain acts are forbidden by law finder a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; and the reason for this is, that the legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done, the offender is liable to a penalty Whether he had any mens rea or Whether or not he intended to commit a breach of the law."

4.3 IDENTIFICATION/ALTER EGO THEORY

For the purposes of corporate liability for serious offences such as fraud, theft and manslaughter, courts developed the alter ego, or identification theory, under which certain key personnel are said to act as the company rather than for the company. This theory is followed in England and other British Commonwealth countries. It was in 1915 that the House of Lords laid the foundation of the Identification Theory when it held a corporation liable for a crime requiring mens rea in the landmark judgment of *Lennard's carrying Company Ltd. v. Asiatic Petroleum Company Ltd*.[206]Thus the court rejected the application of

203 Supra note 5.

204 *Pearks Gunston and Tee v. Ward [1902] 2 KB 1.*

205 *Ibid.*

206 [1915] A.C. 705

the principle of vicarious liability in the area of corporate criminal liability. In the instant case, Viscount Haldane observed:[207]

"[A]corporation is an abstraction; It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of_ somebody who for some purposes may be called an - agent, but who is really the directing mind and will of the corporation, the very ' ego and centre of the personality of the corporation. That person may be under I the direction of the Shane-holders in general meeting; that person may' be the. board of detectors itself, or it may he, and in some companies it is some that person has authority co-ordinate with the board of directors given to him under the Articles of Association and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company."

Therefore, under this theory, the state of mind of the agent is imputed to the corporation. The offences of individual senior officers and employees are imputed to the corporation on the basis that the state of mind of these senior officers and employees — their knowledge, intention, recklessness — is the state of mind of the corporation. If a member of the company commits a crime within the course of employment, such act and intent can be attributed to the ' company. Under this theory, the wrongful act of the directing mind is attributed to the corporation so that the corporation has vicarious, liability, primary, not for the acts and mind.

of an official who is a directing or controlling mind of the corporation. The corporation is identified with these acts and is held directly accountable for the offence. In such case, it will always be possible to bring a prosecution against both the company and the individual.

In a famous English case*, H. L. Bolton (Engg') Co. Ltd. v. T S. Graham and Sons*, [208]Lord Denning famously observed that a company may, in many ways, be compared to a human body for it must be held to have a brain a nerve centre, that controls What the company does; the hands that hold the tools and act according to the directions of the nerve centre.

207 Id. At 713

208 [1956] ALL ER 624

The underlying idea behind the identification theory is identifying the guilty mind, finding an individual Who will' be identified as: the Company - the alter ego of the company. By and large,- the guilty mind can be identified with the board of directors, the top officers of the corporation, those who are delegated responsibility, and those that have duties of such responsibility that their conduct may fairly be assumed to represent the policy of the corporation. In *Tesco Supermarket Ltd. v. Nastrass*,[209] Lord Reid pointed out that since a company does not have a mind, which can have intention or be negligent and the hands to carry out the intention, consequently it must act through living persons who have all these.

In 1995, in Meridian Global Fund Management Asia Ltd. v. Securities Commission,[210] the issue of segregating the mind from the will of the company. It was argued that there is a possibility that the directing mind of the company rests with one person, while the will of the 'company rests with the other, in which situation the theory of identification would not apply. It was held that the phrase directing mind and will' was not to be understood in such a' manner that the court would start looking into the question as to whether a natural person was not only the directing mind of an act that had been done, but also the will of the company.

Modern corporations are fragmented and decentralized; modern corporate organizational structure of authority is complex. Identification is seen as insensitive to the diversity of corporate organisation.[211] The theory is simple in concept but difficult in

practice.[212] One example of practical difficulty: take a situation when all the persons constituting the senior officers of the company resign after a corporate crime has been committed. The question is whether the new management officers can be identified with the mind and will of the company.

209 [1971] 2 all ER 127

210 [1995]3 WLR 413

211 SUPRa note 5

212 I. A. Ansari, "Corporate Criminal Liability" 1 GLT 20 48 (2011). '9 821 F.2d 844.

Aggregation Theory

This theory, also known as 'collective knowledge doctrine' in the United States, is a contribution of the American Federal Courts. Under this approach the corporation aggregates all the acts and mental elements of many relevant persons within the company to see if in totality they are liable for the crime. In *United States v. Bank of New England,*[213] the issue raised was if any knowledge and will could be attributed to the corporate entity. The trial judge found that the collective knowledge approach was appropriate in the case and observed that if the bank was looked upon as an institution, its knowledge is the sum of all the knowledge of all its employees within the scope of their employment. This doctrine can prevent companies from evading responsibility by reason of: the organizational complexity of the present day corporations.

The Corporate Culture Method

Corporate culture method is a new approach to the corporate criminal liability adopted by Australia. This method is employed for ascertaining negligence of company} Corporate 'culture is "the specific-collection of values and norms that are shared by people and groups in an organization and that control the way they interact with each other and with stakeholders outside the organization."[214] Section 12.3(2)(c) of the Crime Act of Australia defines corporate culture as "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes."[215] According to section 12 (4)(3) of the Act, negligence may be evidenced by the fact that the commission of the offence was substantially attributable to inadequate corporate management, control or supervision of the conduct of the one or more of its employees, agents or officers or failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate. The corporation may be found to have the requisite fault element, even though no one individual had that fault element, by viewing the conduct of the corporation as a Whole, i.e., by aggregating the conduct of any number of its employees, agents or officers.[216]

213 821 f.2d 844

214 Supra note 17 at 35.

215 Ibid. As quoted by I. A. Ansari. p.35.

216 Section 12 (4)(2).

Under the corporate culture method criminal liability cannot be established under the provision unless there is also the conviction of an individual offender. In order to make the corporation liable under these provisions, it is necessary to establish that the individual has committed an offence. But it is difficult to prosecute an individual under this method either because he/she is not identifiable or is out of the jurisdiction.[217]

In Canada, courts refused to go along with the vicarious liability of corporations for the *mens rea* of their employees. In its place, they identified the; corporation with official who acts as the directing mind of the corporation attributing the fault or mental element of that person to the corporation for the purpose of determining the criminal liability. Thus, the courts in Canada followed the English authorities that suggest that a corporation is liable only for what is clone by the 'directing mind and will of the corporation, the very ego and centre of the personality of the person.'[218] But in late 2003, a bill was enacted by the Canadian Parliament to amend the Criminal Code in order to provide a new regime for the determination of criminal liability of corporations and other organizations; its provisions took effect from 2004.[219] The Bill also provides a new punishment regime to allow courts to fine corporations and also to place them on probation in an attempt to; ensure that the offences were not repeated. Thus the new regime replaces the Common Law concept of a directing mind with a new and broader statutory concept of a senior officer, which now includes those who are responsible for managing an important aspect of the corporation's activities.[220]

Canadian criminal law makes a difference between '*mens rea'* offences (requiring a culpable state of mind), 'strict liability' offences (for which a defendant will be liable unless it can be established that the defendant used due diligence to avoid the commission of the offence) and 'absolute liability' offences (for which a defendant will be liable regardless of their state of mind). In the case of absolute and strict

217 *Supra note 17.*

218 Supra note 11 at 713.

219 Kont Roach, Criminal Law 202 (Irwin Law, Toronto, edn., 2004).

220 Ibld.

liability offences, no question arises as to the corporation's state of mind[221]

Before the 1980s, the Swiss system could not accommodate generalised criminal liability for corporations because it had been assumed that it was heavily influenced by the principle *societias delinquere non potest.* Presently, article 102 of the Swiss Penal Code provides bases of corporate criminal liability, whereas Article 103 provides for the calculation of fines against corporations found guilty under art 102 on the basis of several factors, including the 'organisation' of the company.[222]

In Japan, criminal liability of corporations does not generally exist. This situation arose from the historical origins of the inborn Japanese legal system; which was originally based on the French and German Civil law systems and the notion that only natural persons can commit crimes. As a result, the Japanese Penal Code of 1907 contained no provisions for corporate criminal liability. However, in 1932, the Act Preventing Escape of Capital to Foreign Countries was passed. The Act introduced the 'Rydbalsu-Kitei" (translated as 'double punishment'/'[t]wo-sided or bilateral punishment') into Japanese law. In effect, *Ryobatsu-Kitei* are clauses declaring that im the event of a natural person committing an offence, an associated legal person may also punished.[223]

4.4 THE INDIAN POSITION

The question relating to corporate criminal liability came for discussion in *Punjab National Bank v, A.R.Gonsalycs, Bunder Inspector Karachi Port Trust*.[224] In this case the Punjab National Bank, a limited liability company registered in India, was convicted at a trial held by the City Magistrate, Karachi, for infringing Karachi Port Trust bye-law 6 and, under bye-law 62, was sentenced to pay a fine of Rs. lOO/-. The court held that a corporation was liable for crimes requiring no

221 Allens Anhur Robinson, "'Corporato Culture' as a basis For the criminal liability of Corporations", available ast: http:// l 98. l 70.85.29/ Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Fob-2008.pdf

222 Ibid

223 Ibid

224 AIR 1921 Sind

mens rea and it is necessary that the act charged against the company should be one which is contemplated in the Chapter- or Articles of Association as being capable of being performed by the corporation or must be intimately connected with the statutory and legal obligations. It was further laid down that a corporation cannot commit murder or treason for such an offence presupposes commission of acts wholly ulta vires on the part of the company.

In Superintendent and Remembrance of *"Legal Affairs, Bengal v. Manmatha Bhusan*

Chatterjee,[225] it was held that the corporation cannot suffer damage in mind or body. An incorporated company may have a reputation for the good conduct of the business or understanding of the company and the company's reputation may be quite distinct from that of any of its officers however highly placed.

In *Ananth Bandhu v. Corporation of Calcutta,*[226] an appeal was preferred against the conviction of the appellant under Section 407 of the Calcutta Municipal Act read with Section 488 and a fine of Rs. 500 was imposed by the Third Municipal Magistrate of Calcutta. The complaint was also against Samanta Industries Ltd. It was argued that a limited company under Indian Law cannot be proceeded against under criminal law or even under Municipal law. The Calcutta High Court did not agree with the above proposition. Clarifying the law on the point, the Division Bench stated that under Indian law a company can be proceeded against, unless the same is prohibited expressly by the Section or the offence cannot physically be committed by the company, or the offence is such that *mens rea* is an essential element of the same.

In the instant case, the court held that a corporation can be convicted of offences where:

(*i*) There is no requirement of *mens rea.*

(*ii*) It is physically impossible for the company to commit the offence, and

(*iii*) Where the corporation cannot suffer from the mandatory sentence mentioned in the statue.

225 1924, Cal 495.

226 AIR 1952 Cal 759.

While discussing the scope and applicability of corporate criminal liability, the court ignored the evolution of corporate criminal liability in England by refusing to include offences requiring *mens rea* within the ambit of corporate criminality in India. Further, the court made no attempt to give any theoretical basis on which it accepted the doctrine of corporate criminal liability, nor did it elucidate the scope and extent of the same.

It is a well settled that the liability of corporation for the acts committed by its servants or agents is governed by the same rules which determine the liability of a principal or an agent. In *T. Pillai v. Municipal council, Shericottah*, [227] which is considered to be a leading example relating to the concept of vicarious liability, the defendant municipality was held liable for the unlawful act of killing the plaintiff's dog, The act was done through the servants. The court observed that the corporation is a fictitious person having an entity in law distinct from its members and by its very nature can only act through its servants and agents, and not in propria persona.

Further, the jurisprudence of liability can even be determined by the concept of "strict" and "absolute" liability. Initially, the principle of strict liability [228]was followed, wherein the liability of the corporation or any company was determined subject to certain exceptions (act of God, act of third party, plaintiff's own default, consent to the plaintiff, statutory authority). The doctrine was well accepted in India.[229] But later, the doctrine was changed from strict to absolute, wherein the liability was determined without exceptions. It was followed by the Supreme Court, wherein it was laid down that "it has extended the scope of the strict liability principle by making it absolute in nature with no exceptions attached to it". [230]Thus, the principles of absolute liability show that if the corporation commits a wrong, then it would be held liable.

In *State of Maharashtra v. Syndicate Transport Co*., [231]the Bombay High Court held that a corporate body must be held liable for criminal

227 AIR 1961 Mad 230.

228 Rylands v. Fletcher, (1868) LR 3 HL 330.

229 Minu B. Mehta v. Balakrishna, AIR 1977 SC 1248.

230 Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1441.

231 AIR 1964 Bom 195.

acts or omissions of its directors, authorised agents or servants whether they involve mens rea or not, given that they have acted or have purported to act under the authority of the corporate body or in pursuance of the aims and objectives of the corporate body.[232] Thus, this judgement opens the way for implicating corporations for offences involving mens rea under Indian criminal jurisprudence. In this case, we find refrences are being made to those cases characterizing vicarious liability for attributing criminal intent, but ultimately the findings are based on the

concept of the "directing mind and will" (i.e; identification theory) without referring to the *H.L.Bolton case.*[233]

In *Aligarh Municipality v. E.T.Mazdoor,* [234]the Supreme Court held that a command to a corporation is in fact a command to those who are officially responsible for the conduct of the affairs. The court further held that failure on the part of the people in command to take appropriate action would make them liable together with the corporate body. Hence, the apex court implicitly accepted the concept of corporate criminal liability of corporations. Thus the Supreme Court uses the English identification theory to impose liability on corporations.

In the case of *M.V. Javali v. Mahajan Borewell & Co.,* [235]the Supreme Court focused much on the prescribed punishment of mandatory punishment and fine and did not discuss whether the model to be adopted is vicarious liability or identification theory.

The Supreme Court was again faced with the issue of corporate *mens rea* in *Kalpanath Rai v. State*.[236] In this case, the company named M/s. East West Travel and Trade Links, Ltd. Was prosecuted under TADA on the accusation of harbouring terrorist. The company was sentenced by the trail court to a fine of Rs. 50,00,00/-. The matter came before the Supreme Court. The question raised was whether the offence committed under Section 3(4) of the TADA[237] required *mens rea*. The

232 Id. At para 17.

233 Supra note 17.

234 AIR 1970 SC 1767.

235 (11997) 8 SCC 72.

236 AIR 1998 SCC 201.

237 Whoever harbours or conceals, or attempts to harbor or conceal, any terrorist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

Apex Court's answer was in the affirmative. The next question raised was whether the appellant company should have been prosecuted if the offence required *mens rea*. The Court's answer was in the negative and thus it set aside the conviction passed against the above company in the following observation.[238]

"On the above understanding of the legal position we may say at this stage that there is no question of A-12-company to have had the *mens rea* even if any terrorist was allowed to occupy the rooms in Hotel Hans Plaza. The company is not natural person. We are aware that in many recent penal statues, companies or corporations are deemed to be offenders on the strength of the acts committed by persons responsible for the management or affairs of such company or corporations e.g. Essential Commodities Act, Prevention of Food

Adulteration Act, etc. But there is no such provision in TADA which makes the company liable for the acts of its officers. Hence, there is no scope whatsoever to prosecute a company for the offence under Section 3(4) of TADA."

