

Liaquat Ali Siddiqui

RIGHT TO PROTECT ENVIRONMENT AS A HUMAN RIGHT : INTERNATIONAL AND NATIONAL PERSPECTIVES

1. INTRODUCTION

Whether there should be a "right to protect environment", parallel to the other well recognized human rights like right to life, right to health, right to property, right to equal protection of law etc., is a significant issue in the contemporary environmental legal discussion. Much has been written on the theoretical aspects of the necessity of having a "right to protect environment" even for the proper realization of the already recognized human rights. Certain developments have also taken place on this issue at national, regional and international levels. Notionally as well as normatively the issue is clear cut, yet at the operational level, much remains to be desired.

This paper intends to examine, *inter alia*, the issues like the rationale of the right to environment, its relationship with other already recognized human rights, different trends toward recognition of a right to protect environment at international, regional and national levels, with special reference to the cases of India and Bangladesh. Certain observations and recommendations are also made at the end.

Liaquat Ali Siddiqui is an Assistant Professor of Law, University of Dhaka.

2. RIGHT TO PROTECT ENVIRONMENT AS A COMPONENT OF HUMAN RIGHTS

Theoretical arguments may be made to establish a link between human rights and environmental protection. It is argued that there are three approaches to linking human rights and environmental protection and that each of such approaches has some support in international and national texts.

The first approach shows that existing human rights like right to life, health, property, safe and healthy working conditions, freedom from hunger, etc. can be violated or threatened by environmental degradation. This approach also explains that through procedural mechanisms for enforcing human rights, the environmental harms causing human rights violations may be stopped. This way of protecting environment, in real sense, ensures further human rights observations. The second approach suggests that procedural human rights like right to participate in government, access to information, procedural fairness, including non-discriminatory access to remedies etc., may be applied or modified for application in protecting the environment. This approach, therefore, uses procedural human rights as a means to enhance environmental protection. The third approach, which offers a new dimension to our environmental thinking, is to create or declare a right to a safe and healthy or ecologically balanced environment as a new human right, taking into consideration both the environmental and human rights issues.

These approaches have received their expressions in different ways at least at national level in the forms of constitutional reforms, judicial activism and legislative enactments.¹

However, many scholars have expressed doubt whether mere recognition of a right to environment would at all provide greater

1. Dinah Shelton, "What happened in Rio to Human Rights", in Gunther Handle, *Yearbook of International Environmental Law*, Graham & Trotman Ltd., UK, Vol.3, 1992, pp. 90-91.

protection for the environment than what is available under existing international law or what could be made available simply through better regulation. Stone's view is that conferring the rights straight away is not the same as introducing more protective rules. He argues that 'rights' introduce a flexibility and open-endedness that no rule can capture.²

The right to environment is not an abstract idea which is difficult to define. Rather like other rights e.g., right to liberty and security of person, it can be implemented through procedural safeguards.³

It is argued that the environmental 'due process' would comprise the right to be informed of projects or of programmes that concern one's environment.⁴

It does not, however, imply one's right to an ideal environment which a state can not aspire or afford but, in reality, a right to have the present environment conserved and protected from any significant deterioration and also improved in some cases.

3. RIGHT TO PROTECT ENVIRONMENT: INTERNATIONAL PERSPECTIVE

International legal developments toward the issue of recognition of a right to protect environment have not been consistent and satisfactory. Unlike the international human rights declarations and conventions, the international environmental documents do not contain express provisions on right to protect environment. Why the international community has not risen to the occasion to assert a right

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2. Stone, 45 Southern California Law Review, 1972, p. 488 cited in Patricia W. Birnie and Alan E. Boyle, *International Law & The Environment*, Clarendon Press, Oxford, 1994, P.189.
 3. See for procedural safeguards, Article 9, United Nations Convention on Civil and Political Rights (1966).
 4. Alexandre Kiss and Dinah Shelton, *International Environmental Law*, Graham & Trotman Ltd., London, 1991, p. 25.

to protect environment is a moot point. What is expected from a world community, having much commitment for human rights issues, is to respond to the issue of right to environment positively since their mutual relationship and dependence has been reiterated by many international and national socio-legal institutions. In this section different international environmental declarations, conventions, treaties and other documents will be examined in order to trace out the international trends toward the issue of right to protect environment.

