

## RIGHT TO LIFE AS A FUNDAMENTAL RIGHT IN THE CONSTITUTIONAL FRAMEWORK OF INDIA, BANGLADESH AND PAKISTAN: AN APPRAISAL

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“The fundamental right to life which is the most precious human right and which forms the arc of all other rights must ... be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person”.

Justice Bhagwati in *Francis Coralie Mullin vs. Administrator Union Territory of India*<sup>1</sup>

### Introduction

Life is generally regarded as man's most valued and precious possession and the fear of losing one's life is the worst possible of all fears<sup>2</sup> and nothing can be more fundamental than preservation of life.<sup>3</sup> Therefore, right to life is one of the basic fundamental rights recognised by every legal system. The constitutions of India, Bangladesh and Pakistan are no exception in this regard. Article 21 of the Indian Constitution provides: “No person shall be deprived of his life or personal liberty except according to procedure established by law”. Article 9 of the Pakistan Constitution runs: “No person shall be deprived of life or liberty save in accordance with law”. With almost a similar tone the Constitution of Bangladesh in Article 32 prescribes: “No person shall be deprived of life or personal liberty save in accordance with law”. Moreover, Article 31 of Bangladesh Constitution provides “... No action detrimental to life, liberty, body, reputation or property of any person shall be taken except in accordance with law”.

While highlighting the significance of constitutional provision as to fundamental right to life, the India Supreme Court in the case of *Minerva*

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1. (1981) 1 SCC 608
  2. Huda, Shahnaz, 'Death Penalty – The Continuing Controversy' in *The Dhaka University Studies, Part – F, Vol. II (1), June 1991, p.139.*
  3. Islam, Mahmudul, *Constitutional Law of Bangladesh* (Bangladesh Institute of Law and International Affairs, Dhaka, 1995), p.166.

*Mills Ltd. vs. Union of India*<sup>4</sup> observed: "Three Articles of our Constitution and only three stand between the heaven of freedom, into which Tagore wanted his country to awake, and the abyss of unrestrained power. They are Articles 14, 19 and 21". This importance attributed to Article 21 of the Indian Constitution equally applies to Articles 31 & 32 of the Bangladesh Constitution and Article 9 of the Pakistan Constitution.

In this paper, humble efforts are put to present the multi-dimensional aspects of fundamental right to life, to sketch the scope and extent of fundamental right to life in context of the constitutional framework of India, Pakistan and Bangladesh.

In this paper, status of fundamental right to life in India, Bangladesh and Pakistan are presented as a whole since "[the] word 'life' in Pakistan Constitution is similar to the word 'life' appearing in Article 21 of the Indian Constitution and in Article 32 of the Bangladesh Constitution".<sup>5</sup> This is also because interpretation of this fundamental right by the higher courts of these countries are made in the backdrop of almost similar socio-economic and political circumstances. This is more because development of jurisprudence over this fundamental right in these countries is almost straight-lined. Hardly any development of this jurisprudence in any of these countries has been ignored by the higher courts of another country. This is further because development of jurisprudence over fundamental right to life in any of these three countries possesses a strong possibility of being transplanted to the legal system of another country – today or tomorrow.

### **Constitutional provision as to fundamental right to life: A site for the creation of new rights and entitlements**

The fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience.<sup>6</sup> In the constitutional framework of India, Bangladesh and Pakistan, fundamental right to life is such an empty vessel into which express provisions of the constitutions have hardly contributed any precise content. The drafters of the constitutions of these three countries deliberately avoided in prescribing any definition of the term 'life'. This self-restraint on the part of the drafters of the constitutions conveys a significant message that the word 'life' is an open-textured expression and has wider meaning that would be discovered from time

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4. (1980) 3 SCC 625.

5. Professor Nurul Islam vs. Government of Bangladesh and others; 20 BLD (HCD) (2000) 377.

6. Mathew, J. in *Keshvananda Bharati vs. Kerala*; 1973 Supp. SCR 1.

to time. Moreover, unlike most other fundamental rights, fundamental right to life has not been positively conferred by any of these constitutions. Probably, “[t]he reason is,” according to the authority of *Unni Krishnan, J.P. vs. State of Andhra Pradesh*<sup>7</sup>, “... only a stagnant society remains unchanged. ... The right to life and liberty is inherent in every man. There is no need to provide for the same in a positive manner.”