Thus the appellant company was acquitted on the single ground that it was an artificial person and, even though it was capable of committing a crime, it could not commit one that requires *mens rea,* such as one provided under Section 3(4) of TADA. The position in india till *Kalpanath's case* was that a corporation cannot be prosecuted for a crime that requires proof of *mens rea*.

A landmark Supreme Court decision on the question of corporate criminal liability comes in *Assistant Commissioner v. Velliappa Textiles Ltd. And Others*.[239] In this case, two among other issues that arouse before the Supreme Court are : (1) whether the *mens rea* of the person in charge could be attributed to the company, and (2) whether a company was liable for punishment of fine alone if the law contemplated punishment only or by imprisonment plus fine. The Bench was divided on the first issue.

Rajendra Babu, J., while delivering the majority judgement, laid down the principles regarding the imposition of mens rea on the corporate entity. Since the corporation has no mind of its own, its, active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the

238 Supra note 41 para 58.

239 (2003) 11 SCC 405.

directing mind and will of the corporation, the very ego and centre of the personality of the corporation. This is English model of imposition of m,ens rea on corporations.

But in the next statement he points out that it is not possible to attribute element of *mens rea* to a juristic person, which requires positive act of omission or commission. Since this cannot be attributed to a juristic person, it is difficult to accept the proposition of punishing a company wherein *mens rea* element is necessary. In the first place Rajendra Babu, J., accepts the alter ego doctrine; in the second, he denies the *mens rea* element to corporations. But the purpose of the alter ego doctrine is to impose *mens rea* of the controlling officers of the corporation. There seems to be confusion and lack of clarity in this matter, which resulted in the corporation being allowed to get away with the offence it had committed.

Mathur, J., who delivered the minority opinion, uses both the identification and aggregation models while holding the corporations criminally liable.

In *Standard Chartered Bank v. Directorate of Enforcement,*[240] while dealing with the question of corporate punishment, the judges did not address the question of imposition of mens rea on corporations.

In a recent case *Iridium India Telecom India Limited v. Motorola Incorporated and Others*.[241] In its ruling, the Supreme Court while adhering to the legal position particularly in England and United States, stated that "the companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing mens rea for the commission of criminal offences."[242]

Hence, the settles position in India is that corporations are liable also for crimes that require mens rea. As regards imposing criminal liability to corporations, the Indian courts, as seen in the above cases, either apply the theory of vicarious liability or the identificationtheory.

4.5 CORPORATE ENVIRONMENTAL LIABILITY

Tortuous liability (where damages and injuctions are available a s remedies) has become part of the Indian legal system. In India, the

240 (2005) 4 SCC 530.

241 (2011) 1 SCC 74.

242 Id. At para 55.

law of tort "has been is a mixture of common law and statutory law of England to the extent to which it is applicable to Indian circumstances."[243] But the major problem with tort law is that "it limits compensation to the amount of harm done to the victim."[244]

Strict Liability and Absolute Liability

Liability for harm cause from environmental damages "has, to some extent, moved away from fault-based regimes towards strict liability."[245]Strict liability crimes-also calles "no fault" liability crimes-are those in which "the necessity for mens rea or negligence is Wholly or partly excluded."[246] Under this rule, "an actor is liable for any harm he causes, even if he is not at fault."[247]It was developed in England and is popularly known as the rule in *Rylands v. Fletcher:*[248] In the European Union, the move from fault liability to strict liability "has largely been under the rubric of the Polluter Pays principle."[249] The rationale for this lies in the difficulty in proving fault in the environmental context due to the complex process of tracing emissions to harm and "because the polluter has better information about the process."[250] Besides, "strict liability is thought to better provide compensation to victims of pollution and to impose the risk from pollution on the party that can control it."[251] The

243 Furqan Ahmad, Legal Regulation of Hazardous Substances 194 (Daya Publishing House, Delhi,2009).

244 Michael Faure, "Environmrntal crimes", in Nuno Garoupa (ed.) Criminal Law and Economics 320 (Edward Elgar Pub., Chelteriham, 2009);

245 David Weisbach, "Negligence, Strict Liability, and Responsibility for Climate Change" 97 ILR 524(2012).

246 R.C.Nigam, Principles of criminal law 210 (Asia Publishing House, Bombay, Calcutta, 1965).

247 Supra note 51.

248 (1868) LR 3 HL 330. Justice Blackburn enunciated the rule in the following words: "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is a natural consequence of its escape."

249 Supra note 51 at 555.

250 Ibid.

251 Ibid.

American environmental law generally does not impose strict liability; by and large it uses "command-and-control" regulations that prohibit certain activities. In fact, the only one example of strict liability is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[252]

In the context of emission cases, David Weisbach mentions certain problems associated with strict liability:[253]

- Problem of calculating the net harm from emissions;
- Problem of time period over which we measure emissions;
- Problem concerning how we treat population growth;
- Problem of ongoing harm resulting from emissions.

In addition to the above problems, the rule of strict liability is subject to certain exceptions[254] which exempt the actor from liability. The Indian Supreme Court, in

M.C. Mehta v. Union Of India,[255] (Oleum gas leakage case, a case involving liability of an enterprise engaged in hazardous or inherently dangerously activity) took a bold step in rejecting the rule of strict

252 Ibid; CERCLA was enacted by Congress on December 11,1980. This law creates a tax on the chemical and petroleum industries and provides broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. CERCLA establishes prohibitions & requirements concerning closed and abandoned hazardous waste sites.It provides for liability of persons responsible for releases of hazardous waste at these sites; and establishes a trust fund to provide for cleanup when no responsible party could be identified. CERCLA was amended by the Superfund Amendments and Regulations Act (SARA), 1886.

253 Id. at 556,557.

254 Those exceptions are: (i) damage due to natural use of land, (ii) act of God (e.g;natural catastrophes), (iii) act of stranger, (iv) consent of plaintiff, (v) plaintiff's own fault, (vi) statutory authority.

255 AIR 1987 SC 1086; the Supreme Court remarkably stated: "[W]here an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account an accident in the operation of such hazardous and inherently dangerous activity…..the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operates vis-à-vis the tortuous principle of strict liability in Rylands v. Fletcher."

liability and evolved the rule of "absolute liability" in the context of India. This new principle of liability makes ineffective the exceptions laid down by the strict liability principle.

In the *Bhopal Gas leakage case,* where multinationals were involved, initially "the Supreme Court missed a chance to decide about the liability principles"[256] in an effort to arrive at a compensation settlement. Complex legal issues came up regarding the liability of the parent company. The Principle of strict liability and the Indian principle of absolute liability should be acknowledged as apt and effective enough to fix liability on the offender corporation. Thus, the Public liability Insurance Act, 1991 was enacted with the main objective to provide for damages to victims of an accident which occurs as a result of handling any hazardous substance; and "for the first time acknowledges the principle of no-fault liability."[257] The Act applies to all owners associated with the production or handling of any hazardous chemicals.

The National Environment Tribunal Act, 1995 was meant to provide for strict liability for damages arising out of any accident occurring while handling hazardous substances and for establishing a National Environment Tribunal for effective disposal of cases arising from such accidents.[258] Section 26 of the Act provides for penalty for offences by companies.[259]

256 Furqan Ahmad, "Origin and growth of Environmental law of India", 43 JILI 378(2001).

257 Id. At 379.

258 Preamble of the Act; also see Ministry of Environment and Forests, Government Of India, "National Environment Tribunal", available at: http://moef.nic.in/modules/rules-and-regulations/national-environment-tribunal/.

259 **26. Offences by Companies.-** (1) Where any offence under this Act has been committed by a company,every person who, at the time the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemedbto be guilty of the offencen and shall be liable to be proceeded against and punished accordingly.

Provided that nothingcontained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

However, this Act remains a "paper tiger"[260] and is unsuccessful in tackling environmental problems in India. Then again, the National green Tribunal Act, (NGTA) 2010 "does not fix the responsibility of who is liable to pay compensation in case of an accident…"[261] The Act also dilutes its purpose by allowing industries to appeal before the National Green Tribunal (NGT) if they fail to get environmental clearance.[262]

4.6 PURPOSES OF CRIMINAL SANCTION

The settled legal position is that corporations are liable both for crimes that did not require mens rea as well as those that require mens rea. The next question is relating sentencing the corporation. Any

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that; the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director,manager,secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

260 Meena Menon, "How green is my tribunal", The Hindu, July 07,2010.

261 Ibid.

262 Section 16 of the Act.

The Act came into force on October 18,2010 and it allows the NGT to entertain only those appeals against orders passed on or after that date and those which stood transferred to it from the National Environment Appellate Authority (NEAA). Recently, The NGT rejected a plea challenging the green nod given to a 1,127- acre industrial park in Tamil Nadu in August 2008, saying it is "helpless" as it is bound by the National Green Tribunal Act, (NGTA) 2010 which fixes a timeline for cases it can hear: see "Helpless' green tribunal rejects plea against industrial park", The Times Of India, April 26, 2012. In a significant decision on April 20,2012, the Tribunal set aside the Environmental Clearance granted to Jindal Steel and Power Ltd. (on November 4, 2011) for coal mining project in Chattisgarh on grounds of faulty public hearing that was held in January, 2008:see Aarti Dhar, "Green tribunal says 'no' to Jindal Steel", The Hindu, April 21, 2012. But the Tribunal refused to entertain the plea challenging the Ministry of Environment and Forests' (MoEF) decision to grant environment clearance on March 18, 2011, for the first phase of the project on the ground that it was time-barred: see "Tribunal to hear plea against nod to Jindal's power plant", The TimesOf India, April 26, 2012.

punishment inflicted on a person (including an artificial person) should have a purpose or a definite rationale; and the form of punishment prescribed must serve that purpose for which it is served.

The purpose of legal punishment can be significantly derived from the various theories of punishment propounded by jurists over the centuries. These theories can be divided into two general philosophies : utilitarian and retributive. Larry Alexander divides the theories of punishment into retributive, consequentialist and threat-based.[263] The utilitarian[264]/ consequentialist theory of punishment seeks to punish offenders to discourage, or

"deter", future wrongdoing. Under the deterrent viewpoint, punishment should deter other people from committing criminal acts. Salmond considers deterrence to be the most important one. He observes: 'Punishment is before all things deterrent and the chief end of the law of crime is to make the evil doer an example and a warning to all that are likeminded with him[265]. The retributive theory seeks to punish offenders because they deserve to be punished. A criminal deserves

263 Supra note 2.

264 Utilitarianism is the moral theory that holds that the rightness or wrongness of an action is determined by the balance of good over evil that is produced by that action. Philosophers have argued over exactly how the resulting good and evil may be identified and to whom the greatest good should belong. Jeremy Bentham identified good with pleasure and evil with pain and held that the greatest pleasure should belong to the greatest number of people. John Stuart Mill, perhaps the most notable utilitarian, identified good with happiness and evil with unhappiness and also held that the greatest happiness should belong to the greatest number. Traditionally, utilitarians have focused on three ways in which punishment can reduce crime. First, the threat of punishment can deter potential offenders. If an individual is tempted to commit a certain crime, but he knows that it is against the law and a punishment is attached toa conviction for breaking that law, then, generally speaking, that potential offender will be less likely to commit the crime. Second, punishment can incapacitate offenders. If an offender is confined for a certain period of time, then that offender will be less able to harm others during that period of time. Third, punishment can rehabilitate offenders. Rehabilitation involves making strides to improve an offender's character so that he will be less likely to re-offend. [quoted verbatim from: http://www.iep.utm.edu/punishme/]

265 P.J.Fitgerald, Salmond on Jurisprudence 94 (Universal Law Publishing Co. Pvt. Ltd, New Delhi, 2009).

punishment in order to 'pay' for his crime. In most extreme form is the lex talionis (the law of retaliation). The concept of desert is fundamental to all retributivist approaches. Weak retributism believes that desert is a necessary, but not a sufficient, condition for justifying punishment. They require, in addition, that punishment produces positive effects, such as deterring crime or reforming or incapacitating offenders. Strong retributivists, on the other hand, regard desert as a sufficient threshold to justify punishment; desirable consequences are immaterial.[266]

The preventive object aims at preventing crime rather than avenging it. It seeks to prevent the recurrence of crime by incapacitating the offenders. It pre-supposes some kind of physical restraint on the offenders in order to disable them to commit further crimes in the future. Reformation aims at restoring the criminal to society as a better and wiser person and a good citizen. Restorative theory aims at 'making good', 'making amends', 'compensation','reconciliation','restoration',' re-integration','reparation',etc. characterize this concept.[267] The process involves meetings between victims, offenders and mediators giving opportunity to the offender to explain his or her offence and apologize to the victim. This is a new approach to crime and punishment in the U.S.A. and Western European countries, but not in India.

Any appraisal of the functions of punishment requires a consideration of the ends that it is thought to serve. The detterent and preventive functions seek to discourage and prevent crimes. They may be effective in the case of first-time offenders but fail in the case of hardened criminals and those with a determined criminal intent. They also fail to have effect in those offences committed in the heat of passion, or extreme excitement- when the emotion is out of control.

The modern trend tends to look at the reformative functions as an ideal object of punishment. But there is a strong feeling that it should not be stretched too far. Reformative treatment may work out in case of first-offenders, juveniles and women offenders. Incorrigible and professional criminals hardly respond to reformative principles. Salmond observes that although general substitution of reformation in place of deterrence may seem disastrous, it is possible and desirable in certain

266 Supra note 2

267 See Chapter 6 of Susan Easton and Christine piper, Sentencing and Punishment: The Quest for Justice, 154-186 (Oxford University Press, New York, 2005).

cases specially for abnormal and degenerates who have diminished responsibility.[268] While reformative function is being generally applied, the value of deterrent function should not be over looked in certain cases.

The restorative function has been criticized for many quarters for lacking the punitive element, which is the basic principle of sentencing. It is, therefore, alleged that it turns criminal justice into civil justice.[269]

Over the past two centuries, our understanding for the retributive purpose of punishment has undergone an enormous change due to the rapidly changing social values, deeper insight into the complexity of the individual person, and human right awareness.

"We no longer understand punishment as retributive in the sense of satisfying the feelings of revenge of the victim, but the view is still held that it is retributive in the sense that it expresses the solemn disapprobation of the community- a reprobation not always unmixed in the popular mind with atonement and expiration."[270]

Retribution inflicted by a court of justice need not to involve a feeling of hatred and revenge against the offender. This understanding of the function of punishment in fact covers the other aspects too-i.e; those of deterrent, preventive and reformative.

Punishment is imposed because some person has done wrong. The main aim of punishment is protection of society from harm caused by a crime. Hence, ultimately, it is the community's acceptance of certain human conducts as approving and certain others as disapproving, or criminal in nature, that the basis and functions of reward and punishment is understood. Penal policies reflect the society's reaction to crime and, therefore, the objects of punishment also depend of the accepted norms and values of a given society.