The Stockholm Declaration: United Nations Conference on the Human Environment

The Stockholm Declaration begins with certain proclamations and in the first paragraph it tries to establish a relationship between the human rights and environment. It says, "Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights even the right to life itself". In paragraph two, it says, "The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world".⁵

The first Principle of the Declaration has more closely established a relationship between the human rights and environment. It says, "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations".⁶

Principle 1 recognizes certain fundamental rights i.e., rights to freedom, equality and adequate conditions of life. Although it does not directly recognize environmental protection as one of the fundamental rights, it envisages 'environmental protection' as a means to achieve

5. See, Harald Hohmann (Ed.), *Basic Documents of International Environmental Law*, Graham & Trotman Ltd., UK, Vol. 1, 1992, p. 21-26.

6. Principle 1, *ibid.*

those fundamental rights. It is observed that the above type of formulation stops short of proclaiming a right to environment, although it clearly establishes a relationship between human rights and environmental protection.⁷

Similarly, Principle 2 of the Declaration recognizes the importance of safeguarding natural resources and other samples of natural ecosystems, for the benefit of present and future generations. According to the principle, environmental protection is a precondition for the benefit and well-being of the people.

Principle 21 of the Declaration recognizes a right of states to exploit their own resources but at the same time places a responsibility on their shoulders not to cause damage to the environment of other states or of areas beyond their jurisdiction. The Stockholm Declaration did much to recognize the biosphere as a legitimate subject of international law.⁸

From the above, it turns out that the Stockholm Declaration has rightly recognized the issues of protection human rights and environment as quite interdependent. Although it does not directly recognize environmental protection as one of the fundamental rights, it envisages 'environmental protection' as a means to achieve those fundamental rights. However, it is observed that the above type of formulation stops short of proclaiming a right to environment and such linkage has little operational value. But the interdependent approach emphasizes the importance of environmental protection for proper observance of human rights and at the same time, it holds out the prospect that human rights provisions can be attracted in order to prevent the environmental degradation.

The Brundtland Commission Report : World Commission on Environment and Development

The report "Our Common Future" prepared by the World Commission On Environment and Development (WCED) in 1987

7. Dinah Shelton, *op. cit.*, p.75.

8. Louis B. Sohn, "The Stockholm Declaration on the Human Environment", *Harvard Journal of International Law*, 14, 1973, pp. 423-31.

recognizes, *inter alia*, the following legal Principles-(i) that all human beings have a fundamental right to an environment adequate for their health and well-being (Art.1), (ii) that there should be sustainable use and management of natural resources, development of environmental assessments, and public participation in the planning process (Arts. 2-5), (iii) that states have an obligation to assist other states and to cooperate regarding environmental rights and obligations (Arts. 6-8), (iv) that states have an obligation to use transboundary and extraterritorial national resources in a reasonable and equitable manner (Arts. 9-20). Thus the report in Article 1 has recognized a right to environment more explicitly than the Stockholm Declaration.⁹

In 1983, the United Nations General Assembly entrusted the WCED to reexamine the critical issues of environment and development and formulate new and concrete action proposals to deal with them. After three years of independent inquiry into various economic, scientific and legal issues, it found the proposition 'goals of incompatible' as quite untrue. The Commission found that the right to environment was not yet well established. As an independent international research body, its recognition of a right to environment deserves strong merit. However, the Commission's view does not reflect the attitude of the world community even though it is an important addition to the development of such a right.

Declaration of the Hague International Summit

The Hague Declaration of 1989 was signed by twenty-four states. The Declaration reaffirms the links between environmental protection and human rights.¹⁰ It says, "the right to live is the right from which all other rights stem. Guaranteeing this right is the paramount duty of those in charge of all states throughout the world. Today, the very conditions of life on our planet are threatened by the severe attacks to

9. See, Gregory G. Label and Hal Kane, *Sustainable Development: A Guide to Our Common Future*, The Center for Our Common Future, Switzerland, 1990.

