

POLLUTION *v.* RIGHT TO SAFE AND A HEALTHY  
ENVIRONMENT; REVISITING THE LIVING TREE  
DOCTRINE AND CONSTITUTIONAL SILENCES IN INDIA

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**ABSTRACT**

Human Rights can never be frozen, but each gains its prominence over another as a result of socio-economic, cultural or political variables taking place in a society. Right to Safe and a Healthy Environment is one such right which has been omitted in the original Constitution of India, yet is currently in limelight when pollution has hit its peak.

This silence in the Constitution has put a creative hat on the judiciary to lead in making new laws with the support from the existing legal fabric to change the constitutional understandings over the time. Thus, Article 21 of the Constitution stating Right to Life and Personal Liberty, along with Article 48 A and Article 51 A(g) of the Constitution was subjected to constant interpretative battles in the court to create a nexus for the right to a safe and a healthy environment. Under the shelter of Article 21, environmental rights have received many prospects to sustain against pollution and public interest litigation plays an evitable role in it.

Therefore, the silence in the Indian Constitution in light of Right to Safe and Healthy Environment has served as a blessing in disguise for the judiciary to uphold rule of law above the rule of Constitution and to voice the silences louder than the texts.

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## INTRODUCTION

As Adam Smith noted, we do have many different motivations, taking us well beyond the single-minded pursuit of our interest.<sup>1</sup> It is important to note how current global interests have shifted towards the equation between pollution v. the Right to a Healthy Environment over most other matters. Hence it is a cry for legal action both at local and international spheres.

Human Rights and environment are inter-related, inter - connected, mutually responsive and crucial issues. “Ancient native Australian wisdom linked every human being by an umbilical cord to Mother Earth. If Mother Earth prospered, the community prospered, but if Mother Earth was sick and afflicted, the community would wither perish.”<sup>2</sup>

Violation of this golden rule of interdependency which intertwined humans with nature has threatened the survival of life on earth. Continuous ill-treatment, torment and disregard towards nature has paved the way for the process of ‘environmental victimization’,<sup>3</sup> which is now inevitably witnessed and all humans trapped into. Climate Change, Global Warming, Acid Rains, Ozone Layer Depletion are a few commonly heard issues in the 21<sup>st</sup> Century and has had detrimental impacts on Human Rights.

Pollution is identified as one of the main causes of environmental degradation and thus takes away the very essence of human rights, extending to the Right to Life. Pollution simply means pollutants contaminating the environment and thus disturbing its smooth functioning.<sup>4</sup> It is diversified into pollution of water, soil, radioactive, air, noise, heat / thermal and light. Reasons for such could be rapid urbanization and industrialization, population growth,

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<sup>1</sup> Amartya Sen, *The Idea of Justice*, Penguin Books Publishers, England, 2010, pp 191.

<sup>2</sup> C. G. Weeramantry, *Tread Lightly on the Earth*, Stamford Lake, Pannipitiya, 2009, pp 36.

<sup>3</sup> Harm to individuals suffered as a result of environmentally damaging activities – M Hall, “Environmental Victims: Challenges for Criminology and Victimology in the 21st Century”, *Journal of Criminal Justice and Security*, Vol 3 No. 4, 2012, pp. 371, available at- [https://www.fvv.um.si/rv/arhiv/2011-4/02\\_hall.pdf](https://www.fvv.um.si/rv/arhiv/2011-4/02_hall.pdf) (last accessed 18 December 2018).

<sup>4</sup> V. Mehta, ‘Types of environmental pollution and their harmful effects’, (21 July 2018) *Toppr*, available at- <https://www.toppr.com/bytes/environmental-pollution> (last accessed 21 December 2018).

industrial waste, dumping of solid waste, rapid increment in number of vehicles in the roads, combustion of fossil fuels and others.

India is among the leading countries which has faced severe impacts of pollution; especially air pollution.<sup>5</sup> As per the WHO results, certain cities of India are declared as death traps of air pollution<sup>6</sup> and hence it is found out that over half of India's population live in areas where pollution is above India's safety standards. According to a report in the Economic Times citing research by environmental economists from Chicago, Harvard and Yale, over half of the Indian population may be set to lose three years of their lives due to the adverse effects of breathing air with highly excessive levels of pollutants.<sup>7</sup> It has been known for some time that the air that people breathe in Indian cities is among the worst in the world. The Environmental Performance Index 2014, generated by researchers at Yale University in the US, has bracketed India among 'bottom performers' on several indicators such as environmental health impact, air quality, water and sanitation<sup>8</sup>. Contaminated water and food varieties have led to the spread of incurable diseases. India has the Ganga and Yamuna ranking as the most polluted rivers and Sukinda in Odisha is among the ten most environmentally degraded zones in the world. Piling of garbage in cities, increasingly toxic urban air, and noise pollution by the excessive number of vehicles are common sites in India.

It is unfortunate to mention that pollution has now thus reached its peak and converted to become a threat to the very existence of human life. It recalls Justice C. G. Weeramantry's statement in the case *Hungary v. Slovakia (1997)*<sup>9</sup> decided in the International Court of Justice, that damage to the environment can impair and undermine all the human rights spoken in the Universal

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<sup>5</sup> 'Air pollution killed over 1 lakh children in a year in India: WHO', (30 October 2018) The Economic Times, available at - <https://economictimes.indiatimes.com/news/politics-and-nation/air-pollution-killed-over-1-lakh-children-in-a-year-in-india-> (last accessed 19 December 2018).

<sup>6</sup> V. Chattopadhyay, 'WHO estimate on air pollution shows Indian cities are death traps', (17 August 2015) Down to Earth, available at - <https://www.downtoearth.org.in/news/who-estimate-on-air-pollution-shows-indian-cities-are-death-traps-44283> (last accessed 19 December 2018).

<sup>7</sup> *Ibid*

<sup>8</sup> *supra* note 4.

<sup>9</sup> *Gabčíkovo-Nagyymaros Project*, (Hungary/Slovakia), 1997 I.C.J., 7.