4.7 FINE- ALTERNATIVE OF MANDATORY IMPRISONMENT

To punish is to cause a person to undergo pain, loss, or suffering for a wrongdoing. It implies the infliction of some penalty imposed on

268 Supra note 71 at 97

269 N.V. Paranjape, Studies in Jurisprudence and Legal Theory 173 (Central Law Agency, Allahabad, 5th ed.,2010).

270 V.Balasubrahmanyam, "Punishment" in K.N.Chandrasekharan Pillai (ed.), Essays on the Indian Penal Code 236 (The Indian Law Institue, New Delhi, 2005).

a criminal for a crime. It is the suffering in person or property inflicted by the society on the offender who has been adjudged guilty of crime under the law.[271] A corporate body cannot suffer imprisonment, as is popularly known it has 'no soul to damn and body to kick'. The issue of the application of statutes that impose a mandatory term of imprisonment or a mandatory term of imprisonment and fine on artificial persons has been considered by both the Law commission of India and the Supreme Court of India in a number of occasions.

4.8 LAW COMMISSION OF INDIA AND RECOMMENDATIONS

As early as 1969, the Law commission of India in its 41st Report,[272] recommended amendment to Section 62 of the IPC,[273] by adding:

"In every case in which the offence is only punishable with imprisonment and fine and the offender is a company or other body corporate or the association of individuals, it shall be competent for the court to sentence the offender to fine only"

Again in its 47th Report, the Law Commission of India made[274] similar recommendation relating to economic offences where imprisonment is mandatory.

271 Supra note 52 at 225.

272 Law Commission of India,41st Report on The Code of Criminal Procedure, 1898-Vol.I (September, 1969).

273 Section 62 IPC: Forfeiture of property in respect of offenders punishable with death, transportation of imprisonment.

274 Law Commission of India, 47th report on the trial and Punishment of Social and Economic offences (February,1972). See Para. 8.3 "In many of the Acts relating to economic offences, imprisonment is mandatory. Where the convicted person is a corporation, this provision becomes unworkable, and it is desirable to provide that in such cases, it shall be competent to the court to impose a fine. This difficulty can arise under the penal Code also, but it is likely to arise more frequently in the case of economic laws. We, therefore, recommend that the following provision should be inserted in the Penal Code as, Section 62: '(1) In every case in which the offence is punishable only or with imprisonment and fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine only.

(2) In every case in which the offence is punishable only or with imprisonment and any other punishment not being fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine.

In 1977, in the case of *M.V.Javali v. Mahajan Borewell & Co.,*[275] the position is that prosecution of a corporation is not barred simply because the punishment is mandatory imprisonment with fine, that is, merely because imprisonment cannot be imposed on a corporation. In that situation, a sentence of fine alone is justified. The Court observed:

"That the only harmonious construction that can be given to Section 276B is that the mandatory sentence of imprisonment and fine is to be imposed, where it can be imposed….but where it cannot be imposed, namely, on a company, fine will be the only punishment."

In the *Velliappa textiles case,*[276] one of the question that arises is whether a company was liable for punishment of fine alone if the law contemplated punishment only or by imprisonment plus fine. The majority view was that a company cannot be prosecuted for offences which require mandatory imprisonment with fine. It was further held that where punishment is imprisonment, the court cannot impose a fine only. The majority view is that if the offence prescribes mandatory imprisonment or mandatory imprisonment with fine, the company cannot be prosecuted for it would go against the intention of the legislature to do away with imprisonment and impose fine alone. This position was refuted in *Standard Chartered bank and Others v. Directorate of Enforcement and Others*[277] when

Balakrishnan, J. stated, "We do not think that the intention of the legislature is to give complete immunity to the corporate bodies for these grave offences." The intention of the Parliament is clearly not to let off the offender but to identify and bring him/her it to book:

The Standard Chartered Bank's case overruled the ratio laid down in the Velliappa textiles case when the Supreme Court held that there is no immunity for a company merely because punishment is mandatory imprisonment. While overruling the Velliappa textiles case, K.G. Balakrishnan, J. observed:

"As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is

(3)In this Section, "corporation" means an incorporated company or other body corporate, and includes a firm and other association of individuals.'"

275 (1997) 8 SCC 72.

276 Supra note 45.

277 Supra note 46.

the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such discretion is to be read in to the section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is blanket for any company for any protection for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment."

In a most recent case on the issue, the *Iridium India Telecom Limited v. Motorola Incorporated and Ors,*[278] the supreme Court merely reiterates the position held in the *Standard Chartered Bank's Case* when it observes:[279]

:A company/corporation cannot escape liability for a criminal offence m,erely because the punishment prescribed is that of imprisonment and fine. We are of considered opinion that in view of the aforesaid judgement of this Court, the conclusion reached by the high Court that the respondent could not have the necessary mens rea is clearly erroneous."

Thus the position in India makes it clear that, as far as guilty juristic persons are concerned, where the punishment prescribed is mandatory imprisonment and fine, the court has a discretion to impose a sentence of fine alone because it is impossible to imprison a company.

4.9 FINES IN VARIOUS COUNTRIES

In England fines are imposed for indictable offences. Courts in England have the general power to impose fine in all cases except those that require death sentence or Imprisonment for life or detention

278 Supra note 47

279 Id. At para. 66.

during Her majesty's pleasure.[280] But statutory limitations as regards the maximum amount permitted are prescribed.

In the unites states, chapter 8 of the US Federal Sentencing Guidelines Manual lays down very detailed guidelines for sentencing of corporations, among which is assessment of suitable fine. Every year, millions of fines are being imposed on small offences like traffic offences and misdemeanour. However, monetary penalties for serious offences have not yet been much appreciated by the American courts.[281] This position is in contrast with the Netherlands where fine is "legally presumed to be the preferred penalty for every crime; if not, judges are required to provide a statement of reason for not imposing a fine."[282]

Canadian criminal law[283] provides that a court should order fines only when satisfied that an offender will be able to pay the fine or to work off the fine in a fine option programme. In *R v. Hebb,*[284] Kelly J. stressed the importance of ensuring that an accused is financially able to pay the fine assessed. "This precaution is necessary to ensure not only that it is not impossible for a person of limited means to pay a fine, but also that a small fine not only become trivial to an accused of greater means."[285]

The National Institute of Justice, in its report on the studies of day- fine by the Richmond County Criminal Court (New York) and the Milwaukee Municipal Court concluded that the day fine can play a major role as an intermediate sanction and that the day-fine concept could be implemented in a typical American limited-jurisdiction court.[286]

280 Rupert Cross and Phillip Asterley Jones, An Introduction to Criminal Law 394 (Butterworths, London, 7th edn, 1972|).

281 Michael torney, "Intermediate Sanctions" in Michael Torny (ed.), The Handbook of Crime and Punishment 699 (Oxford University Press, New York, 1998). 683-711

282 Id. At 699

283 Section 743 (2) of Criminal Code.

284 (1989) 47 CCC (3d) 193 (NSTD).

285 Supra note 24 at 360.

286 Frank Schmalleger, Criminal Justice Today 415 (Prentice Hall, New Jersey, 1999).

Section 1 of the Chapter 9 of the Penal Code of Finland provides that a corporation may be subject to a fine for an offence committed 'in its operations'. Section 2 provides for the basis of criminal liability.[287]

4.10 FINE AS A PUNISHMENT

Concept of Fine in Criminal law

Fine is one of the oldest form of punishment; it predates even the Code of Hammurabi.[288] Black Law dictionary defines 'fine' as "a pecuniary criminal punishment or civil penalty payable to the public treasury."[289] 'Fine', in the context of criminal law, is a "pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanour,"[290] It is "indeed forfeiture of a sum of money by way of penalty."[291]

In India, Sections 53 to 75 of the Indian Penal Code give general provisions regarding punishment for different offences under the code. Section 53 provides six[292] kinds of punishment, among which is Fine.

287 Section 2 reads:

A corporation may be sentenced to a corporate fine if a person who is part of its statutory organ or other management or who exercises actual decision-making authority therein has been an accomplice in an offence or allowed the commission of the offence or if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation.

A corporate fine may be imposed even if the offender cannot be identified or otherwise is not punished. However, no corporate fine shall be imposed for a complainant offence which is not reported by the injured party so as to have charges brought, unless there is a very important public interest for the bringing of charges.

288 Sally T. Hillsman, Barry Mahoney, George F. Cole and Bernard Auchter, "Fines as criminal Sanctions" in Research in Brief 1 (National Institute of Justice, September, 1987).

289 Bryan A. Garner (ed.), Black's Law Dictionary (West group, 7th ed.)

290 John Bouvier, Bouvier's Law Dictionary and Concise Encyclopedia (West Publishing Company, St. Paul, Minn, 1914).

291 Supra note 52 at 244

292 Death Sentence, Imprisonment for Life, rigorous Imprisonment, Simple Imprisonment, Forfeiture of property and Fine

The scheme regarding fine as a punishment under the Indian Penal Code is made out in four classes, which show the way the IPC carries out its express intention in fixing the sentence of fine:[293]

(*i*) Offences in which the fine is the sole punishment, in which the amount is specified or unspecified. For instance, Sections 137, 154, 155, 156, 171G, 171H, 171I and 489E.

(*ii*) Offenses in which fine is an alternative punishment but its amount is limited. This constitutes a large number of offences in the IPC.

(*iii*) Offences in which it is an additional imperative punishment but its amount is limited. This also constitutes a large number of offences in the Code.

(*iv*) Offences in which it is both an imperative punishment and its amount is unlimited.

Advantages of Fine

Bentham, in his Principles of penal Laws[294] lists the advantages and disadvantages of fine as punishment. For Bentham fine has the following advantages:

- It has the striking advantages of being convertible to profit;
- It can be regulated according to means of the offender;
- It implies no infamy;
- It is remissible so that complete reparation can be made for an unjust sentence;
- It is popular.

A fine has the advantage of depriving the offenders of the profit they make out of their act of criminality. Thus corporations amassing huge sum of money through fraud, or any criminal act can be deprived of their illegal profit effectively through fine. Moreover, it can be made proportionate to both the seriousness of the offence and the ability of the offender to pay; it is more likely to be imposed where the offender has both a clean record and the ability to pay.

293 Supra note 52.

294 Id. At 244.

Speaking in the context of prison reform, the Draft National policy of Prison Reforms and Correctional Administration states:[295]

"Fine and other monetary penalties are imposed for various minor offences of the offenders at the pre-trial stage. It is expected this measure will lead to reduction of the last percentage of pre-trial detention of under-trials. Fines are economical in terms of money and man-power and are also humane alternative as it inflicts minimum damage to the offender. However fines cannot be used for poor offenders who cannot pay. Many times, prisoners are committed to prison in default of payment of fine. It is for such cases that community service will be a better option than simple imprisonment."

In the context of environmental offense, Faure states the advantage of monetary sanction in the following words:[296]

"The low probability of detection could well be compensated by imposing a high fine on the polluter. Fines have always been considered the preferred sanction in economic theory, for the simple reason that the costs of imposition are low and fines in fact only generate money for the public budget. Monetary sanctions can, in principle, have both a criminal and an administrative nature."

The deterrence function of criminal law is particularly important in the environmental context. Environmental law should be preventive in nature. The laws should seek to prevent harm to the natural environment. Heavy fine acts as a deterrence and can, therefore, prevent acts that harm the environment (rather than address or compensate for the damage done). In the words of Richard J. Lazarus:[297]

"Monetary remedies do not address the damage issue. Moreover, natural resource restoration may be an illusionary goal. Deterrence, therefore, can be essential to the achievement of the preventive objective of environmental law to prevent such harm, rather than merely to redress harms once they have occurred."

295 The Draft National policy of Prison reforms and Correctional Administration, (prepared by the Bureau Of Police Research and development, Ministry of Home Affairs Government Of India, New Delhi, 2007)

296 Michael faure, "Environmental Crimes", available at: http://ssrn.com/abstract=1498471

297 Richard J. lazarus, "Mens rea in Environmental Criminal law: Reading Supreme Court Tea leaves", 7 F Ev.L.Rev. 865 (2011).

Objections against Fine

The disadvantages of fine as punishment as listed by Bentham are:[298]

- It hits the family and the dependants who are innocent;
- It is not exemplary, as at its execution no spectacle is exhibited.

Without doubt, a fine imposed on a corporation would adversely affect innocent persons who are in no way involved in the crime. "Innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too." [299]

Innocent employees would lose their jobs, and investors may be hard hit.[300] In fact, any punishment inflicted on a person- be it for retributive or utilitarian purpose-will ultimately have a negative effect on other innocent persons. A fine or an imprisonment would consequently affect the innocent wives/husbands, children and other dependants of the convict.

Effectiveness of Fine as Deterrence

One of the most widely cited objections by judges (to the use of fines) is that fines do not form a real deterrence as they allow wealthy offenders to 'buy their way out' and poor offenders cannot pay fine.[301] Further, as in the context of England, there has been a concern that "the general level at which fines are imposed neither reflects the gravity of environmental crimes, nor deters or punishes adequately those who commit them. This is clearly unsatisfactory."[302] Moreover, "the profits made from crimes form too little a part in decisions as to the size of fine or sentence to be given. Courts-and prosecutors-need to bear in mind that unless the polluter pays substantially more than the sum he profits by from his crime there will be no real deterrent or punishment value to the sentence given."[303]

298 Supra note 52

299 Albert W.Alschuler, "Two ways to think about the Punishment of Corporations" ACLR (Northwestern Public Law Research Paper No. 09-19,2009).

300 Ibid.

301 Sally T.Hillman, Joyce L. Sichel & Barrey Mahoney, Fines in Sentencing 35 (|Vera Institue Of Justice, New York, 1983).

302 House of commons Environmental Audit Committee, 6th Report on Environmental Crime and the Courts (May,2004), at para 16.

303 Id. At para 21.

Problem concerning the amount of Fine

The amount of fine imposed on the convict poses another problem. Should the same amount of fine be imposed on the same offence committed by persons of different financial and economic status? Imposition of a certain sum of money may be beyond the reach of a poor offender, while it is a laughable matter for the rich offender. Section 63 of the Indian Penal Code provides that 'where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.' Thus the section leaves the matter to the discretion of the judge to fix the amount of fine. The framers of the Indian Penal Code gave good reason for this discretion when it observed:[304]

"It is impossible to fix any limit to the amount of a fine which will not either be so high as to be ruinous to the poor, or so low as to be no object of terror to the rich….A just and wise judge, even if entrusted with a boundless discretion, will not, under ordinary circumstances, sentence such an offender (a poor one) to the fine of a hundred rupees."

(*a*) Information of Financial and Economic Status of the Offender

As early as the1950s, in *Adamji Umar Dala v. State*,[305] the appellant was convicted by the trial court for black-marketing and sentenced to a fine of Rs 1,500 along with substantial sentence of imprisonment. The Supreme Court, however, reduced the amount to Rs 1,000 in the opinion that the accused was a commission agent and the fine imposed by the trial court was harsh. The Supreme Court observed:

"In imposing fine, it is necessary to have as much regard to the pecuniary circumstances of the accused person as to the character and magnitude of the offence."