10. See, Harald Hohmann (Editor), *op cit*, p. 528.

which the earth's atmosphere is subjected". Thus the Declaration states that environmental protection is directly related to the enjoyment of other rights including the basic rights of 'right to live'.¹¹

Again, it says, "Because the problem is planet-wide in scope, solutions can only be devised on a global level. Because of the nature of the dangers involved, remedies to be sought involve not only the fundamental duty to preserve the ecosystem, but also the right to live in dignity in a viable global environment, and the consequent duty of the community of nations *vis-a-vis* present and future generations to do all that can be done to preserve the quality of the atmosphere".¹²

The expression 'the right to live in dignity in a viable global environment' has been adopted with slight variation of the Stockholm language. Such an expression, as it has been examined earlier, stops short of proclaiming a right to environment. It makes 'viable environment' conditional for the proper realization of the right to life and has recognized environmental degradation as a human rights issue.

Rio Declaration and the United Nations Conference on Environment and Development (UNCED)

The United Nations Conference on Environment and Development¹³ (UNCED) held in June 1992 at Rio, Brazil, adopted the following instruments.¹⁴

- (i) Rio Declaration on Environment and Development,
- (ii) Agenda 21,
- (iii) Non-Legally Binding Authoritative statement of Principles for global consensus on the Management, Conservation, and Sustainable Development of all types of Forests.

11. First Paragraph, Declaration of the Hague, 1989, *ibid*.

12. P.528, *ibid*.

13. UNGA Resolution 44/26 on the United Nations Conference on Environment and Development (22 December, 1989). UN. Resolution 228(XLIV).

14. Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF. 151/26, Vol.1, at 6 (1992).

In addition to the above instruments, two treaties were concluded and opened for signature as part of the UNCED process. These are:

- (iv) the United Nations Framework convention on climate change¹⁵ and
- (v) the Convention on Biological Diversity.¹⁶

A careful study of the above documents adopted in Rio will show that nowhere a 'right to environment' is recognized. It was expected that as a further extension of post-Stockholm texts, the Rio Declaration would contain a clear statement about the right to environment. The UNCED Texts do not even establish a relationship between human rights and environment. It is stated that the term human right is used only three times in the Rio texts¹⁷ once in calling for an end to human rights abuses against young people¹⁸ a second time in stating that "indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination¹⁹ and finally, in referring to the human right to housing.²⁰

The Preamble of Rio Declaration reaffirms the Stockholm Declaration. Principle 1 of the Declaration says, "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature".²¹ Thus, it avoids to clearly declare a right to environment. In the Declaration, even some well-recognized environmental rights go without the names

15. Adopted in New York, May 9, 1992, 31 ILM 849 (1992).

16. Adopted in Rio de Janeiro, June 5, 1992, 31 ILM 818(1992).

17. Dinah Shelton, *op cit*, p. 82.

18. Agenda 21, United Nations Conference on Environment and Development, UN Doc. A/CONF. 151/26, Vol.111, Ch.25, Para.25.8 at 12.

19. Ch.26, Para. 26.1, p. 16, *ibid*.

20. Vol.1, Ch.7, Para. 7.6, p.74. *ibid*.

21. Principle 1, Rio Declaration on Environment and Development, 1992.

of rights. Thus, principle 10 says, "Environmental issues are best handled with the participation of all concerned citizens at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities effective access to judicial and administrative proceeding including redress and remedy shall be provided".

Agenda 21 does not also recognize a right to environment although it makes a few references to human rights. Public participation in environmental protection process is recognized but not as a matter of right. For example, in chapter 3, while discussing about the programme of combating poverty, it speaks of a parallel process of creating a supportive international environment. However, this chapter does not take account of the existing human rights provisions about freedom of hunger or right to food. In chapter 7 it speaks of right to adequate housing as a basic human right which is enshrined in the Universal Declaration of Human rights and the International Covenant on Economic, Social and Cultural Rights. However, in chapter 29, on the role of workers and their trade unions, the link between human rights and sustainable development is clearly established. It says, "For workers and their trade unions to play a full and informed role in support of sustainable development, governments and employers should promote the rights of individual workers to freedom of association and the protection of the rights to organize as laid down in ILO Conventions".