Declaration and other Human Rights instruments.<sup>10</sup> Although in India, the matter has become a national concern warranting immediate legal protection and India being a country which has pledged its commitment to many of the international conventions on environment; the supreme law of the land is silent with reference to a right to a safe and a healthy environment.

In this context, the objective of the paper was to identify how predominance of the law<sup>11</sup> is secured in the country in light of right to a safe and a healthy environment when the law is silent.

To achieve this objective, the paper was structured as; first, analysis of the existing constitutional safeguards over environmental rights against pollution; second, analysis on how constitutional silences have been voiced in the local and international spheres; third, the original v. living constitutions and the role of the judiciary; fourth, analysis on how right to healthy environment received shelter under Article 21 of the Constitution along with its prospects and finally, the procedural innovations to evoke a Right against pollution.

The research took a qualitative approach in analysing the issue and thus, books, online materials and newspapers were utilized as sources to gather information to critically examine the hypothesis of the research that the silences of the Indian Constitution has spoken louder than the texts.

## DISCUSSION

### **Constitutional safeguards over environmental rights against pollution**

The Constitution stands as the top most law in the hierarchy of laws in a country. It represents a country's legal system, national goals and political culture, upholds state sovereignty, democracy, rule of law and values of the society, controls actions of the government bodies and above all acts as the custodian of the rights of the people. It is considered an achievement to different categories of Human Rights - be it Civil, Political, Cultural or Socio-Economic Rights, to gain recognition under a Constitution of a country, which is an eventual result of social transformation.

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<sup>10</sup> *Ibid.*

<sup>11</sup> Third pillar in Dicey's Rule of Law.

In light of the Constitution of India, the only two-fold provisions referring to environmental matters that can be found is under the directive principle of state policy. The first is Article 48A, which provides directives to the state as the guardian to protect and improve the environment and safeguard the forest and wildlife of the country. This stance was supported by the case *M C Mehta v. Kamal Nath and Others*,<sup>12</sup> where the state was considered the guardian of all-natural resources meant for public use. Reading this Article along with the 42nd Amendment Act of 1976 to the Constitution, it is understood that the Indian government has taken initiatives to share this State power among the Centre and the states and thus, now the forest, wildlife and population control is moved from the State to the Concurrent List enabling both the State and the Centre to make laws pertaining to these areas of environment protection.<sup>13</sup>

Meanwhile, abiding to the environmental concepts of inter-generational equality and the trusteeship principle, Article 51 A (g) casts the duty on every citizen to preserve the environment as it is not ours to do with as we wish, but to use with prudence and regard for those who are yet to come.<sup>14</sup>

Application of these two articles in light of environment is stated in the case *Shri. Sachidanand Pandey v. State of West Bengal*<sup>15</sup> where the Supreme Court pointed out that whenever a problem of ecology is brought before the court, the court is bound to bear in mind these two Articles of the Constitution.

Yet, the gravity of having a Right against Pollution is not achieved through these Articles, as they only carry persuasive value and not enforceable in a court of law. The benefit of enjoying the shelter of a 'human rights-based approach to environmental protection'<sup>16</sup> is a substantial victory to all right-seekers. A right in its abstract sense would mean justice, ethical correctness or

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<sup>12</sup> *M. C. Mehta v. Kamal Nath and Others*, (1997) 1 SCC 388.

<sup>13</sup> S. Sharma, 'Environment Protection Under the Indian Constitution', (23 October 2018), I Pleadings – Intelligent Legal Solutions, available at - <https://blog.iPLEADERS.in/environment-and-constitution/> (last accessed 17<sup>th</sup> December 2018).

<sup>14</sup> C. G. Weeramantry, *Xenotransplantation: The Ethnic and Legal Concerns*, Weeramantry International Centre for Peace, Education and Research with Faculty of Medicine, University of Colombo, Colombo, 2006, pp. 140.

<sup>15</sup> *Shri. Sachidanand Pandey v. State of West Bengal*, AIR 1987 SC 1109.

<sup>16</sup> 'Environmental Rights Report: Human Rights and the Environment', (2005) Earth Justice, available at - <http://www.earthjustice.org/library> (last accessed 25 January 2019).

harmony with the rules of law or the principles of morals. Thus, in a concrete legal sense, it is a power, privilege, demand, or claim possessed by a particular person by virtue of law<sup>17</sup> and paves the way to seek remedy in a court of law. Hence, it is also a reflection of the relationship between the individuals and the society. Therefore, the lacuna in the Indian Constitution with regard to the trauma of pollution has created a dilemma.

### **Attempts to voice the constitutional silences; local and international experiences**

Referring to the golden silences of the Constitution, Justice Chelameswar in his dissenting opinion in the *NJAC Case*<sup>18</sup> observed that the dark matter of the Constitutions is as equally important as the text. The overwhelming sense of deficiency, incompleteness and irresolution sets stage for the challenging task of improving and completing it through time and experience.

Basic Structure Doctrine is one such example of a result of the exposition of the 'dark matter' and now it is an integral part of the Indian Constitution, though there is nothing in the text suggesting that principle.<sup>19</sup> The mere fact that the Constitutional Silences are functional was proven through this stance, stated by the case *Kesavananda Bharati and Others v. State of Kerala*.<sup>20</sup> It further elaborated that Parliament, through its power to amend the Constitution, cannot abrogate it.<sup>21</sup>

A more recent achievement in this light would be *Navej Singh Johar v. Union of India*<sup>22</sup> which decriminalized sex between consenting adults of the same gender. The case received privilege by the judgement in the *Justice K. S. Puttasamy v. Union of India*<sup>23</sup> where the court held that the Right to Privacy is an intrinsic part under Article 21; the Right to Life and personal liberty. Hence,

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<sup>17</sup> *The Free Dictionary*, available at - <https://legal-dictionary.thefreedictionary.com/right> (last accessed 21 December 2018).

<sup>18</sup> *Supreme Court Advocates-On-Record Association v. Union of India*, (2016) 5 SCC 1.