But, how to define and interpret the term ‘life’, when it is a fundamental right? In the early fifties the Indian Supreme Court observed that it is most difficult to define what a right to life is.<sup>8</sup> Since then over fifty years have passed but the higher courts of India, Bangladesh and Pakistan are yet to offer any precise, exhaustive and conclusive definition of ‘fundamental right to life’. This practice of self-restraint on the part of the higher judiciary indicates that with the passage of time jurisprudence of fundamental right to life is to change, extend and enrich. Nevertheless, in different cases the higher courts of India, Bangladesh and Pakistan had to answer in different circumstances whether fundamental right to life could be claimed and enforced in the backdrop of those circumstances or not. These cases ultimately have produced some imprecise and inclusive definitions of the term ‘fundamental right to life’. These definitions presuppose that ‘life’ is certainly more than mere human existence. The case of *The Employees of the Pakistan Law Commission vs. Ministry of Works*<sup>9</sup> dealt with the meaning of Article 9 of the Constitution of Pakistan. The Supreme Court of Pakistan held that: “Article 9 of the Constitution which guarantees life and liberty according to law is not to be construed in a restricted and pedantic manner. Life has a larger concept which includes the right of enjoyment of life, maintaining adequate level of living for full enjoyment of freedom and rights.” In the case of *Ms. Shehla Zia and others vs. WAPDA*,<sup>10</sup> the Supreme Court of Pakistan held that the word ‘life’ does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death and life includes all such amenities and facilities which a person born in a free country is entitled to enjoy. In the case of *BELA vs. Bangladesh and others*<sup>11</sup>, the High Court Division of the Supreme Court of Bangladesh observed: “... [the] expression ‘life’ does not mean merely an elementary life or sub-human life”. This case further went on saying:

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7. 1993 SOL Case No. 051. Downloaded from : [www.supremecourtonline.com](http://www.supremecourtonline.com) (March21,2004).

8. A.K. Gopalan vs State of Madras; AIR 1950 SC 27 = 1950 SCR 88.

9. 1994 SCMR 1548.

10. PLD 1994 Supreme Court 693.

11. 7 MLR (HC) (2002) 157.

"The expression 'life' enshrined in Article 32 includes everything which is necessary to make it meaningful and a 'life' worth living ... Not only a right to life but a meaningful life is an inalienable fundamental right." In the case of *Francis C. Mullin v. Administrator, Union Territory of Delhi*<sup>12</sup>, the Indian Supreme Court observed: "... the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes right to live with human dignity and all that goes along with it viz., the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about the mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must in any view of the matter, include a right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the humanself." According to Kerala High Court: "A wide meaning should be given to the expression 'life' to enable a man not to sustain life but to enjoy it in a full measure."<sup>13</sup> In the case of *State of Himachal Pradesh and another vs. Umed Ram Sharma and others*<sup>14</sup>, the Indian Supreme Court has extended the definition of the term 'life' to include the quality of life. In another case it was observed that Article 21 guarantees a person to lead a meaningful life.<sup>15</sup> In the case of *Vikram Deo Singh Tomar vs. State of Bihar*<sup>16</sup>, the Indian Supreme Court emphasized that right to life includes the right to human dignity.

This general consensus among the higher judiciary of India, Bangladesh and Pakistan as to the fact that fundamental right to life means right to live a meaningful life, right to enjoy life, right to lead a qualitative life has marked the way of reading various rights as implicit in the constitutional provision as to fundamental right to life. As such, day by day various rights are being recognized as inclusive within fundamental right to life. Thus jurisprudence of fundamental right to life is being multi-dimensional, its contents are being enriched. To quote an author's observation regarding the status of constitutional provision as to fundamental right to life of India: "Article 21 has ... become a main site

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12. 1981 (2) SCR 516.

13. Ramkrishna vs. State of Kerala and others; 1992 (2) KLT 725.

14. AIR 1986 SC 847.

15. Lallan Rai vs. State of U.P.; 2002 (2) Crimes 545 (All).

16. AIR 1988 SC 1782.

for the creation of new rights and entitlements".<sup>17</sup> According to another author: "Article 21 is connected with all matters of Human Rights. It is due to the expansion of the ambit of Article 21 that the sun of human dignity shines brightly on our horizon bringing hope to people, in personality of human being by giving protection to human life".<sup>18</sup> These observations are equally true about the provisions of fundamental right to life as contained in the constitutions and as interpreted by the higher courts of Bangladesh and Pakistan.