It was expected that the Rio conference would go one step forward than the previous position. But unfortunately the UNCED Texts adopted at Rio do not appear to be satisfactory so far as right to environment issue is concerned. The reasons why Rio conference did not satisfy many people's expectation may be many. Dinah Shelton gives the following explanations for the lack of agreement on human rights.

First, the focus of the meeting was North-South issues of economic development and global environmental protection. Unlike

human rights, the linkage of environmental protection and economic development presents the possibility of traditional trade-offs and bargaining power for each side. In contrast, most states feel that they gain little from pushing human rights. Each state has its own problems and the commitments tend to take on a unilateral-or *erga omnes* - character, rather than bargained-for reciprocal rights and duties.

Second, human rights leadership generally comes from NGOs and victim groups. Apart from women's and some indigenous organizations, human rights NGOs were generally absent from UNCED preparatory meetings and the Conference itself.

Third, there have been suggestions, however unwarranted, that human rights are a luxury the developing world cannot afford. Developing states now asked to make sacrifices for the environment may be unwilling to tackle both environmental protection and human rights; other states may conclude that self-interest makes environmental protection the priority.

Another element limiting the appeal of human rights at UNCED may be the current human rights focus on the rights of indigenous populations. Indigenous rights often are closely tied to environmental protection, especially for those living in the rain forests.²²

Apart from the above reasons, the fact that recognition of a right to environment at international level, would provide additional scope for the developing countries to claim compensation as of right from the developed countries for their greater liability in environmental pollution, is also important.

International Human Rights Instruments

The international human rights instruments have also not yet adopted a right to protect environment. However, Universal Declara-

22. Dinah Shelton, *op cit*, pp. 89-90.

tion of Human Rights and other human rights instruments guarantee certain human rights i.e. right to life, health, property etc. which may be used as a means of environmental protection.²³

Under Article 6(1) of the 1966 UN Convention on Civil and Political Rights, it was argued by an individual petition that the dumping of nuclear wastes in a Canadian town violated the right to life of its inhabitants and future generations, although it was dismissed on the ground of failure to exhaust local remedies.²⁴ Article 12 of the UN covenant on Economic and Social Rights, 1966, refers to the right to improvement of environmental and industrial hygiene.

Two human rights treaties, on the regional level, include a right to environment. African Charter of Human and Peoples Rights, 1981, was the first human rights treaty to contain a right to environment. Under Article 24 it states that all peoples have a right to a general satisfactory environment favourable to their development.²⁵ Such a right appears to be a collective right rather than individual right and is comparable to rights such as self-determination or economic and social rights, whose implementation by states is subject to political supervision by various UN organs and not by individual enforcement through judicial bodies.

The Organization of American States similarly included the right to a healthy environment under Article 11 of the Additional Protocol to the American Convention on Human Rights, adopted in San Salvador in 1988.²⁶

The European Convention on Human Rights, however, does not contain any such provision and the state parties have failed repeatedly

23. Art.25, Universal Declaration of Human Rights ; Art.11 of the International Covenant on Economic, Social and Cultural Rights (1966).

24. UN HRC, Decision No. 67/1980 V. Canada (1990).

25. Art. 24, African Charter on Human and Peoples Rights, June 26, 1981, 21 ILM 59 (1981).

26. Additional Protocol to the American Convention on Human Rights, November 14, 1988, 28 ILM 161 (1988).

to adopt proposals for a protocol elaborating a right to environment. European Court of Human Rights, on the other hand, has recognized that environmental degradation can result in violation of rights guaranteed by the convention.²⁷

In 1990 Economic Council for Europe (UNECE), adopted a Draft ECE Charter on Environmental Rights and Obligations for submission to UNCED. Article 1 states, "Everyone has the right to an environment that is adequate for his general health and well-being".