Complete information on the financial and economic status of the offender would enable the court to resolve this particular issue to a large extent.

(*b*) Day-fine System

Perhaps the day-fine system of the Scandinavian criminal courts may shed more light on the problems relating to justification in the use of fines both in sentencing the rich and the poor, as it takes into account

304 Supra note at 245.

305 AIR 1952 SC 14.

both the seriousness of the offence and the ability of the offender to pay. The day-fine system is based upon the idea that fine should be proportionate to the severity of the offence but also need to take into account the financial resources of the offender. Day fines are computed by first assessing the seriousness of the offence, the offender's degree of culpability, and his or her prior record as measured in 'days'. The use of days as a benchmark of seriousness is related to the fact that, without fines, the offender could be sentence to a number of days (or months or years) in jail. The number of days an offender is assessed is then multiplied by the daily wages that person earns. For example, if two persons were sentenced to a five day fine, but one earned only 20 dollar per day, and the other 200 dollar per day, the first would pay a 100 dollar fine and the second 1000 dollar fine.[306] Efforts have been made to introduce the day-fines to the United States.[307] In fact, estimation of appropriate fines to be imposed upon the corporate offender is provided under the Federal Sentencing Guidelines Manual, where 'corporate culture' concerns are taken into consideration.[308]

306 Supra note 92.

307 Supra note 87 at 699.

308 Supra note 25.

Chapter-5

CORPORATE RESPONSIBILITY FOR ENVIRONMENTAL SUSTAINABILITY

A RELATIONAL PERSPECTIVE

This chapter contemplates the role of corporations in environmental sustainability on the ground prepared by the previous chapters, particularly chapter 2, which emphasizes on the close relationship human beings have with the environment. It attempts at defining the duty and responsibility of corporations in balancing development and environment on a sustainable basis.

5.1 CORPORATIONS AND HUMAN PERSONS

Corporations exist in the society of persons. They are artificial persons, created and managed by natural persons who are individual human beings with human behaviour and human needs. One such need is the need to be in relation with the society and to be accepted by a community in which they live. A distinguished thinker, John Macmurray, emphasizes that 'human being is a being of relation'.[309] Relationship, in its deeper aspect, embraces relationship with the self, with other human beings, with the community/society, with the environment and with the cosmos. The need to be in relationship is necessary for growth and development of a human person to his or her full potential.[310]

309 As quoted by Franson Manjali in "Dialogics or the Dynamics of Intersubjectivity", available at: http://www.revue-texto/Inedits (visited on Fe 16,2012); also see John Macmurray, Persons in Relation (Humanity Books, New Jersey, 1998).

310 See Maslow's hierarchy of needs in Saundra K. Ciccarelli and Glenn E. Meyer, Psychology 366 (Dorling Kindersley India pvt. Ltd., New Delhi, 2008).

To some measure, this notion may be extended to corporations by virtue of their being constituted of and managed by natural persons. Actually, the growth and success of a corporation depends largely on the dynamics of human relation that extends to the stakeholders and the community at large. In fact, one approach to corporate governance and, subsequently, to corporate social responsibility, is a relationship approach. The very concept of 'responsibility' strongly suggests a relationship. Relationship entails rights, duties and responsibility.

The concept that corporations can and should act ethically and be accountable to society for their actions suggests that corporations have a duty[311] – both legal and ethical- to various groups in society. Corporations have a duty towards the shareholders, the employees, the consumers, and towards the society as a whole. They have a duty to act in the interest of the shareholders because of the nature of their relationship with the directors and officials.[312] The duty towards the consumers is not only an ethical duty but also a legal duty.[313]

This chapter is a small attempt at exploring this rational approach to the concept of Corporate Social Responsibility (CSR) in relation to the environment and the community. This approach makes it desirable to appreciate the personality of the corporation, which is briefed in the first part of the chapter. It then highlights the concept of Corporate Governance given that it is the building block of Corporate Social Responsibility. The paper examines the purpose of the company in the light of the relationship approach to CSR. The paper also examines CSR in the Indian context and touches upon some issues, concerns, challenges and opportunities in CSR agenda.

5.2 CORPORATE PERSONALITY

A corporation basically means a group of individual persons coming together to carry on a business for profit. Corporation is a creation of law, a business entity recognised by law. A company may be unincorporated, but "when we speak of a company we usually mean an incorporated

311 Roger Leroy and Franks B. Cross, the Legal and E-Commerce Environment Today 42 (Thomson Learning,USA,2002).

312 Ibid.

313 For Instance, Consumer Protection Legislations aim at protecting and promoting the rights of consumers as well as imposing legal duties on traders/manufacturers.

company, a corporation,"[314] As per section 2(7) of the companies Act, 1956, a corporation includes a company incorporated outside India. Under section 3(1), the meaning of the word 'company' is narrower than the expression 'corporation'.

A company "implies an association of a number of people for some common objects….In common parlance, the word 'company' is normally reserved for economic purposes, i.e., to carry on a business for gain."[315] However, there are also non- profit companies registered under the Companies Acts.[316]

5.3 LEGAL PERSONALITY

In legal parlance, the word 'person' refers both to a human being (natural person) as well as a juristic person (artificial person, such as the corporation). The term 'person', according to the Oxford English Dictionary, comes from the Latin word 'persona' which means 'mask' or character in a play. its etymology can be traced from different languages and cultures:[317]

"In antiquity, persona was derived from personare (to ring through). Modern investigators seek its origin rather in the Etruscan word for mask, phersu. Its second meaning 'face', however, is also already an old one. Persona has also come eventually to mean 'person'. This meaning occurs more often. In Hebrew the word panim also has the meaning of 'face' or 'person'. In Greek we find the word prosopon for 'person', its first meaning also being 'face'.

Well known jurists define the term person interms of rights, duties and will. According to Salmond, "A person is any being, whom the law regards as capable of rights and duties. Any being that is so capable, is a person whether a human being or not and nothing that is not so

314 Glanville Williams, Text Book Of criminal Law 969 (Universal Law Publishing Co. Ltd., New Delhi, 2nd ed.,2009).

315 Paul L. Davis, gower and Davies 'Principles of Modern Company Law 3 (Sweet & Maxwell, London, 7th ed., 2003).

316 Ibid.

317 H.G. Hubbeling, "Some Remarks on the concept of Person in Western Philosophy", in H.G. Kimpenberg, Y.B.Kuiper et.at. (eds.), Concepts of Person in Religion and Thought 9 (Mouton de Cruyter, New York,1990).

capable is a person even though he be a man."[318] For Gray, a person is an "entity to which rights and duties may be attributed."[319] For Zitelmana, 'will' is the essence of legal personality. Personality for him is the "legal capacity of will, the bodiliness of men for their personality a wholly irrelevant attribute." [320]

This understanding of a legal person or juristic person, as an entity attributed with rights and duties, confers a legal status upon various entities such as the unborn natural persons[321], dead persons[322], animals, idols, mosques, church, temple, universities, colleges, The President of India (corporation sole), The Union Of India and the States,[323] etc.

5.4 PERSONALITY OF CORPORATIONS

The legal Fiction: One entity-Two Persons

The nature of corporate personality has been explained through various theories, one of which is the Fiction theory. The Fiction Theory[324] sees the corporation as a creation of the law; their legal personality is recognized only after incorporation under the law. It has no personality apart from what is given by the State. Corporation is a legal fiction which is given a legal entity and has its own will clothed with the will of an individual member. The will (animus) of the corporation is different from the will of its individual members. Like fictitious personality, its will is also imaginary creation of law. It is a distinct person different from its members. Like any juristic person, it is legally an entity apart from its members, capable of rights and duties of its

318 P.J. Fitgerald, Salmond on Jurisprudence 299 (Universal Law Publishing Co. Pvt. Ltd.,New delhi, 2009).

319 As quoted by N.V. Paranjape, Studies in Jurisprudence and Legal Theory 340 (Central Law Agency, Allahabad, 5th ed., 2010).

320 Id. At 341.

321 For example, R.v. Shepherd (1919) 2 KB 125; Montreal Tramways Co. v. Leveille (1933) 4 DLR 337 (Canada); Sections 312, 313 and 316 of the Indian Penal Code.

322 Supra note 10 at 301; Ashray Adhikar Abhiyan v. Union of India, AIR 2002 SC 554; R.v. Ensor (1887) ILR 366.

323 The Union Of India and the States are juristic persons under article 300 of the Constitution of India.

324 Supra note 11 at 358; V.D. Mahajan, Jurisprudence & Legal Theory 390 (Eastern Book Company, Lucknow, 5th edn., 1987).

own, and endowed with the potential of perpetual succession. It is an entity having existence apart from the individual members who form the corporate group. Consequently, change in the membership affects neither the existence nor the unity of the corporation. This theory is mainly supported by *Savigni, Salmond, Coke, blackstone and Holland.*

The English law as well as the Indian Law recognises the legal personality of corporations. That is, both legal systems recognize the capacity of corporations to enjoy rights and duties. However, unlike human persons / human beings (natural persons), a corporation is an artificial person that is constituted by a group of members (corpus) and a 'will'(animus) to which is attributed by legal fiction.[325] Thus, a corporation:

(*a*) Has an independent existence from its members;

(*b*) Has a perpetual; succession;

(*c*) Can sue and can be sued for breach of duties;

(*d*) Has members having limited liability;

(*e*) Owns and can sell property in its name.

In *Solomon v. Solomon and co. ltd.,*[326] it was held that a corporation has its own personality (independent existence) separate and distinct from its members:

"The company is at law a different person altogether from subscribers to the memorandum, and though, it may be that after incorporation the business is precisely the same as it was before, and the same persons are the managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees to them. Nor are the subscribers, as members, liable, in any shape or form, except the extent and in the manner provided by the Companies Act."

The Calcutta High court had recognised this position even before *Solomon's* casein *Re Kondoli Tea Co. Ltd.,*[327] when it held that "the company was a separate legal person, a separate body altogether from its shareholders and the transfer was as much a conveyance, a transfer of the property, as if the shareholders had been totally different persons."

325 Id. At 346.

326 (1897) AC 22.

327 ILR (1886) 13 Cal 43.

In Tata Engineering & Locomotive Company Ltd. V. State of Bihar,[328] the Supreme Court Of India observed that the corporation in law is equal to a natural person and has a legal entity of its own.

One aspect of the Fiction theory is obviously an analogy of the Aristotelian hylomorphic compounds: principle of matter-form, substance-accidents or esse-essence, which was effectively used in the Scholastic metaphysics. The corporation (matter/substance/essence) is seen as different from its individual members (form/accidents/esse). This is evidenced from the propositions that a corporation as an entity does not come into existence without its members; and that it exists even if its individual members keep changing: one identity, two persons-distinct yet not separated. Even though the theory is very abstract and of little ptractical application, it is useful at least in two aspects: one, the first part of the proposition has an advantage in establishing liability for, imposing duty or attributing responsibility to the corporation; two the second part, i.e., its independent legal existence, "has the great advantage of creating limited Liability,"[329] where only the company is liable for its debts, while the shareholders are liable only to the extent of their shares.[330]

5.5 BUSINESS ETHICS AND RESPONSIBILITY

The company does not exist merely as a legal institution. It is rather a legal device for the attainment of any social or economic end and to a large extent publicly and socially responsible.[331]

The legal position in criminal law that corporations 'can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary mens rea for the commission of criminal offence'[332] would-by implication and on the same underlying principle-mean that corporations have a mind, by virtue of their being

328 AIR 1965 SC 40 (46).

329 Supra note 6 at 970.

330 Ibid.

331 Avtar Singh, Company Law 1 (Eastern Book Company, Lucknow, 15th edn., 2009).

332 In India, this position is reiterated recently in Iridium India Telecom Limited v. Motorola Incorporated and Ors. (2011) 1 SCC 74.

directed, controlled and managed by natural persons,[333] and so they are expected to act ethically and responsibly. Good relationships entail responsibility at the same time as climbing the ladder of success in profit-making. Business responsibility takes into account values and ethics in such endeavour.

Business ethics leads to the evolution of corporate Governance and from the idea of corporate Governance and business ethics flows the concept of Corporate Social Responsibility.[334]

5.6 CORPORATE GOVERNANCE

Corporate Governance may be broadly approached as a System, a Process and a Relationship. For example, the Cadbury Committee, in its Report, defines Corporate governance as the "system by which companies are directed and controlled."[335] For Parkinson, it is the "process of supervision and control…intended to ensure that the company's management acts in accordance with the interests of the shareholders."[336] Thus, on the one hand, direction and control are considered to be the "two cornerstones of a corporate governance system."[337]

333 Lord Denning in H.L.Bolton (Engg.)Co. Ltd. V. T.J.Graham & Sons ltd. (1957) 1 QB 159, likens a company to a human body. He argues that they have a brain and nerve centre which controls what they do. The directors and managers represent the directing mind and will of the company and their state of mind is the state of mind of the company (AC p. 172).

334 A. Raghunadha Reddy, "Corporate Social Responsibility: Problems and Perspectives" 3 MLJ 51 (2011).

335 The Cadbury Committee Report on The Financial Aspects of Corporate Governance (December, 1992), para. 2.5, available at: http://www. Ecgi.org/codes/documents/Cadbury/pdf. (visited on 02.10.2011).

336 J.E.Parkinson, Corporate Power and Responsibility, Issues I the Theory of Company Law 159 (Claredon Press; U.K., 1993); also see Ada Demb and F. Neubauer, The Corporate Board; Confronting the Paradoxes 187 (Oxford University Press, Oxford, 1992).

337 Klaus J.Hopt, "Comparative Corporate Governance: The State of the Art and International Regulation", 59 AJCL 7 (2011).

On the other hand, the relationship aspect is thought about by Monks and Minnow [338]who define corporate governance as:

"The relationship among various participants in determining the direction and performance of corporations. The primary participants are (1) the shareholders, (2) the management (led by the chief executive officer), and (3) the board of directors."

These authors also mention the other such participants that "include the employees, customers, suppliers, creditors and the community."[339] The community should be understood to include its environment, culture and value system. "Effective corporate governance is a combination of ethical, physical, financial, mental, emotional and spriritual intelligence."[340] These are the values that qualify human relationship in a corporation, for the reason that "corporate governance is nothing, if not human."[341] Therefore, corporate governance is "not only about the business of making money for shareholders but it is also about the quality of life we can live as human beings."[342]

5.7 CORPORATE SOCIAL RESPONSIBILITY (CSR)

Corporate Social responsibility is the "assumption of responsibilities by companies, whether voluntarily or by virtue of statute, in discharging socio-economic obligations in society."[343] The World business Council for Sustainable Development (WBCSD) defined Corporate Social responsibility as "the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life."[344] Thus

338 R.A.G. Monks and N.Minnow, Corporate Governance 1 (Blackwell, New York, 1995).

339 Ibid.

340 S.K. Verma and Suman Gupta, Corporate Governance and Law Reform in India 45 (2004) (Unpublished Research, The Indian Law Institute/ Institute of developing Economics, Asia Law Series, No-25).