<sup>19</sup> F. Mustafa, 'The Silences of the Constitution', (6<sup>th</sup> September 2017) *The New Indian Express*, available at - <http://www.newindianexpress.com/opinions/2017/sep/06/the-silences-of-the-constitution-1653111--1.html> (last accessed 20<sup>th</sup> January 2019).

<sup>20</sup> *Kesavananda Bharati and Ors. v. State of Kerala*, AIR 1973 SC 1461.

<sup>21</sup> *supra* note 19.

<sup>22</sup> *Navej Singh Johar v. Union of India*, 2018 SCC Online SC 1350.

<sup>23</sup> *Justice K. S. Puttasamy v. Union of India*, 2013 SCC Online SC 1325.

by allowing the term marriage to adapt or grow with contemporary times, its meaning within legislation became modernized and subsequently included unions of same-sex couples.<sup>24</sup> Declaring that homosexuality is within the private sphere, the court further held that social morality should not be a hurdle for the individuals to enjoy their rights.<sup>25</sup> Such results of innovations and experimental judgements are made possible in the process of attempting to voice the silence rather than reading the texts out loud.

Experiences of similar scenarios were witnessed in the international sphere through cases such as *Bowers v. Hardwick*<sup>26</sup> which was overruled by the Supreme Court of USA and declared that homosexuality is a Fundamental Right and not subjected to legislative curtailment despite there being no clause in the Constitution. *Roe v. Wade*<sup>27</sup> of USA opened the doors to another crucial aspect of declaring abortion a fundamental right while having a similar constitutional silence. In a way, it diverted the common narrations in the minds of the ordinary towards exceptional contexts; which can be made possible.

It is noteworthy that such gaps in law even create room for the flow of international norms to fill in the pending formal legislations. *Vishakha and Others v. State of Rajasthan*<sup>28</sup> where the absence of Right against Sexual Harassment in Workplace was faded away by interpretation and re-interpretation of Articles 14,<sup>29</sup> 15,<sup>30</sup> 19(1)(g)<sup>31</sup> and 21<sup>32</sup> of the Constitution to evoke the conceptual essence embedded in the Convention on Elimination of All Forms of Discrimination Against Women.

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<sup>24</sup> “Living Tree Doctrine”, *Official site of Center for Constitutional Studies*, University of Alberta, (28 October 2014), available at - <https://ualawccsprod.srv.ualberta.ca/ccs/index.php/1-o/795-living-tree-doctrine> (last accessed 12 January 2019).

<sup>25</sup> ‘Individual’s Privacy is Supreme, says CJI Dipak Misra’, (27 July 2018) *The Hindu*, available at - <https://www.thehindu.com/news/national/individuals-privacy-is-supreme-says-cji-dipak-misra/article24527742.ece> (last accessed 3 January 2019).

<sup>26</sup> *Bowers v. Hardwick*, 478, U. S. 186 (1986).

<sup>27</sup> *Roe v. Wade*, 410 U. S. 113, 164 (1973).

<sup>28</sup> *Vishakha and Others v. State of Rajasthan*, 1997 SC 3011.

<sup>29</sup> INDIA CONST. art. 14.

<sup>30</sup> INDIA CONST. art. 15.

<sup>31</sup> INDIA CONST. art. 19(1)(g).

<sup>32</sup> INDIA CONST. art. 21.

A similar situation is witnessed in light of Environmental Rights in India. India being a signatory to many of the international agreements of environmental concerns, has received an opportunity to recollect such through these multi-factored analyses of the scope of constitutional provisions through judicial dynamism. One such would be the use of PIL which is in consonance with the Principle 10 of Rio Declaration, that provides the fact that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. It impacts not just individuals but the whole world, including the unborn. Its emphasis was based on the core argument that individual-based approach of procedural rules tends to be incompatible with the broader character of Environmental Rights. This development has been of much beneficial in this area of law and has been elaborated in detail in the latter part of this paper.

Thus, it was an opportunity for environmental concepts such as polluter pays principle, sustainable development, precautionary principle and so on to creep into the local legal architecture and currently play an inevitable role in almost all judgements propounded by the lords of the green bench.

### **Original Constitution v. Living Constitution; Role of the Judiciary**

In a way, constitutional silences have paved the way for an exclusive exercise of judicial creativity. They are empowered to experiment with new interpretations of law to voice the silence and thus, to observe how the society would behave to these new interpretations of laws they invent. Following its footsteps, the legislature would enact laws and amendments and that has turned out to be the latest tendency.

Thereby, whether a Right is fundamental is also decided by the Supreme Court, which again left itself to its own devices.<sup>33</sup> The constitutional mysteries are divulged through judicial expertise to endow the intention of the constitutional framers. Thus, under constitutional democracy, even a deviation or an alteration of the intention of the parliament is made possible by the judiciary, being in par with constitutional stability. A similar situation was

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<sup>33</sup> S. Kruger, 'The Nature of the Judicial Process', *Social Science Research Network*, available at - <https://www.google.com/search?client=firefox-b&q=ssrn> (last accessed 23 January 2019).



witnessed in the case *Maneka Gandhi v. Union of India*,<sup>34</sup> where protection under Article 21 was extended beyond executive action.<sup>35</sup> Such exceptions to original Constitution was made possible no longer only by the parliament amendment procedure, but also by the judiciary.

It's a new era where content of the constitutions is to be changed not just by the traditional method of amending procedure, but even through interpretative battles in courts.<sup>36</sup> This attempt gets more motivated within the context of India when Separation of Power turns out to be a blur in practice. This stance was espoused in the *Delhi Laws Act Case*<sup>37</sup> which has noticed that the framers of the Indian Constitution have not incorporated a strict doctrine of separation of powers but have rather envisaged a system of checks and balances<sup>38</sup> which leaves space for overlap of power to a certain extent.

Using this benefit, hence, the judges have removed their traditional hats and play even a legislative role in the constant evolution and transformation of laws and effective realization of the Rights enshrined in the Constitution. Thereby, gaps, ambiguities and silences in the constitutions are blessings for the judges to divert from textual interpretations of it and adopt a constructive approach to judicial process. Thus, it has paved the way for the constitutions to function as a 'living tree' which will adapt and evolve with realities and social changes.