There is no explicit statement recognizing a right to environment in the convention on the Rights of the Child, 1989.²⁸ However, it requires the state parties to take appropriate measures to implement the Child's right to health which include, *inter alia*, the provision of nutritious foods and clean drinking water 'taking into consideration the dangers and risks of environmental pollution'.²⁹

The convention also emphasizes on the education of environmental sanitation.

The United Nations Sub-commission on the Prevention of Discrimination and Protection of Minorities has adopted a few resolutions showing inter-relationship of the environment and human rights. In a resolution it reaffirms that the movement of toxic and dangerous products endangers basic human rights such as the right to life, the right to live in a sound and healthy environment and the right to health, and calls on UNEP to find global solutions to the problem.³⁰

In another resolution, affirming the inextricable relationship between human rights and the environment, it appointed a special rapporteur to study the relationship between environment and human rights.

The UN Human Rights Commission also adopted a resolution in 1990 stressing the importance of the preservation of life-sustaining ecosystems to the promotion of human rights.³¹

27. European Commission on Human Rights, *Arrondelle V. United Kingdom* (Application 7889/77), 19 D.R.186 (1980).

28. United Nations Convention on the Rights of the Child, adopted November 20, 1989, G.A. Res. 44/25.

29. Art.24, *ibid*.

30. Res. 1989/12, E/CN. 4/Sub. 2/1989/58 p, 1-2.

31. Res. 1990/41, March 6, 1990.

There are also norms of humanitarian law which prohibit destruction of or a damage to environment. Thus, the 1977 Protocols to the 1949 Geneva Conventions ban employing methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Also, Article 1 of the Environmental Modification Convention, 1977, provides that each state party undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long lasting or severe effects as the means of destruction, damage or injury to any other state party. Similarly, Inhuman Weapon Convention, 1981, prohibits making forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.

From the above discussion it appears that in the first UN Conference on Human Environment, held at Stockholm in 1972, the members of the world community could not reach to an agreement to recognize a right to environment although it established a link between human rights and the need for environmental protection.

After twenty years, in the second UN Conference on Environment and Development, held at Rio, in 1992, the members of the world community, again failed to reach an agreement to establish a right to environment. The performance at Rio was more frustrating. In view of the above, it can clearly be laid down that no right to environment has yet been established under international law.

International Human Rights instruments do not similarly recognize a 'right to environment' as one of the fundamental human rights, although many environment related rights are recognized by human rights instruments i.e right to have information, to take part in decision making process etc.

Regional organizations have increasingly proclaimed some form of 'right to environment' or environmental rights and duties. This

rights are mostly collective rather than individual, and may be implemented by supervision on state actions rather than judicial action. Thus, the best that can be argued is that international and regional texts on environmental protection and human rights reflect a general trend toward recognizing a link between human rights and environmental protection.

Although the more common view is that an independent right to environment has not yet become part of international law, it is expected that the growing concern at all levels will contribute toward recognition of such a right in near future.

4. RIGHT TO PROTECT ENVIRONMENT : NATIONAL PERSPECTIVE

Although international developments toward recognition of a right to protect environment is not satisfactory, since 1970s significant developments have taken place at national levels in many countries toward this issue. These may be divided into three broad headings: 1) Constitutional reforms, 2) Legislative enactment, and 3) Judicial activism.

It should, however, be mentioned here that limited protection is provided to the various environmental components under the traditional common law approach but in no way it acknowledges a right to protect environment to individuals. One of the important reasons is that common law is concerned more with the protection of individual's personal rights over land and property but it does not encompass all the modern issues relating to right to environment. There is no recognition of "environment" as a separate entity in common law. Therefore, it does not receive full credit in the traditional common law protection approach. Whatever protection it receives is again marked by uncertainty. The current trend of applying "foreseeability test" by the English common law courts has made the environmental protection issue more uncertain. The foreseeability test attempts to protect a defendant rather than the environmental interests,

as an environmental wrongdoer may escape liability only because the plaintiff fails to prove that a reasonable man in his place could have foreseen the type of damage actually caused.