341 Ibid.

342 Ibid.

343 Saleem Sheikh, Corporate Social Responsibilities Law & Practice 1 (Cavendish Publishing Limited, London, 1996).

344 World Business Council for Sustainable Development, "The Business Case for Sustainable Development:Making a Difference toward Johannesburg Summit

the concepts of corporate philanthropy and trusteeship or stewardship are implied in the notion of Corporate Social responsibility.

Theories of CSR

The main CSR theories can be classified into four groups:[345]

(*i*) The Instrumental Theories: In this group, corporations are perceived as only instruments for profit-making and; their social functions are thus seen as the means towards this end.

(*ii*) The Political Theories: These theories concern themselves with the power of corporations in society and a responsible use of this power in the political arena;

(*iii*) Integrative Theories: in which the corporation is focused on the satisfaction of social demands; and

(*iv*) Ethical theories, based on ethical responsibilities of corporations to society.

In Practice, each CSR theory presents four dimensions related to profits, political performance, social demands and ethical values. There is a need to emphasise on an invaluable model of the company and society relationship, which should integrate these four dimensions. In doing so, we need to make out the very purpose of the existence of the company.

5.8 PURPOSE OF THE COMPANY

What is the ultimate goal of the company? If it is mere accumulation of profit[346] alone, where profit is considered as an end in itself, or where

2002 and Beyond", available at:www.wbesd.org/web/publications/business-case.pdf (visited on 18.10.2011)

345 Elisabet Garriga and Dome'nee Mele, "Corporate Social Responsibility Theories: Mapping the Territory" 51 JBE (2004).

346 Traditionally, the goal of the corporation has been understood in economic terms, e.g., providing goods and services, creating jobs and maximizing profit. Gradually, stakeholders take a broader view of the purpose of the corporation, which includes not only economic ends, but also social and environmental concerns. (For Instance, see C.V. Baxi and Nazy Chadha, "Corporate Social Responsibility: Concepts, Practice and Country Experiences" in C.V. Baxi and Ajit Prasad (eds.), Corporate Social Responsibility,
Concept and Cases: The Indian Experience 8 (Excel Books, New Delhi, 2005)

profit become the sole motive or exclusive goal of the company, then persons and the community may possibly be treated as mere means of profit making. Here arises the danger of mindless exploitation of human and natural resources resulting in extensive economic inequality and destruction of the environment, But if we ascribe the aspect of relationship, solidarity and interdependence to the corporations then we will find that "it is possible both to generate wealth and at the same time benefit people in terms of non-financial aspects of their lives."[347] Accordingly, greater emphasis is laid on 'profit-optimization' rather than 'profit-maximization' as the goal of the company. S.Sheikh uses the term 'profit-optimization' as different from the term 'profit-maximization' to imply social responsibilities and obligations of the company.[348]

The inter-dependent relationship[349] between corporations and the community (stakeholders) is particularly felt in this age of globalization and economic liberalization in which trans-border or global transactions involving powerful corporations are being carried out round the clock. The society/community is largely dependent on the goods produced and services provided by the company either at home or abroad. Simultaneously, the company, for its profit, depends on the resources – both human and physical – available in the community. This mutual dependence gives way to mutual enrichment, which is a give and take process – a win-win situation. At the same time the impact of the company's activity on the environment, health, education and the quality of life and the livelihood of the local community in which the company exists and does business should be assessed for a more positive contribution to the well-being of society.

Thus in a relationship model, the ends of a company is mutual enrichment- the benefit of both; the welfare of the whole community within which the company operates; in short, the achievement of a Common Good.[350] The corporation, through its CSR programmes,

347 Supra note 30.

348 Supra note 32 at 21.

349 Id. at 4.

350 The Common Good here refers to goods in general that are rightfully used by everyone each in his or her own way; for example, the air in the skies, the water in the river, the clean environment, etc. [se also Dario Composta, Moral Philosophy and Social Ethics 162 (Theological Publications in India, Bangalore, 1988).

John Rawls conceives of the common good as 'certain general conditions that are in an appropriate sense equally to everyone's advantage'. See John Rawls, A Theory of Justice 246 (Universal Law Publishing Co., New Delhi, 2011).

becomes a responsible participant in the achievement of the common good.

5.9 INDIAN PERSPECTIVE

The concept of Corporate Social Responsibility is not new to India. It may be traced to the ancient Indian concept of Dharma which, among other things,[351] also connotes as individual's sense of duty, responsibility or obligation towards the community. Likewise, in an equalitarian society like the Khasi tribal community of India, the principles of kamai ia ka hok (literally 'to earn Righteousness'), and tip Briew tip Blei (literally 'Human-conscious, God-conscious') strongly entreat the values of solidarity, honesty, fair dealings and social responsibility in business endeavour and human relations. In the context of india as a developing country, CSR can be considered as representing the "formal and informal ways in which business make a contribution to improving the governance, social, ethical, labour and environmental conditions…. while remaining sensitive to prevailing religious, historical and cultural context."[352] Thus, the concept of sustainable development is inherent both in the Indian value system and in CSR agenda.

351 B. Kuppuswamy, Dharma and Society 16 (Macmillian, Delhi, 1977). According to this author, Dharma "stands for religious observance, righteousness, justice, conformity in law, conformity to custom, obedience to the social order, sense of duty, etc., and thus has religious, moral, ethical as well as legal significance." P.V.Kane in history of Dharmashastra, Vol. 1, Part 1 (BORI, Poona, 1968)at page 1, describes Dharma as "ordinance, usage, duty, right, justice, morality, virtue, religion, good works, function or characteristic."

In this background, the term 'Dharma' is thus all comprehensive, covering both religious and ethical aspects; it 'aims at securing the material and spiritual sustenance and growth of the individual and society':

See R.N. Dandekar, "Dharma the First End of Man" in W.T. de Bary, Sources of Indian Tradition 218 (Motilal Banarsidass, Delhi, 1963)

352 Wayne Visser, as quoted by Shwetank Tripathi and Shashwat Tripathi, "Corporate Social Responsibility in developing Nations", 103 CLA 5 (2011).

THE PRESENT INDIAN CONTEXT

Economic Social and Political Realities

In the era of Globlization and liberal economic policies, India has moved from its socialistic pattern to the free market economy.[353] India's economic growth may thus be seen in term of trade and commerce.[354] In this free market economy there grows a trend of economic inequality – the increasing gap between the rich and the poor. On the subject of economic development, situations in India are very diverse. Some regions are highly developed, others are moving towards the process of development, through effective economic policies, and others still find themselves in abject poverty, malnutrition, starvation and food crises in the midst of plenty. There is a phenomenon of urbanization and the emergence of huge urban masses, often with large depressed areas where organized crime, terrorism, prostitution, slum dwelling and the exploitation of the weaker sectors of society thrive. Migration too is a major social trend, exposing millions of people to situations which are difficult economically, culturally and morally. People migrate from the rural areas to the urban areas for many reasons, among them unemployment and poverty. They shift to the major cities of India in search of job to earn their livelihood.

Some of the ideologies accompanying Globalization undermine traditional, social and cultural values. Corruption is rampant in almost every aspect of life in India. It exists at various levels of both government and society.

The persistent poverty and the exploitation of people in India especially women and children, are matters of critical concern. Tourism also demands special attention. Though a lawful industry with its own cultural and educational values, tourism has, in some cases, a disturbing influence upon the moral and physical background of India as noticeable in the degradation of young women and even children through human trafficking and prostitution, besides environmental concerns.

The mass media has been an effective means of communication and, at the ame time, it has also an adverse impact on the Indian society. New forms of behaviour are emerging, especially among the children, as

353 Ranbir Singh, "Globalization, Human Rights and Legal Education: Challenges Ahead", 8 Nyaya Deep 77 (April 2007).

354 Id. at 79.

a result of over-exposure to the mass media and the kinds of websites, literature, music, pictures and films that are flourishing in the market. As a result, the negative aspects of the media and entertainment industries are threatening traditional Indian values, and in particular the value of marriage and the stability of the family in India. The effect of images of violence and obscene pictures tend to corrupt the tender mind.

In the Indian political scenario, today there are new demands for greater political justice, more participation in government and the political life of the nation. The people of India are becoming more and more aware of their political rights and more determined to safeguard them. Ethnic, social and cultural minority groups are finding out ways to become instruments of their own social progress through active participation in politics. However, there is also a rising awareness throughout India of people's ability to change unjustifiable political treatments.

Religious and Cultural Realities

In the context of culture and religion, the most striking feature of India is the variety of its people who are successors of ancient cultures, religions and traditions. India is home of many cultures, languages, beliefs and traditions, which comprise such a significant part of human history. India is also the cradle of some of the world's major religions—Hinduism, Islam, Sikhism, Christianity, Buddhism, Jainism and the Indigenous Tribal religions. In India, religious Pluralism is an ancient reality. Each religious community has its own definite boundary, even geographical boundaries, it own rules and norms. In the midst of plurality, the country is well known for its religious tolerance and openness to all religions.

5.10 ENVIRONMENTAL SCENARIO

The present day environmental scenario in India is quite disappointing. The issues of deforestation, land degradation, pollution and the scarcity of safe drinking water are still haunting the rural India. According to the State of Environment Report India-2009, "due to an uncontrolled urbanization in India, environmental degradationhas been occurring very rapidly and causing shortages of housing, worsening of water quality, excessive air pollution, noise, dust and heat, and the

problems of disposal of solid wastes and hazardous wastes."[355] Other environmental issues involve climate change, biodiversity loss, food security, water security, energy security (all environmentally connected issues).

Thus keeping in mind the context of India, CSR should be seen as more of an ethical business relationship motivated by solidarity rather than by philanthropy. It should concern the corporate sector reaching out to the society outside, in order to benefit both business and the social and physical environment from which it grows and within which

355 Government of India, Report: State of Environment Report India-2009 (Ministry Of Environment and Forests,2009); see also Government of India, Report: Report to the people of Environment and Forests 2009-2010 (Ministry of Environment and Forests, 2010). It is relevant to note here the main features of the 2009 Report:

About 45% of India's land is degraded due to erosion, soil acidity, alkalinity and salinity, water logging and wind erosion. The prime causes of land degradation are deforestation, unsustainable farming, mining and excessive groundwater extraction. However, over two-thirds of the degraded 147 million hectares can be regenerated quite easily. India's forest cover is also gradually increasing (current about 21%).

Air Pollution is increasing in all its cities. The level of respirable suspended particulate matter (the small pieces of soot and dust that get inside the lungs) had gone up in all the 50 cities across India. The main causes of Urban Air Pollution were vehicles and factories.

India is using 75% of the water it can use, and it has just enough for the future if it is careful. Lack of proper pricing of water for domestic usage, poor sanitation, unregulated extraction of groundwater by industry, discharge of toxic and organic wastewater by factories, inefficient irrigation and overuse of chemical fertilizers and pesticides are the main causes of water problems in the country.

While India remains one of the worlds 17 "megadiverse" countries in terms of the number of speciesin houses, 10 % of its wild flora and fauna are on the threatened list. The main causes for this were habitat destruction, poaching, invasive species, overexploitation, pollution and climate change.

About one-third of India's urban population now lives in slums

India contributes only 5% of the worlds greenhouse gas emissions that are leading to climate change. However, about 700 million Indians directly face the threat of global warming today, as it affects farming, makes droughts, floods and storms more frequent and more severe and is raising the sea level.

it functions. It should reflect the Gandhian principle of developing the society, with a particular focus on the rural society. Corporations through their CSR programmes, should go beyond mere charity and donation and move towards improving the environment, empowerment and sustainable development. True development is development of people.

What has been discussed above is the ideal of CSR which is necessarily derived from the very concept of "social responsibility". An ideal remains an ideal. \the ground reality, particularly in the developing countries, like India, is far from the ideal-far from the treasured Indian values. Let alone CSR activities, corporations have involved in crimes and scandals for profit at the cost of human lives. Daily environmental disasters (due to the company's activities) occur at the face of the local community that receives nothing but broken promises of CSR activities. Any intervention by civil society regarding environmental disasters is bound to fail on many occasions, due to the company's political connivance. Where CSR activities have been carried out, either they fail to sustain after the company leaves the locality or die down with the closing of the company. They have not been planned on a long-term basis. In the long run, it is in the self-interest of a few influential and powerful people of the arena that the company operates, and its CSR activities are either falsely promised or carried out in a shoddy manner.

5.11 ENVIRONMENTAL ASPECTS OF CSR

In this present day of emerging global economy "companies are more frequently judged on the basis of their environmental stewardship."[356] CSR for environmental protection has become a necessity. The environmental aspect of CSR is defined as "the duty to cover the environmental implications of the company's operations, products and facilities; eliminate waste and emissions; maximize the efficiency and productivity of its resources; and minimize practices that might adversely affect the enjoyment of the country's resources by future generations."[357]

356 Piotr Mazurkiewiez, "Corporate Environment Responsibility: Is a Common CSR Framework Possible?", available at http://siteresources.worldbank.org/EXTDEVCOMSUSDEVT/Resources/csrframework.pdf

357 Ibid.

In India renowned companies, such as the Tata Group, the Birla Group, the Infosys Technologies, The Indian Oil Corporation, The Bharat Petroleum corporation Ltd., Hindustan Universe Ltd., to name a few, have been engaging in far-reaching social welfare projects like rural community development, health, education, water management, etc. as part of their CSR programmes. Their contribution in the field of development is invaluable seeing that the government has limited resources in tackling the socio-economic problems of the country.[358] If properly motivated more by community concerns (solidarity) and environmental responsibility than popularity and political affiliation, these corporations could well take a lead in the right direction in this long pathway towards CSR in India.

Under The Charter on Corporate Responsibility for Environmental Protection (CREP) adopted in March, 2003, eight task forces have been constituted for its effective implementation and for monitoring and providing guidance to the industries to adopt necessary pollution abatement measures.[359] This step could well be credited as a big thrust to corporate environmental responsibility, which is fundamental to CSR programmes.

358 Supra note 26 at 57.

359 Government Of India, Report: Annual Report 2010-2011 (Ministry of Environment and Forests, 2011); the CREP was adopted in March, 2003 by the Ministry of Environment and Forests, Government of India, for seventeen categories of polluting industries and it is a road map for progressive improvement in environmental management.

Chapter-6

CORPORATE RESPONSIBILITY AND ENVIRONMENT IMPACT ASSESSMENT

6.1 INTRODUCTION

THE SUPPORTERS of Milton Friedman school of thought[360] may find it difficult to accept that there could be any social responsibility of a corporate organization which has been formed, with the motive of maximizing profits and doing business.