The 'living tree' metaphor dates back to the Canadian Case of *Edwards v. Attorney General*<sup>39</sup> which is famous as the 'Persons Case' where the Judicial Committee of the Privy Council (JCPC) in Britain analysed the Constitution's

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<sup>34</sup> *Maneka Gandhi v. Union of India*, 1978 AIR 597.

<sup>35</sup> D Das, 'Article 21 of the Constitution of India – Right to Life and Personal Liberty', *Academike- Articles on Legal Issues*, (13<sup>th</sup> November 2015), available at - <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/> (last accessed 18 January 2019).

<sup>36</sup> V Jackson, "Constitutions as Living Trees? Comparative Constitutional Law and Interpretive Metaphors", *Fordham L. Rev*, George Town University Law Centre, Vol 75, 2006, pp. 942.

<sup>37</sup> *In re Delhi Laws Act*, AIR 1951 SC 332.

<sup>38</sup> G Sahu, "Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence", *Environment and Development Journal*, Vol 4/1, 2008, pp. 14, available at - <http://www.lead-journal.org/content/08001.pdf>. (last accessed 3 February 2019).

<sup>39</sup> *Edwards v. Attorney General*, (1929) UKPC 86.

use of the term ‘persons,’ to both men and women and thus, giving equal opportunity for the women to be eligible to sit in the Canadian senate. The constitutional scholar William Lederman who is credited with spearheading the movement toward legal instrumentalism in Canada, saw this case as a progressive move from literalist or textualist approach to a living constitutionalist or sociological approach to law,<sup>40</sup> where the legal texts become inferior to the ongoing life of the country<sup>41</sup>. It is believed that the Constitution is a living organ in which courts have a more hands-on style of constitutional gardening, which keeps a strict check on its growth, maps out piece by piece the parameters of the fence and prevents state from trespass.<sup>42</sup> It better embraced it through multiple modalities such as text, original intentions, structure and purpose, precedent and doctrine, values and ethos, prudential or consequentialist concerns—of contemporary constitutional interpretation<sup>43</sup>.

The Indian Judiciary has adopted the last method – contemporary constitutional interpretations to overcome the lacuna in the Constitution of India with regard to a ‘Human Rights-based approach to environmental protection’<sup>44</sup> and thus, has casted light on ‘evolutive meaning approach’ over ‘fixed meaning approach’ to constitutional adjudication.<sup>45</sup> It emphasized that human rights are never frozen concepts, but strong ethical pronouncements as to what should be done<sup>46</sup> in different routes other than motivating legislations.<sup>47</sup> Hence, Article 21 of the Constitution which depicts that ‘no person shall be deprived of his life or personal liberty except according to the procedure established by law’ is utilized as a single window to claim Environmental Rights.

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<sup>40</sup> *supra* note 19.

<sup>41</sup> A Honickman, ‘The original living tree’, *Advocates for the Rule of Law*, (21<sup>st</sup> August 2018), available at - <http://www.ruleoflaw.ca/the-original-living-tree/> (last accessed 26 December 2018).

<sup>42</sup> A Huttichson, ‘Living Tree’, (1992) Osgoode Hall Law School of York University, pp. 98, available at [http://digitalcommons.osgoode.yorku.ca/scholarly\\_works](http://digitalcommons.osgoode.yorku.ca/scholarly_works) (last accessed 28 January 2016).

<sup>43</sup> *supra* note 36, pp. 926.

<sup>44</sup> *Id.*

<sup>45</sup> *supra* note 36, pp. 927.

<sup>46</sup> *supra* note 1, pp. 357.

<sup>47</sup> *Ibid*, pp. 364 – 366.

In fact, it is believed that the Indian Supreme Court was one of the first Courts to develop the concept of 'healthy environment' as part of right to 'life' under Article 21 of the Constitution. As per the view of Hart, Human Rights being the parent of law<sup>48</sup>, the judiciary is left with interpretations which are everywhere guided by similar considerations, the ordinary or technical-legal meanings of words, evidence of their originally intended meaning or purpose, 'structural' or 'underlying' principles, judicial precedents, scholarly writings, comparative and international law, and contemporary understandings of justice and social utility<sup>49</sup> to give life to the original constitution.

Hence, the Preamble of the Indian Constitution can be read in favour of utilizing Article 21 as a safeguard for environmental pollution issues. It pronounces the purpose of the Constitution and the fact that it stands for a socialist pattern of democracy depicts its commitment to a decent standard of living and pollution free environment. Environmental pollution has emerged as one of the biggest social problems affecting the society at large and thus, has put a burden on the state to fulfil the basic aim of socialism, which is to provide a decent standard of living to everyone. Such is made only possible from a pollution free environment. Therefore, interpreting Article 21 against environmental pollution issues can be justified as it is in par with the purpose of the Constitution and the fact that it actually has a direct impact on Right to Life of the people.

Implanting the roots on such a legal fabric, how the judiciary critically and creatively deployed environmental rights can be witnessed through the below elaborated case laws. It was in the case of *Hinchlal Timari v. Kamala Devi*<sup>50</sup> that the judiciary interpreted environment as a source which enabled people to enjoy quality life which is the essence of the guaranteed right under Article 21 of the Constitution. Thus, in the case of *Maneka Gandhi v. Union of India*<sup>51</sup> the Supreme Court transformed these Rights into Positive Rights and imposed an affirmative duty on the State to enforce it. The judiciary hence coined the idea that pollution free environment, Right to Live with human dignity, free of

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<sup>48</sup> *Ibid*, pp. 363.

<sup>49</sup> *supra* note 20, at 1, 5.

<sup>50</sup> *Hinchlal Timari v. Kamala Devi*, 2001 SC 4787.

<sup>51</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

danger of disease and infection are understood as important attributes of Right to Life and personal liberty. It paved the way for cases such as *Th. Majra Singh v. Indian Oil Corporation*<sup>52</sup> to declare that special precautions need to be taken in choosing a location for establishing a plant for filling cylinders with liquefied petroleum gas as it would be polluting the air that people would breathe to sustain life.