Constitutional Safeguards

"Right to environment" of different qualifications (healthful, natural, decent, clean, safe, ecologically balanced etc.) have been incorporated in the constitutions of different countries of the world. The Constitution of Peru, 1979, for example, under Article 123, recognizes a right to environment which reads: "the right to live in a healthy environment, ecologically balanced and adequate for the development of life and the preservation of the countryside and nature."³²

The draft Constitution of the Russian Federation, 1992 in Article 38 states: "everyone has the right to a favorable environment and to compensation for impairment of his health or property caused by environmental transgressions".³³

In the United States, several states now guarantee a right to environment within their declarations or bills of rights. Thus, the Constitution of Hawaii in Article xi provides: "Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality including control of pollution and conservation protection, and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulations as provided by law."³⁴ Other states in the

32. Article 123, The Political Constitution of Peru, July 12, 1979, reprinted in A. Blaustein & G. Flanz, (eds.) *14 Constitutions of the Countries of the World* 1, 1992 pp.64-65.

33. European commission for democracy through law, Strasbourg, April 23, 1992 cdl (92)18.

34. Hawaiian Constitution, Art.xi.

United States of America guaranteeing a right to environment include Illinois³⁵, Massachusetts³⁶ Pennsylvania,³⁷ etc.

Duty to Protect Environment: Constitutional Amendment in India

In India constitutional changes have been brought about in order to ensure the state's responsibility and citizens duty toward protection of environment.³⁸

Article 48 A provides:

"The state shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country."

Article 51- A(G) provides : "to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures."

Thus, the constitution of India has placed a joint responsibility on the state and every citizen to protect the environment. Also in the Indian Constitution the fields of forest, and protection of wild animals and birds has been shifted from list II, where only legislature of the states (as opposed to the Union legislature) can enact laws, to list III where both the legislatures of the state and the union (the parliament) can enact laws.⁴¹

In a court of law, however, fundamental principles of state policy are not enforceable. These principles are fundamental in the governance of the country and serve as a useful guide in administrative

35. Constitution of Illinois, 1870, revised 1970, Article xi.

36. Constitution of Massachusetts, 1780, Amendment Article xlix.

37. Constitution of Pennsylvania, 1874, Article 1 Adopted in 1971.

38. 42nd Constitutional Amendment Act, 1976.

39. Parag P. Tripathi, Changing Dimensions of Environmental jurisprudence: the Indian example, Published in *SAARC Law*, Inaugural issue, September 1993, p. 35.

40. JAIN M.P., *Indian Constitutional Law*, 672, 2nd Edition, 1970.

41. Satish Shastri, *Pollution and the Environmental Law*, Printwell Publishers, Jaipur (India) 1990, p. 37.

and legislative policy making.⁴² However, the Indian courts have attempted to implement these directive principles of state policy to the extent possible. Thus, it is observed:⁴³ "the direction of Article 48-A has become an obligation of the state and all state organs including courts⁴⁴. If the state⁴⁵ does not abide by this constitutional obligation, the court will be left with no alternative but to intervene effectively by issuing appropriate writs, orders and directions including the direction as to closure of mines, in the furtherance of constitutional goal enshrined in Article 48A.⁴⁶

Fundamental Right to a Wholesome Environment: Judicial Activism in India

The Supreme Court of India, by a liberal interpretation of "fundamental right" clause, has ruled that the fundamental right to life guaranteed by Article 21 of the Constitution includes a right to a wholesome environment. After the High Courts of various states of India had clearly articulated this right, the Supreme Court of India, following the same trend, established the same right in its judgement on Subhash Kumar V. State of Bihar⁴⁷ where the court observed: "(right to life guaranteed by Art. 21) includes the right of environment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the constitution for removing the pollution of water or air which may be detrimental to the quality of life."

42. T. Damodhar Rao v. S.O. Municipal Corp., Hyderabad, AIR 1987, 171, 181.

43. According to Article 12 of the Constitution "the state" includes the Government and parliament of India, the Government and legislatures of the States and all local or other authorities within the territory of India or under the control of the Government of India.