Similarly, it is also presumed that state is the strongest potential human right violator and accordingly article 13 of the Indian constitution has been interpreted in the judicial pronouncements. But since recent times such presumptions and thoughts have been made subject to scrutiny especially in wake of expansion and growth of private sector. such a rethinking is desirable because today expansion of private organizations is a reality and, therefore, their functioning in the society cannot be overlooked. Also, corporate citizenship is now understood as no longer discretionary.[361]

In this respect one crucial kind of responsibility, which can be studied separately from other human rights responsibilities is that related

360 In his book *Capitalism and Freedom* (1962), Milton Friedman advocated for minimizing the role of government in a free market as a mean of creating political and social freedom and said that there is one and only one social responsibility of business- to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in the open and free competition without deception or fraud.

361 . In his *Corporate Citizenship* (1998) Malcolm McIntosh argued that for many people responsible corporate citizenship is only an ethical issue, but actually there are also compelling arguments for adopting a responsible approach.

to environment.in pursuance of business the corporate bodies tend to disregard the effect of their activities on immediate environment and this disregard itself becomes the reason responsible for several other problems related to both humans and the environment in general.

The *raison de etre* of most business organizations is to make money, perhaps as much of it as possible. This is not an immoral objective in itself, but neither is it necessarily a moral one[362]. However, there is growing discourse, of much wider concept of corporate responsibility and accountability, not just among philosophers or social critics but also in business community itself.[363]under the present discourse on human rights, business is seen as accountable to not just the shareholders but also the "stakeholders".

6.2 ETHICS AND BUSINESS

There is the emergence of a whole new ethics industry, which can be seen as both a product and a constituent part of the new 'accountability'[364]. Broader ethical approach ensures financial benefits in the long run and actually ethical conduct is in fact a good business strategy.

The new accountability, which comes under the nomenclature of corporate responsibility, is being converted into a new market opportunity by being seen as a source of competitive advantage over the rest in the market. Social conscience is a key part of corporate public relations and advertising campaigns.

One such amalgamation of ethics with business has taken place as a response to crisis situations relating to environment and human rights issues which the companies had to face in the past.

6.3 REPUTATION RISK MANAGEMENT

Managing risk is a central part of many corporate strategies. Reputations that take decades to build up can be ruined in hours through incidents such as corruption scandals or environment accidents.

362 Tom Campell, "Moral Dimensions of Human Rights" in Tom Cambell and Seumas Miller (Eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organizations* 11-30 (2004).

363 Doreen McBarnet, "Human rights, Corporate Responsibility and the New Accountability", in *id*. At 63

364 Ibid.

These events can also draw unwanted attention from regulators, courts, governments and media. Building a genuine culture of 'doing the right thing' within a corporation can offset these risks.[365] In Nigeria, the shell company's operations came under serous criticism for its oil extraction exercise and it was seen as a public relations disaster which was followed by shell's plan to dump its spar oil rig at sea.

In this context the new philosophy of corporate responsibility adopted by the company[366] can be seen as a response to a very old way of crisis management. Importance of reputation has been implicit in factors such as public relations crisis management.[367]

Thus,corporate responsibility is a part of process of managing the costs and benefits of business activity to both internal and external stakeholders. Setting the boundaries for how those costs and benefits are managed is partly a question of business policy and strategy and partly a question of public governance.[368]

It is interesting to note that Bhopal, which can be called a gross instance of corporate environment "irresponsibility", has influenced corporate behaviour on health, safety and environmental issues and has pushed back the frontiers of the law on corporate responsibility.[369]

6.4 "CORPORATE ENVIRONMENT RESPONSIBILITY" AND EIA

Environment protection constitutes a precondition for the effective enjoyment of human rights protection. The two concepts have become interlinked and interdependent now. Synergy has developed between

365 Available at http://www.ksg.hawards.edu/m-rcbg/CSRI/publications/workingpaper_10_kytle_ruggies.pdf

366 As is evident from the language used in its First Annual Social Report, which reads as,"…how we, the people companies and businesses that make up the Royal Dutch/Shell Group are striving to live-up to our responsibilities- financial, social and environmental."

367 Doreen McBarnet, "Human Rights, Corporate Responsibility and the New Accountability", in sura note 3 at 74.

368 Ramesh Chandra and RituAneja, Corporate Governance for the sustainable Environment 132 (2004).

369 See remarks by Ved P. Nanda, 79 American Society of international Law Proceedings 303, Apr 25-27 (1985).

these previously distinct fields.[370] In fact, some hold it strongly that there is the obvious relationship among environment, economic development and human rights that occurs with global problems involving the shared concerns of healthy, safety and individuals well-being[371]. It is certainly reasonable to claim that development is about improving the quality of life and therefore, inappropriate development is development inconsistent with the basic human rights[372]. It is further reasonable to claim that the development at the expense of the environmental quality is detrimental to human condition.[373]

In this context, fixing of the environment problems has gone beyond the scope of any national integrate social and environmental concern in their business operations and in their interaction with their stakeholders on a voluntary basis and from this has emerged the concept of corporate environment responsibility(hereinafter, CER). CER signifies the environmental commitment of the companies through material and energy management and the transparent working within ecological limits.

An environmentally responsible company aligns its business with ecological principles and can be expected to abide by the following:[374]

- Embrace sustainability and the 'precautionary principle';
- Adheres to government regulations;
- Uses the earth resources efficiently;
- Internalizes environmental cost and benefits and
- Measures and regularly reports the results and impact of its activities on the environment and so on.

Out of these, the CER assessment tools of measuring, auditing and reporting are important and indispensable from the point of view

370 G.S.Karkara, Human Rights, Development and environmental Law: An Anthology 52 (2006)

371 Robert E. Lutz, Ibrahim Shishata, David Wirth, Philip Alston, Stephen C. Mccaffffrey, John porter and John Warren Kindt : " Environment, Economic Development And Human Right: A Triangular Relationship?" 82 American Society of International Law Proceeding 40 (Apr 20-23, 1988).

372 Id. At 41.

373 Id. At 41.

374 "Defining Corporate Environment Responsibility"; available at http://www.pollutionprobe.org/reports/cerreport.pdf

of obtaining information on the status of environmental policy of companies. The phrase 'environmental impact assessment' comes from section 102 (2) of the national environment policy act (NEPA), 1969, USA. EIA is an effort to anticipate,measure and weigh the biophysical changes that may result from a proposed project. It assists decision makers in considering the proposed project's environmental costs and benefits. Where the benefits sufficiently exceed the costs, the project can be viewed asenvironmentally justified.[375]

Environmental impact assessment (EIA) is an important management tool for ensuring optimal use of natural resources for sustainable development. It is a formal study process used to predict the environmental consequences of any development project. EIA thus ensures that the potential problems are foreseen and addressed at an early stage in project planning and design.

6.5 EIA AS A TOOL OF VERSION AND PRECAUTION

As its core, the precautionary principle of the environment law is a risk management theory that elaborates on the simple command "shown". It decides whether "show" means proof to a scientific certainty or scientific consensus, a scintilla of evidence, a wild hunch, or some other standard[376]. It decides when the showing is to start, when it must be completed, what are the consequences of not showing, what roles the regulators and the regulated have in process of showing. And whether showing should protect the public interest primarily under liability model or a preventive model.[377]

The precautionary principle has been adopted in such a widespread fashion that it is now difficult to find in either the international environmental arena or countries with advanced environmental protection framework and environmental policy document, a new environmental law, or even a political statement about environmental

375 Shyam Divan and Amin Rosencranz, Environmental Law And Policy in India 417 (2001).

376 Philip M. Kannan, "The precautionary Principle: More Thn A Cameo Appearance in United States Environmental Law?" 31 Williams and Mary Environmental Law and policy review 409 (winter, 2007).

377 Ibid.

management that does not include a reference to the principle or reflect some of the core ideas of the precautionary concept.[378]

The precautionary principle approach is a common place internationally (and, in fact, is considered by many to have crystallized into a norm of customary international law) and in domestic jurisdictions, is a testament to the soundness of the concept and the usefulness of considering precaution when devising environmental management and protection strategies.[379]

The precautionary principle or approach is generally understood to include three elements "fully assessing possible impacts of an action, shifting the burden of proof to those whose activities pose a threat to the environment, and not acting if there is significant uncertainty or risk of irreversible harm"[380]. The first two elements are procedural, and the third is substantive.[381] And EIA is the most rational vehicle of what of the precautionary principle because if is a practice, which is appropriate for considering precaution; namely, whether to proceed with development proposals in situations where uncertainty exists about future environmental effects.

6.6 JUDICIAL PRONOUNCEMENT AND EIA

In India, while examining the issue whether mining activity in an area up to 5 km. from Delhi- Haryana border on the Haryana side of the ridge and also in the Aravali hills causes environmental degradation, the apex court in a PIL in *M.C. Mehta v. UNION of India*[382], held that the precautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented even on the reasonable suspicion. It is not always necessary that there should be direct evidence of the harm to the environment.

378 Warwick Gullett, "The Precautionary Principle In Australia: Policy, Law & Potential Precautionary EIAs"

379 Id. At 94.

380 See Chairman Barton, " The status of the precautionary Principle in Australia Its Emergence in Legislation and a Common Law Doctrine" 22 HawvardEnvironmental Law Review 509-515 (1998): also see supra note 17.

381 Supra note 17.

382 AIR 2004 SC 4016.

The precautionary principle has been again affirmed and well explained by the supreme court in Andhra Pradesh Pollution Control Board v. *M.V.Nayadu.*[383] The apex Court held.[384]

[T]he principle of precaution involves the anticipation of environment harm and taking measure to avoid it or to choose the least environmentally harmful activity. It is based on the scientific uncertainty. Environment protection should not only aim at protecting health, property and economic interests but also protect the environment for its own sake. The precautionary duties must not only be triggered by the suspicion of concrete danger but also by way of (justified) concern or risk potential. The principle suggests that where there is identifiable risk or serious irreversible harm, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment.

Bharucha J dissenting opinion in the *Narmada BachaoAndolan* v. *Union of India*[385] case highlighter the importance of EIA of the Narmada Sagar Project in absence of which he judge that the construction work on judicial recognition of EIA wherein it conveys that EIA should not be run on the discretion of the administrative branches of the government because it derives its strength from the law itself.

6.7 POLITICS OF EIA NOTIFICATIONS IN INDIA: DILUTION OF LAW

A beginning was made in the country with the impact assessment of river valley projects in 1978-79 and the scope was subsequently enhanced to cover other developmental sectors such as industries, thermal power projects, mining schemes etc. Prior to January 1994, EIA in India was carried out under administrative guidelines, which required the project proponents of major irrigation projects, river valley projects, power stations, ports and harbours, etc. to secure a clearance from the Union Ministry of Environment and Forests.

On 27th January 1994, the ministry notified mandatory EIA under rule of the Environment (Protection) Rules of 1986 for 29 designated projects. The notification made it obligatory to prepare and submit

383 AIR 1999SC812.

384 Id. At 820-21

385 AIR 2000 SC 3751

an EIA, an environment management plan (hereinafter, EMP) and a project report to an impact assessment agency for clearance. The Ministry of Environment and Forest was designated as the impact assessment agency and was required to consult a multi-disciplinary committee of experts.

Under the January 1994 notification any member of the public was to have access to a summary of the project report and the detailed EMPs. Public hearing was mandatory. This requirement was India's first attempt at a comprehensive EIA scheme.

Environment assessment is to be taken up in this exercise as a rapid assessment technique for determining the current status of the environment and identifying impact of critical activities on environment para meters. Based on this analysis the ministry can draw up an environment management plan that would ensure impact monitoring and mitigation planning.[386]

But most unfortunately these attempts to create a successful strategy for commercial environment compliance(through EIA's, in case of India) have been unsuccessful due to the voluntary nature of existing guidelines and at the end of the day they remain mere "soft law" recommendations.[387]

6.8 EIA PROCESS: "JUST ANOTHER REGULATORY HURDLE" AFTER THE CHANGES IN 1994 NOTIFICATION?

On 4th May 1994 the ministry issued an amending notification substantially diluting the January 27th notification.

- The amendment was introduced furtively, without pre-publication of the draft. With these changes, the project report (presumably, a summary report would do so) and the previous requirement of preparing both an EIA and EMP, was diluted to now requirement of preparing both an EIA and EMP, was diluted to now require either of these documents to be submitted.

386 Available at http://envfor.nic.in/divisions/iass.htmlEnviromental impact Assessment Division, ministry Of Environment & Forest, Government of India.

387 See, Sophie Hsia, "Foreign Direct Investment and The Environment: Are Voluntary Code of Conduct And Self –Imposed Standards Enough?" 9 Environmental Lawyer 673 (june 2003).

- In the earlier notification the impact assessment agency (IAA) was enjoyed to prepare its recommendation after technical assessment of the document and data furnished by the project authorities as supplemented by data collected during visits to sites or factories and in interaction with affected population and environment group The later notification states the need to supplement data in purely optional terms.
- In the earlier notification, the concerned parties and environment groups are assured of receiving on request a copy of the summary feasibility report along with the detailed environment management plans and the conditions of which the environment clearance is given. The later notification made supply of these documents subject to public interest.
- Perhaps more individuals than the formal amendments to the parent notification, was an administrative guideline styled as an 'Explanatory Note' which was issued simultaneously bu the Ministry Of Environment And Forest. The "explanatory Note" restricted the public access to an 'Executive Summary' of the environment impact documents and further narrowed access to 'bonafide residents located at or around the project site or sites of the displacement or alleged adverse environment impact'.
- Moreover, the note diluted the comprehensive EIA Report requirement (covering one year) to single season report, termed as a rapid EIA report.

The main EIA notification has been amended seven times in the past eight years. All these amendments instead of strengthening the process have diluted it to an extent that it is now merely viewed by industries as a formality in the environment clearance procedures[388].

Section3 of the Environment Protection Act, 1986 (EPA) under which the EIA notification has been issued, authorised the central government to take measures for, "protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution. "Thus when the environment (protection) rules, 1986 refers to the public interest it is obviously in that context.

388 SunitaDubey, "Disarming the Law" (Dec. 2002) available at http://www.indiatogether.org/environment/articles/eia1202.html (visited 30/10/2007).

If that is the case, one fails to see how these recent amendments serve the public interest.[389]

6.9 RIGHT TO DEVELOPMENT VIS-À-VIS THE RIGHT TO CLEAN ENVIRONMENT

Though there is no legally recognised right to development, this right limits the application of the right to environment.[390]

Probably, more than any other jurisdiction, India has fostered an extensive and innovative jurisprudence on environment rights.[391] But EIA Process has been seen as anti-development and, therefore, not being implemented properly. And there have been both practices and argument either to counter the establishment of EIA procedure or to avoid/evade them.