Meanwhile, it was in the case *Dr. Ashok v. Union of India*<sup>53</sup> that the Supreme Court held that giving an extended meaning to the expression “life” in Article 21 of the Constitution, brought health hazards due to pollution within it. Also, in the case of *A.P. Pollution Control Board (II) v. Prof. M. V. Nayadu*<sup>54</sup> the Supreme Court stated that the rights to healthy environment and to sustainable development are Fundamental Human Rights implicit in the Right to Life. The stance was reaffirmed by *Attakoya Thangal v. Union of India*,<sup>55</sup> where the Kerala High Court in 1990 stated that the right to sweet water and the right to free air are attributes of the Right to Life, for these are the basic elements which sustain life itself.<sup>56</sup> Thus, in *Charanlal Sabu v. Union of India*<sup>57</sup> the Supreme Court of India held that, in the context of national dimensions of Human Rights, Right to Life, liberty, pollution free air and water is guaranteed by the Constitution under articles 21, 48 A and 51 A (g). It is the duty of the State to take effective steps to protect the guaranteed Constitutional Rights. Therefore, it should be understood that Article 21 guaranteeing Right to Life has stood for the prevention of pollution along with the support of the two provisions in the Directive Principles of State Policy.

This stance was reaffirmed in the case *M.C. Mehta v. Union of India*<sup>58</sup> known as the Vehicular Pollution Case was dealing regarding the vehicular pollution in Delhi city and it was held to be the duty of the Government to see that the air did not become contaminated due to vehicular pollution. The Apex court

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<sup>52</sup> *Th. Majra Singh v. Indian Oil Corporation*, AIR 1999 J K 81.

<sup>53</sup> *Dr. Ashok v. Union of India*, (1997) 5 SCC 10.

<sup>54</sup> *A.P. Pollution Control Board (II) v. Prof. M. V. Nayadu*, (2001) 2 SCC 62.

<sup>55</sup> *Attakoya Thangal v. Union of India*, AIR 1991 Ker 321.

<sup>56</sup> ‘Right to Water Gets Major Boost in a Historic Judgment by the Mumbai High Court’, (2014) The Council of Canadians, available at <http://canadians.org/blog/right-water-gets-major-boost-historic-judgement-mumbai-high-court> (last accessed 6 September 2018).

<sup>57</sup> *Charanlal Sabu v. Union of India*, 1990 1 SCC 613.

<sup>58</sup> *M.C. Mehta v. Union of India*, 1991 SCR (1) 866.

again confirming the Right to a Healthy Environment as a basic Human Right and stated that the right to clean air also stemmed from Article 21 which referred to the right to life. This case has served to be a major landmark because of which lead-free petrol supply was introduced in Delhi. There was a complete phasing out of old commercial vehicles more than five years old as directed by the courts.

Living constitutions always set the stage for its content to evolve with time and space. Thus, recent development in the Indian context on this regard would be the idea behind the case *Murali S. Deora v. Union of India*<sup>59</sup>, where the court established that pollution caused by smoking is also a violative of Article 21 of the Indian Constitution. This case emphasized that smoking in a public place should be banned because it pollutes air near them and also affects public health. As aware, public health plays a critical role in promoting, restoring or maintaining the status of a country and thus, the non-smokers Fundamental Right to Life in Article 21 is was declared being infringed through smoking.

### **Benefits retained by right to a safe and a healthy environment under Article 21**

#### ***a. Application and enforceability***

There are many prospects of choosing Article 21 out of all the other Fundamental Right provisions to elucidate the essence of right to safe and a healthy environment against pollution. One such would be its wide applicability from citizens to the non-citizens and even to those whose citizenship is unknown<sup>60</sup>. No person is to suffer from environmental pollution and this right is a strong shield to use against such. It embraces not only the physical existence of life but also the quality of life and thus, protection from noise, polluted air and water are inherent integral parts of it<sup>61</sup>.

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<sup>59</sup> *Murali S. Deora v. Union of India*, AIR 2002 SC 40.

<sup>60</sup> *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742.

<sup>61</sup> V.N. Shukla, *Constitution of India*, Eastern Book Company, Lucknow, India, 2017, pp. 213.

Thus, it enjoys the benefit of Article 32 and Article 226 which respectively empowers the Supreme Court and the High Courts in an appropriate proceeding to issue not only writ of mandamus, certiorari, prohibition or *quo warranto* but also any other direction, order or writ for the enforcement of fundamental rights. In light of environmental pollution, it is beneficial as it has paved the way to promptly act against hazardous activities effecting ecological balance and lives of the people. Thus, within the power of judicial review, courts are called upon to decide whether any instrumentality, agency or organs of the state has transgressed or exceeded the limits of power conferred upon it and to ensure that the state and the public officials fulfil the obligation of the Constitution and the law under which they exist and function.

Enforcement of the above judicial power guaranteed by Article 32 and Article 226 is witnessed to have been used to draw a linkage between Article 21 and right to a safe and healthy environment firstly in the case of *Subhash Kumar v. State of Bihar*<sup>62</sup>. This case also indicated that the municipalities and a large number of other concerned governmental agencies could no longer rest content with unimplemented measures for the abatement and prevention of pollution. They may be compelled to take positive measures to improve the environment.

### ***b. Judicial Viability***

Thus, many cases were followed afterwards to uphold the rights to life of the people against environmental pollution. The *Rural Litigation and Entitlement Kendra v. State*<sup>63</sup>, is one such which is popularly known as Dehradun Quarrying Case. In this case the Supreme Court entertained complaints from a voluntary organization alleging that the operation of limestone quarries in the Mussoorie Dehradun region resulted in degradation of the environment affecting the fragile ecosystem in the area. In this connection the Supreme Court ordered the closure of some of these quarries on the ground that these were upsetting the ecological balance, though it may result in unemployment and loss of revenue. It reflects the current demand in the society and that ecology, life and health of the people takes prominence over other matters.