44. Kinkari Deve V. State. AIR 1988 H.P. 4,9.

45. Subhash Kumar V. State of Bihar, 1991.

46. Gunther Handle (editor), *op cit*, p- 433.

47. See, "Evolving Environmental Jurisprudence : The Role played by the Judiciary ", by P. Leelakrishnan, N.S. Chandrasekharan, G. Sadasivan Nair and K.V. Ramana murthy in P. Leelakrishnan (editor), *Law and Environment*, Eastern Book Company, 1992, p. 148.

This recognition gives plaintiffs the advantage of an additional remedy through writ proceeding directly before the Supreme Court, which is provided by Art. 32. This promises to be an inexpensive and expeditious method for redressing grievances, which otherwise might take years to get through the lower courts before reaching the Supreme Court.⁴⁸

The Supreme Court, however, in a series of cases named *M. C. Mehta V. State of Bihar*, did not explicitly lay down that right to environment is contained in the right to life in Article 21. Therefore, it is observed: "The Supreme Court has not in the *Mehta* cases as well as in the *Rural litigation Kendra* case held directly that the right to the environment is contained in the right to life in Article 21. Mark, they were issuing in all these cases directions under article 32 to protect "the lives of the people", their "health" and the "ecology". This judicial behaviour of interference and the anxiety to save the life and health of the people and to safeguard the fundamental rights through directions issued under Article 32 for ensuring environmental protection despite the presence of specific laws dealing with the matter, indicate nothing but an irresistible conclusion: right to life contained in Article 21 is so wide and takes within its contours the right to a clean and healthy environment."⁴⁹

However, all these cases can be explained as an initial process which ended up with a clear assertion that the right to life guaranteed by Article 21 includes the right of enjoyment of pollution free water and air for full enjoyment of life in *Subhash Kumar V. State of Bihar*.⁵⁰

Thus in India, both constitutional amendments and judicial activism have played an important role in launching an environmental protection movement which can be an instance for other nations in

48. Gunther Handle (editor), *op cit*, p. 433.

49. (1890), ILR 18 CAL. 10 (PC).

50. See, *Bangladesh Penal Code*, 1860 (Sections 269, 270, 277, 278, 283, 284, 285, 286, 290); the *Criminal Procedure Code* (Sections 132a to 143).

building up their environmental protection system. The Indian judiciary, specially, in the absence of specific constitutional provision of right to environment, has developed its own case law for providing the people their right to environment for greater interest of the nation.

Non-Activism in Bangladesh

There has been no significant development toward recognition of a right to protect environment in Bangladesh. The traditional laws do not go beyond the limits of providing inadequate damages under the common law tort principles of liability⁵¹ or some penalty under the traditional penal system⁵² or sectoral regulatory laws.⁵³

The two pieces of legislations recently passed⁵⁴ : 1) the Environment Pollution Control Ordinance, 1977⁵⁵ 2) Bangladesh Environmental Protection Act, 1995,⁵⁶ neither recognize the citizens right to protect their environment nor ensure protection from even the adverse effects of governmental development projects.

The recently passed Environmental Protection Act, 1995 aims at empowering government's environmental administration already established under the previous Environmental Pollution Ordinance, 1977. The Act does not place the protection system on a wider basis. Only a government official, authorised by the Director General, is allowed to file legal action for the enforcement of the Act. Section 17 of the Act prohibits the courts from entertaining suits and allegations

51. A Description of the Sectoral laws affecting the Environment of Bangladesh may be found in different Reports and Research papers like, "draft Environmental Report on Bangladesh", prepared by the science and technology division, library of congress, washington D. C., Published by Department of state, USA, April, 1980. "State of Environmental laws in perspective: the case of Bangladesh" (draft report), by Dr. Mohiuddin farooque, National Environmental Management Actionplan (nemap), Ministry of Environment and forests, Govt. Of Bangladesh and United Nations Development Programme, Dhaka, April, 1991 etc.