The dramatic surge of private investment capital into emerging foreign markets, while assisting developing countries in the struggle for sustainable development.Has created greater pressures on the environment.[392] The intense competition for international capital contributes to the lack of adequate environmental regulation because of the fear of pricing out of international investment, resulting in pollution havens and environmental malfeasance.[393]

6.10 ENRON PROJECT, CORPORATE RESPONSIBILITY AND EIA

Enron confirms the political implications of the onset of foreign involvement in a country that has fiercely prided itself on self sufficiency and a break from its colonial past.[394]

The project gauges whether India's legal mechanisms for environmental assessment, project approval, And dispute resolution

389 Ibid.

390 M.r. Anderson, Human Right Approaches to Environmental Protection: An Overview 19-20(1996).

391 Ibid.

392 Sophihsia," Foreign Direct Investment and The Environment:areVoluatary Codes Of conduct and Self-Imposed Standards Enough?' 9 Environmental Lawyar 673 (June 2003)

393 Ibid

394 Sanjay Jose Mullick, "power Game in India : Environmental clearance and the Enron Project" 16 Stanford Environmental law Journal 256(May 1997).

can protect the country's natural resources from being overrun by industrial development.[395]

The project confirms the open economic policy for India and greater role of corporate in economic setup of India.

This venture became a controversial one, and began to be criticized for no one outside the key negotiators of the deal knew how, or why, Enron was selected for this power generation project.

EIA had been introduced in 1994 with the environment clearance notification and thus, ministry's clearance to Enron without evaluation of the project under the scope of the review (risk analysis and public hearing) required by the notification was challenged in Bombay High court.

When the court ordered to re-evaluate the action it became India's first foray into the implementation of the environmental clearance notification.

The scope and substance of India's environmental impact assessment procedures and their application to the Enron project both falls short in many areas. Nevertheless, applying this evaluation to a development project could be called a great leap forward for India. however, beyond delay, the environmental suit was ultimately unable to substantially modify the project.

Being thought as a step towards bringing the improvements needed in the EIA process also. But when the notification was issued in 2006,the law got further weakened. The major difference in the new EIA Notification 2006 from the earlier one (1994) is its attempt to decentralize power to the state government

Sethusamudram(ram setu) project and EIA: Religion,not the only issue

There is a proposed project of ship canal by the name of sethusamudram shipping canal project, Which claims to cut short the distance between east and west coast. The area covered by the project has a delicate environment.[396]

The gulf of manna and the palk bay are considered to be among the world's richest marine biological resources. The region has a distinctive

395 Id. At 260

396 See, http://www.cseindia.org/programme.industry/eia/sunderam.pdf

socio-economic and cultural profile shaped by its geography. It has 3,600 species of plants and animals (including the endangered mammals like dugongs and five species of sea turtles), which make it India's biologically richest coastal regions. It is of course known for its corals. Which there are 117 species belonging to 37 genera.

It is believed that rushing through with the project without analysing issues related to sedimentation and meteorological regimes might cause a great economic disaster in wake of tsunami that hit the region recently.[397] The Sethusamudram fails a more logical test i.e. of environment clearance.Again disputed public hearing and an inadequate and incomplete environmental impact assessment report make it an irresponsible initiative.[398]

6.11 EIA NOTIFICATION 2006: DOUBTFUL ATTEMPTS OF DECENTRALIZATION

On September 14, 2006,[399] the ministry for environment and forests (MEF) issued a notification replacing the earlier EIA law, despite furious lobbying and campaigns by environmental organizations and some parliamentarians in the weeks preceding this notification.[400]

In 2005 the ministry of environment and forest published a note that the environment clearance process shall be "re-engineered" and this was the new EIA law categorizes projects as A and B, for the purpose of the clearance by the centre or the state respectively. While 'decentralization' effort is appreciated, the handing over of the EIA evaluation responsibility to the state government[401] without any system

397 R.ramesh, "Is the Sethusamudram Shipping Canal Project Technically Feasible?' Economic and political weekly 271-274, (jan 2005)

398 Id. At 274

399

400 BharathJairaj, "EIA 2006 leaves much to be desired " The Hindu (Sep 23, 2006) available at http://www.hindu.com/pp/2006/09/23/stories/20060923000

401 The term of reference (Tor) of the project will now be decided by the state Environment Appraisal Committee (SEAC) at the level and by Environment Appraisal Committees at central level. This will be decided on the basis of the information provided by the proponent. If needed the SEAC's and EAC's would visited the site, hold public consultation and meet experts to decide the TOR. The final TOR has to be posted in the website for t public viewing. Further, if the EAC does not decide the TOR within the stipulated time, the project proponents can go EAC does not decide the TOR within the stipulated time, the project proponents can go ahead with their own Tor. See http://www.cseindia.org/programme/industry/eia/existin_notification.htm

of checks and balances is unacceptable. In several projects, for example, thermal power plant up to 500MW, state government directly promote the project and in fact, compete with each other to seek more investments.[402]

The area where there could have been major improvements in environment clearance process, i.e. public consultation as was earlier done will still be conducted at the end of the environment clearance process where there is very little scope for the public to play any active role.[403]

The new EIA law also exempt several projects from the EIA process. Construction projects less than 20,000 square meters and the new township less than 50 hectares, for instance, are exempted from going through the EIA process. In the zeal to implement the Govindarajan Committee recommendations to expedite the entry of FDI into the country, the ministry has committed a serious mistake in prioritizing time limits over the "precautionary principle".[404]

The focus of the new notifications has been to reduce the time required has been to reduce the time required for the entire environment clearance process.

There seems to be no justification for this and may result in compromising on the efficiency and transparency of the clearance process, which was quite evident from the earlier notification even though the process had more time.[405]

6.12 IMPORTANCE OF PUBLIC PARTICIPATION IN EIA

An ideal environment clearance process requires that there are "frequent public involvement provisions, full access to information, right of appeal to an independent third party, the full involvement of

402 Supra note 40.

403 See, http://www.cseindia.org/programmc/industry/cia/existing_notification.htm

404 Supra note 40.

405 The earlier process took around 14-19 months for rapid EIA and 21-28months for comprehensive EIA. As per the new notification, the category A project will be completed only in 10.5 to 12 months. See, http://www.cseindia.org?programme/industry/eis/existing_notification.htm

interested and affected parties and explicit decision making role for the public". Public participation deserves attention because the degree of participation affects the quality of the environmental impact analysis process, which, in turn, affects the quality of the decision about a project.[406]

Broader participation creates more information and alternatives to be presented to decision makers. Enhancing the opportunity to mesh public values and government policy.[407]

EIA is effective in providing local people with an opportunity to be heard and to participate in decision making that affects their environment EIA facilitates democratic decision making and consensus building regarding new development.[408]

The public needs to be aware of the procedures for participation in environmental decision making have free access to them and know how to use them. But the environmental public hearing (EPHs) process that began from 1997 in India fails to make any necessary changes in the project. This is because industries violate the legal provisions and go for hearing only after their projects have become functional and not prior to it, as is mandatory.[409]

Years after they were first introduced, public hearing continue to be organized with an extremely casual and token approach. In a public hearing for opencast mining proposed in Bandurang (Jharkhand) on 25th February 2004, the EIA and environment management plan were not made available prior to the hearing, clearly violating that law otherwise mandates.[410]

EIA ensures good CER practice and is so far the most powerful and well-known regulatory measure in India. But unfortunately EIA procedure in India remains half –hearted. The principal flaw is that

406 William A. Tilleman, "public Participation In The Environmental Impact Assessment Process: A comparative study of impact Assessment In Canada, The United States And The European Community"

407 Ibid.

408 Nicholas A. Robinson, "International Trends In Environmental Impact Assessment" 19 Botson College Environment Affairs Law review 591 (Spring 1992).

409 "How Public Are 'Public Hearing?" The times of India, Ahmedabad(jan)

410 KanchiKohli "An impacted assessment process" (apr 2004). Available at www.indiatogether.org http://www.indiatogether.org/2004/apr/env-eiarules.htm

ministry has an inadequate machinery to monitor whether or not the conditions are met. Due to the weak incorporation of it in the legislation, there is little or no jurisprudence on the principle.

The first step should be to amend the project screening criteria to ensure that EIAs are not limited to activities, which will affect the environment 'to a significant extent' as is the common practice.

The EIA process must also be triggered where there is uncertainty regarding the possibility of serious environment impact. Although the parameters of environmental uncertainty are elusive, particularly at the larger scale, guidelines could be prepared to render this threshold operable. This is where more work on risk assessment and uncertainty analysis needs to be undertaken.[411]

To be sure, the EIA process can be contentious when countervailing interests use EIA studies to emphasize their various positions. In a democracy, however, it is better to have the reasoned examination of these contending views in the factually informed context of EIA than to ignore them or treat them exclusively as political views.[412]

Conclusion

Environment assessment enables us in carrying out environmental cost-benefit analysis of` projects at an initial stage. It is thus a precursor to detailed analysis of environmental impacts, which are taken up only if a need for the same is established. It gives a view of the actors involved in the 'development-environment linkages. This is required in view of the fact that the community at large is always at a loss in terms of deterioration of living environmental that accompanies industrial development. Based on environmental assessment, the regulatory measures can be identified and the roles of concerned agencies defined for achieving more efficient environmental management.

In view of the fact that development is an ever-growing process, its impact on the environment is also ever increasing, leading to rapid

411 Warwick Gullett, " the precautionary Principle In Australia: Policy, Law& Potential Precautionary EIAs" 11 Risk: Health, Safety and Environment 93 (spring 2000)

412 Nicholas A. Robinson, "International trends In Environment Impact Assessment"19 Boston College Environment Affairs Law review 591 (spring 1992).

deterioration in environmental conditions. As such environmental assessment provides a rational approach to sustainable development and, therefore, should be made more effective.

India's current emphasis on economic development seems to eclipse its environmental protection efforts. But the combination of strong legislative mandates, an activist judiciary, aggressive public interest litigators, and a proliferation of highly committed environmental NGOs means that India is no longer the heaven it once was for industries indifferent to environmental values.[413] Thus, one may hope that the history of environmental degradation that has characterized investment in India's power and industrial sectors has begun to slow.[414]

The biggest problem facing India's environment is not a lack of environmental laws. Nor is it a lack of precedent to protect our environment. The single biggest issue facing India's beleaguered, yet resilient environment today is the failure of the Indian government to adequately enforce existing environmental laws.[415] There is no excuse good enough, no obstacle obtrusive enough, and no circumstance restrictive enough to exonerate the government from failing to perform its statutory duty to arrest environmental decline.[416]

Therefore, EIA requires to be made an effective mechanism for making the corporate responsible to its environment obligations.

AmartyaSen, writes:[417]

The ends and means of development require examination and scrutiny for a fuller understanding of the development process; it is simply not adequate to take as our basic objective just the maximization of income or wealth, which is, as Aristotle noted, 'merely useful and for the sake of something else'. For the same reason, economic growth cannot sensibly be treated as an end in itself. Development has to be

413 Armin Rosencranz and Kathleen D. Yurchak," Progress On The Environmental Front; The Regulation O The Industry And Development In India" 19 Hastings International and Comparative Law Review 489 (spring1996).

414 Id. At 527

415 Book Excerpts from M.C. Mehta's "The accountability Principle : Legal Solutions to break Corruption's Impact on India's Environment" 21 Journal of Environmental Law and Litigation 141 (2006).

416 Ibid.

417 Amartya Sen, Development as Freedom 14 (1999).

more concerned with enhancing the lives we lead and the freedoms we enjoy.

There is a contentious mix of competing values: environmental, economic, developmental, religious, and political in India over rights and development but priorities of environment protection should not be compromised thoughtlessly if we are to survive.

Chapter-7

CONCLUSION

From the foregoing discussion, it becomes obvious that the quality of human life and existence depends upon the quality of the natural environment. "Economic development will be sustainable only if it is pursued in a manner which protects the environment."[418] Development should be accompanied by environmental protection and socio-economic justice. "Development without social and economic justice is just as bad as social and economic justice without development."[419] Sustainable development may be understood as representing the quality of life-respect for and openness to life; freedom, equity and justice. It calls for a holistic and integrated approach to the environment, focusing more on policies in support of environmental values. In contrast, environmental crime, by its very nature and extent, poses serious dangers to the society and is an adversary to sustainable development. It is more so when the offenders are powerful corporations and 'eco-mafia' operating internationally. The goals of environmental law should be to fix liability on individual as well as organizational offenders and to protect our natural heritage and the quality of environment and life by stringent and deterrent environmental measures.

Corporations as legal persons enjoy certain rights and duties. Various theories attribute criminal liability on them for their crimes. Earlier, it was thought no punishment was possible for a corporate body. In India,

418 Government of India, Report: Faster, Sustainable and More Inclusive Growth: An Approach to the 12th Five Year Plan, (Planning Commission,2011).

419 Chhatrapati Singh, Common Property and Common Poverty: India's Forests, Forest dwellers and the law 48 (Oxford University Press, Delhi, 1986).

the present position is that where imprisonment with fine is mandatory, the courts have the discretion to impose fine alone as the punishment.

Fine has its advantages and disadvantages. Criminal Law contemplates the purpose of punishment and, as far as punishment for corporations is concerned, fine is the most favoured form adopted. But fine alone without any form of restrain on the liberty of the corporate body is equivalent to the discharge of the convicted offenders into the community but do not impose stringent control on their criminal behaviour. Thus it defeats the deterrent on preventive purpose of punishment. The National Environment Policy (2006) has recognized this position when it states that "the present environmental redressal mechanism is predominantly based on doctrines of criminal liability, which have not proved sufficiently effective, and need to be supplemented."[420] The Policy favours civil liability for environmental damage for the reason that "it would deter environmentally harmful actions, and compensate the victims of environmental damage."[421] "If the main problem with tort law is that it limits compensation to the amount of harm done to the victim, one way of counterbalancing the low detection rate is to increase the amount of compensation payable by the injurer under tort law."[422]

Today corporations are so complex and powerful that crimes committed by them have been (and would be) fatal to the life and limb of the environment and the whole community. Corporate crimes have resulted in grave loss to the economy and irreparable damage to the environment. Fine alone would not suffice. Other forms of punishment like economic sanction, compulsory winding up, compulsory community programmes and probation[423] may be suggested as these will serve a particular purpose for a particular crime.

The provisions of law governing corporate criminal liability are evolving. In today's context, corporate environmental crime is a matter of grave concern; there should be effective provisions and stringent

420 The National Environment Policy (2006).

421 Ibid.

422 Michael Faure, "Environmental Crimes", in Nuno Garoupa (ed.) Criminal Law and Economics 320 (Edward Elgr Pub., Cheltenham, 2009); also available at http://ssrn.com/abstract=1498471.

423 I.A.Ansari, "Corporate Criminal Liability" 1 GLT 20-48 (2011).

implementation of environmental laws in order to deal with the crime successfully.

Environmental crime is closely linked with corruption at all levels. Most of the environmental damages could be prevented if corruption is identified and stringent legal actions taken against offenders. Unless this is done, legal procedures and actions against violators of environmental laws would be frustrated.