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<sup>62</sup> *Subhash Kumar v. State of Bihar*, (1998) 9 SCC 589.

<sup>63</sup> *Rural Litigation and Entitlement Kendra v. State*, AIR 1988 SC 2187.

Similar stance was taken in the case of *M.C. Mehta v. Union of India*<sup>64</sup> where the right to clean environment gained importance even over economic interests of the country as well as the interests of the companies carrying out business. As per the legal narration of the case, the Supreme Court ordered certain industries along the Ganga river in Kanpur to establish primary and secondary effluent treatment plants. The financial implications incurring out of such treatment plants on the industries was considered immaterial. Despite the financial capacity of the industries, the order was made mandatory. The presumed adverse effect on the public at large which is likely to ensue by the discharging of the trade effluents from the tannery to the river Ganga would be immense and it will outweigh any inconvenience that may be caused to the management and the labour employed by it on account of its closure. These cases moved environmental rights from being an economic issue to a social issue. Revenue was no longer convincing enough in light of environmental pollution.

This stance was recurred in the case of *Bayer India Ltd. v. State of Maharashtra*<sup>65</sup>, which emphasized that nothing can be more fundamental than the issue of public safety and right to life. Hence, where it is found infringed, the courts will have to act in general interest of the citizens and not the government and public bodies.

It is understandable how economic benefits and development are crucial to any country. Yet, as propounded by *Vellore Citizens Welfare Forum v. Union of India*<sup>66</sup>, development should always be a sustainable development in which Right to Life is an integral part of it<sup>67</sup> and with least friction to the environment. Following a similar line of judicial thought, warning was given by the Supreme Court in the case of *Shriram Foods and Fertilizer Case*<sup>68</sup> to a company manufacturing hazardous chemicals and gases to take all necessary safety methods to protect the health and life of workmen in the factory as well as the neighbourhood.

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<sup>64</sup> *M.C. Mehta v. Union of India*, (2004) 12 SCC 118.

<sup>65</sup> *Bayer India Ltd. v. State of Maharashtra*, (1995) 97 BOMLR 957.

<sup>66</sup> *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647, ¶ 660.

<sup>67</sup> *N. D. Yayal v. Union of India*, 1999 (1) SCALE 463.

<sup>68</sup> *M.C. Mehta v. Union of India*, 1987 SCR (1) 819.

It was reaffirmed in the case *N. L. K. Koolwal v. State*<sup>69</sup>, where the Rajasthan High Court held that the maintenance of health, preservation of the sanitation and environment falls within the purview of Article 21 of the Constitution as it adversely affects the life of the citizen and amounts to slow poisoning and reducing the life of the citizen because of the hazards created, if not checked.

When a case stands in the eyes of the lords, its overwhelming confusions, overlap of issues, rigidity and complexities has to be given considerations and weighed to find out the competing interest. Right to Life is one such which is difficult to be remedied once breached. Therefore, the sense of gravity it carries over other matters are deeper and makes other concerns a step down to a secondary level. The ability of the judiciary to draw the easy nexus between pollution and its adverse effects on right to life of the people has awarded a much safer and prestige position to environmental rights within the constitutional framework of India.

### ***c. Predominant role of Article 21 over Other Rights***

Right to Life has secured the highest position in the hierarchy of human rights and can be described as the most important of all human rights, the most basic or fundamental or the supreme right<sup>70</sup>. On such grounds, it is interesting to identify how Article 21 becomes a ground for reasonable restriction over other rights when reading them in light of pollution.

Article 19 (1) (g) of the Indian constitution confers Fundamental Right on every citizen to practice any profession or to carry on any occupation, trade or business. This Right was never made absolute and subjected to reasonable restrictions. One such restriction would be the interest of the others over their life and liberty. A citizen cannot carry on business activity, if it is causing health hazards to the society or general public. Thus, safeguards for environment protection are inherent in this. The Supreme Court, while deciding a similar matter of trade of liquor in *Cooverjee B. Bharucha v. Excise*

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<sup>69</sup> *N. L. K. Koolwal v. State*, AIR 1988 Raj 2.

<sup>70</sup> Kratochvíl, J. 'The Right to Life in the Perspective of the Human Rights Committee and the European Court of Human Rights', (2006) *Social Science Research Network*, available at - <https://www.google.com/search?client=firefox-b&q=ssrn> (last accessed 23 January 2019.)



*Commissioner, Ajmer*<sup>71</sup> observed that, if there is a clash between environmental protection and right to freedom of trade and occupation, the courts have to balance environmental interests with the Fundamental Right to Carry on any Occupations and in most cases Environmental Rights will take precedence over right to occupation as it is within the shelter of Article 21.

In *Residents of Sanjay Nagar v. State of Rajasthan*<sup>72</sup>, the Rajasthan High Court faced a similar situation. There was a complaint to the courts that the owners of a slaughterhouse were discharging untreated animal blood in the drains of the residential colony, where it was situated. Consequently, the court reminded the owners of their duties under Article 51A (g) of the Constitution and trade was given a subordinate position when it is contributing to the environment pollution and conflicting with the right to life and liberty of the people. Abiding to such argument, the court ordered the owners to shut the slaughterhouse.

This case has laid precedence for many cases to follow. *V. Lakshmiopathy v. State*<sup>73</sup> is one such case where Article 14 which states equality before the law read along with a person's discretion over land use, was restricted in light of Article 21. The Petitioners' challenge regarding the location and operation of industries and industrial enterprises in a residential area was decided by the courts to be violative of Karnataka Town and Country Planning Act, as well as the Right to Life under Article 21 of the Constitution. Among the most vital necessities of human life being air, water and soil; which are the main attributes of environment and hence pollution over them will be a threat to sustain quality life.

Meanwhile, Article 19 (1) (a) of the Constitution of India propounding the freedom of speech and expression is subjected to restriction especially in favour of an anti-pollution. In *P.A. Jacob v. The Superintendent of Police Kottayam*,<sup>74</sup> the Kerala High Court held that Article 19 (1) (a) does not include freedom to use loud speakers or sound amplifiers as noise pollution caused by

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<sup>71</sup> *Cooverjee B. Bharucha v. Excise Commissioner, Ajmer*, 1954 SC 220.