### **Deprivation of fundamental right to life: permissible limit**

Right to life as guaranteed by the Constitution is too fundamental and basic to admit of any compromise; one is not permitted to read any exception into it by a process of interpretation.<sup>19</sup> In case of difference of opinion as to the interpretation of constitutional provision as to fundamental right to life, the interpretation which favours the subject must always be adopted because what has been made fundamental is the right of citizens and not the fetters or limitations on that right.<sup>20</sup> Nevertheless, right to life is not absolute for everybody and in every circumstance. Therefore, like any other fundamental right, this right can be denied to a person, i.e., a person can be deprived of this right, under prescribed circumstances. The Constitutions of India, Bangladesh and Pakistan allow such denial or deprivation. According to Indian Constitution, a person can be deprived of his life "according to procedure established by law".<sup>21</sup> Under the Constitution of Bangladesh such deprivation is allowed if it is "in accordance with law".<sup>22</sup> The same criteria, i.e., "in accordance with law" is fixed by the Constitution of Pakistan.<sup>23</sup>

In India, "... three expressions in Article 21, namely 'life', 'personal liberty' and 'procedure established by law', have ... been construed by the Supreme Court in an expansive manner so as to afford to the individual the due process of law as understood in the United States.

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17. Sathe, S.P., *Judicial Activism in India*, (Oxford University Press, New Delhi, 2002) p.123.
  18. Tendulkar, Adv. Ramshi S., "Evolution of Human Rights and the Ambit of Article 21 of the Constitution" in 'Human Rights and the Law – National and Global Perspective' (Snow White Publications Pvt. Ltd., Mumbai, 1997), p. 164.
  19. Challa Ramkonda Reddy vs. State of A.P.; AIR 1989 AP 235.
  20. Krishnan vs. State of Madras; AIR 1951 SC 301 = 64 Mad LW 945 = 1951 SCJ 453.
  21. Article 21.
  22. Articles 31 and 32.
  23. Article 9.

Although that clause was purposely avoided by the makers of the Constitution, it has been brought into the Constitution through judicial interpretation".<sup>24</sup> In Indian jurisdiction, it has been held that the 'procedure established by law' must be strictly adhered to<sup>25</sup> and not to be departed from.<sup>26</sup> As to the meaning of this phrase, in *A.K. Gopalan vs State of Madras*<sup>27</sup> it was held that the expression 'procedure established by law' only refers to an enacted law. Between the two meanings of the word 'law', namely '*lex*' (enacted law) and '*jus*' (justice), the Court had chosen the former and rejected the latter.<sup>28</sup> Later on, this restrictive interpretation of the phrase 'procedure established by law' has been overruled. It has been held that a fair opportunity of being heard, as part of natural justice, can be read as implicit in 'procedure established by law'.<sup>29</sup> To quote the jurisprudence developed by Indian Supreme Court, "the word 'established' has been used in order to denote and ensure that the procedure prescribed by law must be defined with certainty in order that those who are deprived of their fundamental right to life must know the precise extent of such deprivation".<sup>30</sup> In another case it has been held that 'procedure established by law' must be 'just, fair and reasonable and not any processual barbarity'.<sup>31</sup> In other words, procedure must be right, just and fair and not arbitrary, fanciful or oppressive.<sup>32</sup> The Indian Supreme Court also clarifies that 'procedure established by law' used in Article 21 does not only connote that the procedure has to be reasonable, fair and just but it also stipulates that it has to be a speedy and expeditious procedure.<sup>33</sup> Not only that, 'procedure' established by law does not end with pronouncement of sentence, it includes carrying out of sentence

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24. *Supra* note 17, p.122.

25. *Umraomal vs. State of Rajasthan*; 1955 CrLJ 95 = 1955 Raj LW 75 = ILR (1954) 4 Raj 51 = AIR 1955 Raj 6.

26. *Mohammad Ali vs. Sri Ram Swarup*; 1963 All WR (HC) 760 = 1963 All Cr R 460 = 1965 (1) CrLJ 413 = AIR 1965 All 161.

27. AIR 1950 SC 27 = 1950 SCR 88.

28. *Supra* note 17, p.121.

29. *Maneka Gandhi, Smt. vs. Union of India*; AIR 1978 SC 597 = (1978) 2 SCR 621 = (1978) 1 SCC 248 = (1978) 2 SCJ 312.

30. *A.K. Roy vs. Union of India*; AIR 1982 SC 710 = (1982) 1 SCC 272 = 1982 CrLJ 340 (SC).

31. *Pratul Kumar Sinha vs. State of West Bengal*; AIR 1969 SC 1273.

32. *Kartar Singh vs. State of Punjab*; 1994 (1) Crimes 1031 (SC).