In so far as Corporate Social Responsibility is concerned, the Ministry of Corporate Affairs, Government Of India, has come up with a new Companies Act, 2013, to include CSR provisions among other things. This Act prompts debates especially among the corporate world that has come about with many views and opinions.[424] One thing which is implicit is the concept of CSR is the existence of a good corporate governance and corporate culture that value voluntary profit-sacrificing activities for social interests. Consequently, CSR activities should arise out of the sense of relationship, social consciousness, duty and responsibility be the nature of CSR provisions.Would. With the new Act, the question is should CSR be imposed by law? Besides,

424 For Instance, the Minister Of Corporate Affairs and Union Heavy Indusries Minister were in favour of CSR being made mandatory for the upliftment of the people, while leaving its implementation in the hands of the industry itself. On the other hand, Wipro Chairman, Infosys CEO and Sonata Software MD are of the opinion that since there is enough social consciousness and responsibility among larger companies, amndatory statutory provisions are not needed.
See Rajiv Jayaswal "Murli Deora favours mandatory corporate social responsibility", The Times of india May 23,2011; also availableathttp://articles.economictimes.com/2011-05-23/news/29574380_I_csr-corporate-social-responsibility-murli-deora
http://economictimes.indiatimes.com/topics.cms?query=Murli Deora
http://articles.economictimes.indiatimes.com/2011-03-21/news/29171229_I_praful-patel-companies-bill-corporate- social-responsibility
Pranav Nambiar & Mini Joseph Tejaswi, "IT honchos call for voluntary CSR", TNN March 26,2011. Available at
http://timesofindia.indiatimes.com/topic
"Azim Premji against law on mandatory CSR spending", PTI Mar 25,2011. Available at:
http://economictimes.indiatimes.com/topic.cms?query=private companies.

corporations have a number of statutory duties mandatorily imposed upon them while carrying out their activities. There are existing laws to take care of corporate crimes. What is lacking is their strict implementation. These laws are prohibitory /mandatory and punitive in nature. What would not such provisions discourage rather than encourage private sectors to invest in India?

Whatever said, keeping in view the Indian context and the impact of the companies' activities on the Indian community within which they operate, particularly in the rural and tribal areas, it is imperative that CSR policies are framed making CSR activities mandatory in fair proportion to the profit made by the company out of the resources of the community. As law reflects and enhances the values of the society, mandatory CSR provisions would, ultimately, promote the values of corporation-community relationship. Hence, imposition of CSR activities by law should never be frown upon. At the same time, policies and guidelines that give incentives and encouragement to CSR activities will bring out spontaneous and better response.

Further corporations – being part and parcel of the society - for their very existence, are necessarily engage in the dynamic interplay of human relationship and the environment. Their activities affect the society/community and the environment. As they draw benefits from the society for their survival, they have the moral obligation to give back to the society. The community has a legitimate demand upon a share of its resources. Moreover, corporations have a legal duty to safeguard the rights and interests of the community and to prevent it from any environment harms arising out of their activities. They should ever strive for a sustainable development. There is a room for everyone on this earth. Everyone in the community must find the resource to live a dignified life today and in the future. The means by which corporations participate in achieving this shared goal is Corporate Social Responsibility (CSR), which is just not a buzzword, but should form an integral part of their existence. CSR activities whether mandatory or spontaneous become successful in India when one is able to appreciate these complexities of relational and interdependent aspects of the company's life as well as the timeless values of Indian culture.

A human rights approach to development "ensures equity and sustainability of development by empowering all people to claim their rights and to be active participants in decisions that affect them, rather

than merely being beneficiaries of charity."[425] The gifts of nature are the 'common property' being rightfully enjoyed by all in the condition of justice and freedom. Hence, active community participation in environment protection and conservation brings positive results as it motivates responsible behaviour towards the environment and it can become an effective means of empowerment. In a democratic set-up, it is all the more significant that meaningful public participation in the framing of environmental laws, policies, as well as making of decisions, is appreciated and positively encouraged.[426] "Public participation in environmental decision making augments environmental protection measures and reflects the aspirations of not only the present generation but also future generations."[427] The Indian NGOs have always become the voice of the voiceless in various matters. Their constructive role in environmental issues should be encouraged.

It need not be stressed that India does not lack environmental laws, policies and programmes to deal with environmental issues.[428] Adding another law makes little sense when the existing ones are not being properly harmonized and observed. What is lacking is the political will to implement them. There is also need to bring about changes in attitude, thinking, values and actions of an individual and organizations towards the environment. Education is the light that brings positive changes in world view, behaviour and way of life. A subject on environment should instil in students environmental values; it should impart both scientific knowledge and traditional wisdom of

425 Speech by Navi Pillay, United Nations High Commissioner for Human Rights, (Berlin, February 24,2011):
"25 years of the right to development – Achievements and Challenges: Statement by the United Nations High Commissioner for Human Rights", available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10759&LangID=E

426 See David M. Konisky and Thomas C. Beierle, "Innovations in public Participation ans Environmental Decision Making: Examples from the Great Lakes Region", Society & Natural Resources 815-826 (2011).

427 P.Leelakrishnan, Environmental Law in India 169 (LexisNexis, Butterworths, 2002); P.Leelakrishnan, "Public Participation in Environmental Decision Making" in P.Leelakrishnan (ed.), Law and Environment 163 (Eastern Book Company, Lucknow, 1992) at 162.

428 See Appendix-II

environmental conservation. The subject should be so structured and taught that it inspires proactive and practical steps. Above all, it should educate them on sustainable lifestyle.

Traditional wisdom and methods of environmental conservation (particularly among the indigenous tribal communities) are often associated with myths and parables. The socio-economic, political and environmental values are clothed in religious language and cultural expressions of a particular community. Thus they are far from being merely commercial or consumerist oriented. But considering today's environmental scenario and the need for sustainable development, customary laws and traditional system have to be contextualized. Hence, before framing a policy, policy-makers should learn to interpret and discover the true meaning and significance of these cultural elements in the light of scientific knowledge.

Appendix-I

KEY POLICIES AND PROGRAMMES RELEVANT TO SUSTAINABLE DEVELOPMENT[429]

Economic	
Key Policies and Programmes	New Industrial Policy, 1991 Pharmaceuticals Policy, 2002 Marketing Assistance Scheme for SME Export Promotion Capital Goods Scheme National Mineral Policy, 2008 New Exploration and Licensing Policy National Telecom Policy,2011 National Electricity Policy, 2005
Social	
Key Policies and Programmes	National Housing and Habitat Policy, 1998 Pradhan Mantri Gramodaya Yojna, 2000 National Policy for Empowerment of Women,2001 Sarva Shiksha Abhiyaan,2003 National Policy for Urban Street Vendors,2004 National Rural Health Mission,2005 National Food Security Mission,2007 National Rehabilitation and Resettlement Policy,2007 Debt Waiver and Debt Relief Scheme,2008 National Mission on Education, 2009

429 Source: Government of India, Report: Sustainable Development in India: Stocktaking in the run up to Rio+20 (Ministry Of Environment and Forests, 2011).

Environment	
Key Policies and Programmes	National forestry Action Programme, 1999 National Afforestation Programme, 2002 National Mission for a Green India, 2011 Auto Fuel Policy, 2002 Mission Clean Ganga Initiative National Forest Policy
Social Equity (Economic and Social)	
Key Policies and Programmes	Rural Infrastructure Development Fund, 1995 Annapurna Scheme, 2000-2001 Rashtriya Krishi Vikas Yojna, 2007 Indira Gandhi National Old Age Pension Scheme, 2007 Indira Gandhi National Widow Pension Scheme, 2009
Socio-Ecological (Environment and Social)	
Key Policies and Programmes	National Agricultur Policy, 2002 National Urban Sanitation Policy, 2008 Integrated Watershed Management Programme, 2009
Green Economy (Economic and Environment)	
Key Policies and Programmes	Technological Upgradation Fund Schemes, 1999 Fodder and Feed Development Scheme, 2005 Integrated Energy Policy of 2008 Perform, Achieve and Trade (PAT)
Sustainable Development (Social, Environment and Economic)	
Key Policies and Programmes	Mahatma Gandhi National rural Employment Guarantee Scheme, 2005 National Urban Transport Policy, 2006 National Environment Policy, 2006 National Urban Housing and Habitat Policy, 2007 National Action Plan on Climate Change, 2008 National Disaster Management Policy, 2009 National Rural Livelihood Mission, 2009

Appendix-II

HIGHLIGHT OF FEW SELECTED ENVIRONMENTAL STATUTES, POLICIES AND RULES IN INDIA

India has a plethora of environmental and environment-related legislations, rules and regulations, passed by both the Centre and the States, with penalties for violation of their provisions. Besides those mentioned in this work, few more of them may be briefed below:[430]

- **The Environment (Protection) Act 1986,** (in short, EPA) an umbrella Act which authorises the central government to protect and improve environmental quality, control and reduce pollution from all sources, and prohibit or restrict the setting and/ or operation of any industrial facility on environmental grounds. It also provides penalties for offences and contravention of its provisions and the rules, orders and directions made under it.
- **The Environment (Protection) Rules, 1986,** lays down procedures for setting standards of emission or discharge of environmental pollutants.
- **The Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008,** aims at controlling the generation, collection, treatment, import, storage, and handling of hazardous waste.

430 Sources: Ministry of Environment and Forests, Government of India, available at: http://moef.nic.in/modules/rules-and -regulations/national-environment-tribunal/ also available at: http://edugreen.teri.res.in/explore/laws.htm

- **The Manufacture, use, Import, Export and Storage of Hazardous Micro organisms/ Genetically Engineered Organisms or Cells Rules, 1989,** aims at protecting the environment, nature, and health, in connection with the application of gene technology and microorganisms.
- **The Public Liability Insurance Act and Rules and Amendment, 1992** provides for public liability insurance for the purpose of providing immediate relief to the persons affected by accident while handling any hazardous substance.
- **The Manufacture, Storage, and Import of Hazardous Chemicals Rules, 1989,** sets up an authority to inspect the industrial activity connected with hazardous chemicals and isolated storage facilities.
- **The National Environmental Tribunal Act, 1995,** has been enacted to award compensation for damages to persons, property, and the environment arising from any activity involving hazardous substances.
- **The National Environment Appellate Authority Act, 1997,** has been enacted in order to hear appeals with respect to restrictions of areas in which classes of industries etc. are carried out or prescribed subject to certain safeguards under the EPA.
- **The Bio-Medical waste (Management and Handling) Rules, 1998,** provides for health care institutions to streamline the process of proper handling of hospital waste such as segregation, disposal, collection, and treatment.
- **The Environment (Siting for Industrial Projects), Rules, 1999,** lays down detailed provisions relating to areas to be avoided for siting of industries, precautionary measures to be taken for site selecting are also the aspects of environmental protection which should have been incorporated during the implementation of the industrial development projects.
- **The Plastics Manufacture, Sales and Usage Rules, 1999.**
- **The Municipal Solid Wastes (Management and Handling) Rules, 2000,** applies to every municipal authority responsible for the collection, segregation, storage, transportation, processing, and disposal of municipal solid wastes.

- **The Ozone Depleting Substances (Regulation and Control) Rules, 2000,** regulates the production and consumption of ozone depleting substances.
- **The Batteries (Management and Handling) Rules, 2001,** applies to every manufacturer, importer, re-conditioner, assembler, dealer, auctioneer, consumer, and bulk consumer involved in the manufacture, processing, sale, purchase, and use of batteries or components so as to regulate and ensure the environmentally safe disposal of used batteries.
- **The Noise Pollution (Regulation and Control) (Amendment) Rules, 2002,** lays down such terms and conditions as are necessary to reduce noise pollution, permit use of loud speakers or public address systems during night hours on or during any cultural or religious festive occasions.
- **The Biological Diversity Act, 2002,** provides for the conservation of biological diversity, sustainable use of its components, fair and equitable sharing of the benefits arising out of the use of biological resources and knowledge associated with it.
- **The Indian Forest Act, 1927,** consolidates the law related to forest, the transit of forets produce, and the duty leviable on timber and other forest produce.
- **The Wildlife Protection Act, 1972 and The Wildlife Protection Rules 1995** provide for the protection of birds and animals and for all matters that are concerned to it whether be it their habitat or the waterhole or the forests that sustain them.
- **The Forest (Conservation) Act, 1980 (amended in 1988) and The Forest (Conservation) Rules, 1981,** provide for the protection of and conservation of forests. It was enacted to help conserve the country's forests. It strictly restricts and regulates the de-reservation of forests or use of forest land for non-forest purposes without the prior approval of Central Government. For this purpose, the Act lays down the pre-requisites for the diversion of forest land for non-forest purposes.
- **The Easement Act, 1882,** allows private rights to use a resource that is, groundwater, by viewing it as an attachment to the land. It also states that all surface water belongs to the state and is a state property.

- **The Indian Fisheries Act, 1897,** establishes two sets of penal offences whereby the government can sue any person who uses dynamite or other explosives substance in any way (whether coastal or inland) with intent to catch or destroy any fish or poisonous fish in order to kill.
- **The River Boards act, 1956,** enables the states to enrol the central government in setting up an Advisory River Board to resolve issues in inter-state cooperation.
- **The Merchant Shipping Act, 1970,** deals with waste arising from ships along the coastal areas within a specified radius.
- **The Water (Prevention and Control of Pollution) Act, 1974,** establishes an institutional structure for preventing and abating water pollution. It establishes standards for water quality and effluent. Polluting industries must seek permission to discharge waste into effluent bodies. The Central Pollution Control Board (CPCB) was constituted under this ACT. The Act was amended in 1988.
- **The Water (Prevention and Control of Pollution) Cess Act, 1977,** provides for the levy and collection of cess or fees on water consuming industries and local authorities.
- **The Water (Prevention and Control of Pollution) Cess Rules, 1978,** contains the standard definitions and indicate the kind of and location of meters that every consumer of water is required to affix. The Act was enacted to provide for the levy and collection of a cess on water consumed by persons operating and carrying on certain types of industrial activities. This cess is collected with a view to augment the resources of the Central Board and the State Boards for the prevention and control of water pollution constituted under the Water (Prevention and Control of Pollution) Act, 1974. The Act was last amended in 2003.
- **The Coastal Regulation Zone Notification, 1991,** puts regulations on various activities, including construction, are regulated. It gives some protection to the backwaters and estuaries.
- **The Factories Act, 1948,** gives provisions for the working environment of the workers. The amendment of 1987 has sharpened its environmental focus and expanded its application to hazardous processes.

- **The Air (Prevention and Control of Pollution) Act, 1981,** provides for the control and abatement of air pollution.
- **The Air (Prevention and Control of Pollution) Rules, 1982,** defines the procedures of the meetings of the Boards and the powers entrusted to them.
- **The Atomic Energy Act, 1982,** deals with the radioactive waste.
- **The Air (Prevention and Control of Pollution) Amendment Act, 1987,** empowers the central and state pollution control boards to meet with grave emergencies of air pollution.
- **The Motor Vehicles Act, 1988,** provides for hazardous waste to be properly packaged, labelled, and transported.
- **The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006,** recognises the rights of forest-dwelling Scheduled Tribes and other traditional forest dwellers over the forest areas inhabited by them and provides a framework for according the same.

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