<sup>72</sup> *Residents of Sanjay Nagar v. State of Rajasthan*, AIR 2004 Raj 116.

<sup>73</sup> *V. Lakshmiopathy v. State*, 1991 (2) KarLJ 453.

<sup>74</sup> *P A Jacob v. The Superintendent of Police Kottayam*, AIR 1993 Ker 1.

the loud speakers is a violation of one's personal liberty under Article 21. Following the footsteps of this case, in *Rajni Kant v. State*<sup>75</sup> case the leader of a political party was not allowed to use loudspeakers in the public meeting he wanted to organize. Similarly, records of judiciary depict that though freedom of religion is guaranteed under Article 25 of the Constitution, use of loud speakers creating noise pollution is not tolerated. *Church of God (Full Gospel) in India v. K. K. R. Majestic Colony Welfare Association*<sup>76</sup> stated that excessive noise creates pollution in the society and is detrimental to one's liberty. All the cases elaborated depicts that Right to Life and Liberty takes precedent over other Rights whenever there arises a conflict between the rights. Thus, seeking shelter under such has always been an advantage for the environmental rights to flourish against the constant rise of the pollution levels.

### Procedural Innovations

Meanwhile, Public Interest Litigation (PIL) has evolved as the driving force of ensuring Rights; as Rights are the 'parents of law'<sup>77</sup> which motivates action to protect them. In India, the cause for the effective role of the judiciary for protection of environmental rights has most of the time being through the mechanism of PIL. Commonly known as the class action, it marks a deviation from the conservative immediate client-based approach and has provided a way forward especially in terms of environmental rights, and has laid precedent to enhance the access to environmental justice and to encourage an assertive judicial role. One crucial result achieved through the development of PIL is the ability of third parties to bring actions on a wide variety of matters on the basis that it affects their Rights and the Rights of the public at large<sup>78</sup> which is in a way a mode of facilitation of direct democracy<sup>79</sup> which voices the silenced, empowers the disadvantaged and creates public debate with less cost

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<sup>75</sup> *Rajni Kant v. State*, AIR 1958 All 360.

<sup>76</sup> *Church of God (Full Gospel) in India v. K. K. R. Majestic Colony Welfare Association*, AIR 2000 SC 2773.

<sup>77</sup> *supra* note 1, pp. 363.

<sup>78</sup> R Goonetilleke, 'Public Interest Litigation: A Species of Direct Democracy and Good Governance', *Sri Lanka Journal of Development Administration*, Vol 4, 2014, pp. 88, available at - <https://sljda.sljol.info/articles/abstract/10.4038/sljda.v4i0.7116/> (last accessed 19 December 2018).

<sup>79</sup> In the ancient Greek Cities people, have participated in decision making process known as direct democracy.

and high awareness. This new dimension has been warmly welcomed in India through judicial activism which enabled social activists, NGOs, lawyers, public spirited citizens etc., through a writ petition,<sup>80</sup> to approach the Court on behalf of the person whose right has been infringed or for the best interest of the whole society.

It is through the case *Peoples Union for Democratic Rights v. Union of India*<sup>81</sup> where the court permitted Public Interest Litigation or Social Interest Litigation at the instance of 'Public spirited citizens' for the enforcement of constitutional and legal rights of any person or group of persons who because of their socially or economically disadvantaged position are unable to approach court for relief. It is now developed to such an extent that even Justice Bhagwati declared validity of an open letter to the court in the case of *S. P. Gupta v. Union of India*<sup>82</sup> and a media report in *Bandhua Mukti Morcha v. Union of India & Others*<sup>83</sup> as valid petitions.

Public interest litigation is a part of the process of participative justice and standing in civil litigation of that pattern must have liberal reception at the judicial doorsteps. It's a direct deviation from the standard locus standi grounds provided in the Indian Constitution. Yet, it can be remarked as a positive evolvement in the Constitution, which is less formal; more effective and which would bring the idea of justice closer to the hearts of the ordinary people of the country.

When analysing PIL in light of the environment, one of the land mark cases decided was *Indian Council for Enviro - Legal Action v. Union of India*<sup>84</sup> ;popularly known as H - Acid Case where a public interest litigation action was filed by an environmentalist organization, against the Union of India; State Government and State Pollution Board concerned, to compel them to perform their statutory duties on the ground that their failure to carry on such duties violated Rights guaranteed under Article 21 of the residents of the affected area. The Supreme Court cautioned the industries discharging

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<sup>80</sup> Which is made a possibility through Article 32 and 226.

<sup>81</sup> *Peoples Union for Democratic Rights v. Union of India*, 1982 AIR 1473.

<sup>82</sup> *S. P. Gupta v. Union of India*, AIR 1982 SC 149.

<sup>83</sup> *Bandhua Mukti Morcha v. Union of India and Ors.*, (1997) 10 SCC 549.

<sup>84</sup> *Indian Council for Enviro - Legal Action v. Union of India*, (1996) 3 SCC 212.

inherently dangerous Oleum and Sulfuric acid. The court held that such type of pollution infringes right to wholesome environment and ultimately Right to Life.

Thus, Justice Krishna Iyer observed in the case *Ratlam Municipal Council v. Vardhichand*,<sup>85</sup> that social justice is an expectation of all and therefore the people must be able to trigger off the jurisdiction vested for their benefit to any public functioning. Thus, he recognized public interest litigation as a Constitutional obligation of the courts. The judgment of the Supreme Court in this instant case is a land mark in the history of judicial activism in upholding the social justice component of the rule of law by fixing liability on statutory authorities to discharge their legal obligation to the people in abating public nuisance and making the environmental pollution free even if there is a budgetary constraint.<sup>86</sup>

Thus, in the case *M.C. Mehta v. Union of India*<sup>87</sup> the court by accepting a Public Interest case held that only law can't play the primary role in protection of environment unless there is an exchange of social pressure and social acceptance or will. The court ordered the central and state government to deliver the notice and message concerning environment in cinema halls and spread this information through radio and T.V. The court further directed that the licenses of cinema halls should be cancelled if they do not show the slides concerning the environment in cinema halls.<sup>88</sup> Meanwhile, this judgement also led the government to advise the UGC to think of making environment as a mandatory subject in the college.