52. The latter Act has repealed the former one.

53. Ordinance no. Xiii, of 1977.

54. Act NO.1 of 1995.

about environmental offences from even an aggrieved person. The whole protection system depends upon the sweet will of a few government officials. A recognition of a right to environment would have allowed the people to take necessary actions in order to prevent the environmental degradation and build up a vigilant, active and responsible national environmental protection system.

Public interest litigation in this respect is also lacking. Bangladesh Judiciary has not yet had enough scope to build up its own case-law on this subject in order to ensure the citizens their right to environmental protection. Even the absence of constitutional development toward recognition of a right to environment is well marked in Bangladesh. A superior court can not act *so moto* in making case laws unless a legal matter is brought before it by a party and this can be a good account for the judicial non-activism in Bangladesh. It is true to the same tune that there is lack of public awareness in environmental problems which is another reason for not bringing environmental problems before the courts.

Different private organizations like Bangladesh Environmental Lawyers, Association (BELA), however have been playing active role in this direction in a number of ways i.e., to create public awareness by adopting different methods of mass education, to ensure proper enforcement of environmental laws by providing training to the concerned persons including lawyers and also by initiating environmental public interest litigations.

So long a constitutional initiative is lacking, Bangladesh Judiciary can play an activist role by developing its own case laws in order to ensure the citizens their right to healthy or favorable environment. This again, it should be mentioned here that, does not mean a right to an ideal environment rather a right to have the present environment conserved, protected and where possible improved.

5. CONCLUSION

In the foregoing discussion, it has become evident that the issue of environmental protection is deeply related to the observance of already

recognized human rights including right to life, right to health, right to property etc, and that there are ample justifications for the recognition of a right to protect environment in order to make other human rights meaningful.

It is also evident that the trend toward recognition of a right to protect environment at international level has not been strongly supported by the members of the international community although it was expected from them as already having much concern for the cause of human rights. However, the national developments in various countries toward the recognition of such a right are praiseworthy. The constitutional, legislative and judicial activisms at national level provide a picture which is quite contradictory to the international development. However, it is expected that the tendency of increasing recognition of a right to protect environment at national and regional levels would, in turn, be reflected in the decisions of the international community. In case of other human rights, national developments were largely affected and followed by the international developments but the same has not been the trend so far in case of right to protection of environment.

One of the reasons might be that socio-political rights, being in accordance with the philosophy of most of the developed countries, have been initiated and supported by them. Moreover, the issue of political imperialism has been popularly rejected by all, while the issue of economic imperialism is retained by many. A recognition of a right to protect environment at international level might impair this economic interest of many developed countries.

National developments are largely shaped by the responsible institutions like government, judiciary, public organizations etc., whereas at the international level the elements like process of easy codification by a legislative authority, their bindingness on all, strong enforcement machinery etc. are quite absent.

However, the existing limited recognition and practice of the right to environment by a few regional organizations do not at this stage of

development provide sufficient basis for the formulation of customary international law. Any action in order to be transformed into customary international law requires the existence of certain elements i.e. long practice, *opinio juris*, wider acceptance or absence of disagreements etc. and again regarding each of these points there has been huge controversies among the international jurists and legal scholars for example, at what stage or point of time would an action be treated as forming part of customary international law? Therefore, the existing limited recognition of the right to environment by a few regional organizations do not fulfil many of the above requirements and even it is practiced at the face of denial by many other countries and legal scholars, which tends to show that customary international law has not yet been formed on the right to environment at international level.

From the viewpoints of international law and international relations one of the most important considerations is that through constant recognition and application of the right to environment by the state bodies and regional organizations customary international law would be formulated at certain stage of future developments although until now formation of a hard law has not been possible for various reasons at international level.

Bangladesh should, in line with national developments in other countries, recognize the right to protect environment through necessary amendments of its constitutional and other legal provisions. Unless and until it is done, the Supreme Court of Bangladesh should come forward to overcome the existing lacuna of laws by utilizing its law making powers for recognizing a 'right to environment' and also by providing easy terms in order to overcome the *locus standi* problem in environmental public interest litigations.