Juxtaposing the PIL mechanism of India with countries like Sri Lanka; where environmental concerns are at the apex of other matters and people approach the court to voice not just the violation of their environmental rights but the detrimental impacts to environment itself, treating environment as a living

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<sup>85</sup> *Ratlam Municipal Council v. Vardhichand*, AIR 1980 SC 1622.

<sup>86</sup> R Agrawal, 'Environment Protection through Public Interest Litigation- A Judicial Approach', *International Journal of Applied Social Science*, Vol. 1(1), 2014, pp. 29-36.

<sup>87</sup> *M.C. Mehta v. Union of India*, AIR 1992 SCC 137.

<sup>88</sup> V Megarajan, "A Study on Principle and Doctrine by Supreme Court for Protection of Environmental Law", *International Journal of Pure and Applied Mathematics*, Vol 120, No. 5, available at - <http://www.acadpubl.eu/hub/> (last accessed 14 January 2019).

being. One such case referred to courts on similar grounds was *Bulanulama v. Ministry of Industrial Development* famous as the *Eppawala Case*<sup>89</sup> where the matter revolved around exploitation of phosphate deposit and in which court declared to use it with prudence and sustainable manner in order to strike an equitable balance between the needs of the present and future generations of Sri Lanka. It is known that natural resources, once destroyed cannot be rebuilt by mitigative measures or even be substituted<sup>90</sup>. Therefore, development should take place preventing irreversible damage to the environment. Similar take in the context of India is in need to make voice on behalf of the environmental like they did in *Taj Trapezium Case*,<sup>91</sup> to protect the natural resources from the rising levels of pollution.

However, such public articulations of human rights are often invitations to initiate some fresh legislation, rather than relying on what is already seen as legally installed<sup>92</sup>. Though there is no positive sign on an amendment with regard to introducing the right to healthy environment to the Indian Constitution, the legislature seems to have played its role by enacting many subordinate legislations to meet the social pressure. Few of such are, The Water (Prevention and Control of Pollution) Act, 1974; The Water (Prevention and Control of Pollution) Cess Act, 1977, The Forest (Conservation) Act, 1980; The Air (Prevention and Control of Pollution) Act, 1981; The Environment (Protection) Act, 1986; The Public Liability Insurance Act, 1991 and The Biological Diversity Act, 2002.

Another prospect in light of environment is the establishment of the National Green Tribunal under the National Green Tribunal Act, 2010 for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto. It is a specialized body equipped with the necessary

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<sup>89</sup> *Bulanulama v. Min. of Industrial Development (Eppawala Case)*, S.C. Application No. 884/99 (F/R).

<sup>90</sup> *supra* note 38, pp. 16.

<sup>91</sup> *M C Mehta v. Union of India*, 1987 AIR 1086.

<sup>92</sup> *supra* note 1, pp. 359.

expertise to handle environmental disputes involving multi-disciplinary issues.<sup>93</sup> In a context where prevention of pollution has become the slogan of the country, all these attempts have created the atmosphere to fill in the lacuna of not having a constitutional right to a healthy environment and eventually which given different meanings to the original constitution and allow it to evolve.

## CONCLUSION

The research found that Constitution of India has functioned as a living tree, especially in light of environmental concerns at a time when pollution is rising at an alarming pace. Though the tree is rooted in the past it has been capable of meeting the needs of the present, in the best interests of the future.

The past plays a critical but not an exclusive role; especially in light of Rights and Freedoms. Rights evolve and gain importance over another, based on circumstances and thus, the supreme law should create space to accommodate such developments. Right to a Healthy Environment is one such which was not recognised by the constituent assembly at the time of formulation of the Constitution, yet, it has gained significance with time and space.

The challenge of this silence in the Constitution was a call for re-understanding the application of broad constitutional concepts. For this purpose, the burden is shifted towards the judiciary; a direct deviation from the conventional constitutional amendment procedure conducted by the legislature, which is alleged to be more lathagic, complicated and time consuming. Meanwhile, judicial activism has successfully evolved the spirit of the Constitution by interpreting Article 21 of the Constitution along with the support of Article 48A and 51 A (g) as a single window to overcome the loophole in the Constitution of non-reference to a right to a healthy environment which is in line with the purpose of the Constitution.

Thereby, environmental rights enjoy many privileges under the shelter of Article 21 and few of such are: applicability to both citizens, non-citizens and

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<sup>93</sup> *National Green Tribunal of India*, available at - <http://www.greentribunal.gov.in/> (last accessed 21 December 2018).

to unknowns of the citizenship, effective and prompt enforcement mechanism under writ applications or other directions of the court, inherent sense of upper-hand over other rights during a conflict of Rights, a ground for reasonable restriction of other rights, prevalence over other matters during a conflict of interests and grassroots level application through PIL.

The research suggests that PIL should be expanded to an extent where people approach the courts not just on behalf of violation of their right to a safe and a healthy environment but also for the violation of the dignity of the environmental itself; which will otherwise revert to be a threat to the very existence of human life. Also, it is suggested that right to a safe and a healthy environment should be incorporated as a separate stand-alone right in the fundamental rights chapter to meet the timely needs. A protection under the supreme law of the land is a prestige for any right and more clarity will guarantee its better enforcement.

However, the Constitution of India abiding to the living tree doctrine has evolved with the support of the judiciary in light of guaranteeing environmental rights of the people against pollution. It has proved that rule of law prevails above the rule of constitution and that loopholes in the Constitutions are never permanent obstacles in the eyes of justice. Thereby, in the aspect of right to safe and a healthy environment; the research hypothesis is proven that silences in the Indian Constitution speaks louder than the texts.