33. *Ibrahim alias Munna Salim Shaikh vs. State of Maharashtra*; 1996 (1) Crimes 380 (Bom).

also.<sup>34</sup> Thus it is by now clear that the expression 'law' occurring in Article 21 of the Indian Constitution has been used in the sense of *jus* and not in the sense of *lex* and the word 'established' doesn't mean 'prescribed', it means 'institutionalized'. "Such institutionalization takes place through a long tradition and practice. The Court therefore acquired the power to decide whether proper procedure was prescribed by the legislature and followed by the executive".<sup>35</sup>

In the case of *A.D.M. Jabalpur vs. Shivakant Shukla*<sup>36</sup>, His Lordship Mr. Justice Khanna went a step further in this regard. He observed in his minority judgment: "Even in absence of Article 21 in the Constitution, the state has got no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the rule of law and of men in all civilized nations. Without such sanctity of life and liberty, the distinctions between a lawless society and one governed by laws would cease to have any meaning".

In Bangladesh and Pakistan, the criteria prescribed by the Constitutions for depriving a person of his fundamental right to life is 'in accordance with law'. Whether the word 'law' occurring in this phrase has been used in the sense of *lex* or in the sense of *jus* is yet to be satisfactorily and categorically answered by the higher courts of Bangladesh and Pakistan. In the words of an eminent jurist of Bangladesh: "Where the expressions 'save in accordance with law' have been used to qualify and restrict the right guarantee, as in Article 32, it seems almost to take away the right in the same breath that it is granted. Will the expression exclude the scope of judicial review of legislative or executive action if those rights are interfered with under the provisions of any law which may be highly arbitrary, unjustified or oppressive? Or will the Court intervene to judge the reasonableness of the measures under which the rights are proposed to be taken away? For example, if a law is passed tomorrow that all persons with beard shall be put into prison for two years, would the court uphold its validity if the persons affected thereby challenged the legislation? If the legislature were to substitute, for the procedure at present provided by the Code of Criminal Procedure for the trial of a criminal case, trial by ordeal or trial by battle, would that be within

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34. *Sharomani Akali Dal (MANN) vs. State of J&K and others*; 1993 (1) Crimes 797 (J&K)

35. *Supra* note 17, pp.121-122.

36. (1976) 2 SCC 521.

Article 32 of the Constitution of Bangladesh?"<sup>37</sup> If Indian jurisprudence is transplanted in the lands of Bangladesh and Pakistan, this anxious observation seems groundless. But, probably such transplantation is yet to be judicially pronounced. However, in a Pakistani case<sup>38</sup>, it has been held that no action detrimental to life of any person can be taken unless such detrimental action has the backing of some law in existence. The decision further went on saying that mere existence of any permissive law is not enough to take any such detrimental action and the law authorizing detrimental action must be such that it can validly be passed keeping in view the provision of the Constitution including the fundamental rights. The High Court Division of the Supreme Court of Bangladesh in the case of *Professor Nurul Islam vs. Government of Bangladesh and others*<sup>39</sup> has endorsed this view. It is worth of mentioning in this regard that in another case the Appellate Division of the Supreme Court of Bangladesh has held that there is a distinction between 'in accordance with law' and 'in accordance with the law in force at the relevant time'. If any action is invalid because it was not taken according to any law, it can be validated by making a law retrospectively unless there is any constitutional provision preventing retrospective operation.<sup>40</sup>

It is to be added in this regard that fundamental right to life is not only guaranteed for the citizens of the country concerned. In *Zothansangpui vs. State of Manipur*<sup>41</sup>, the Gauhati High Court ruled that refugees have the rights not to be deported if their life was in danger. In the cases of *Luis de Readt*<sup>42</sup> and *Khudiriam*<sup>43</sup>, the Indian Supreme held that Article 21 of the Constitution of India, which protects the life, and liberty of Indian citizens are extended to all, including aliens. However, fundamental right to life naturally applies only to living natural persons. It has no applicability to legal persons like co-operative societies.<sup>44</sup>

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37. Munim, F.K.M.A., *Rights of the Citizen under the Constitution and Law* (Bangladesh Institute of Law and International Affairs, Dhaka, 1975), pp.339-340.
  38. *Pakistan Chest Foundation and others vs. Government of Pakistan and others*; 1997 CLC 1379.
  39. 20 BLD (HCD) (2000) 377.
  40. *Mofizur Rahman vs. Government of Bangladesh*; 34 DLR (AD) (1982) 321 = BCR 1982 AD 210.
  41. C.R No.981 of 1989 (unreported).
  42. (1991) 3 SCC 554.
  43. 1994 Supp. (1) SCC 615 .
  44. *Seethapathi Nageswara Rao vs. Government of A.P.*; AIR 1978 AP 121 = (1978) 1 All LJ 1 = 1977 An LT 700 = (1978) 1 An WR 209.



### Right to accommodation and right to livelihood as implicit in the constitutional provision as to fundamental right to life

Right to social and economic justice conjointly co-mingles with right to shelter as an inseparable component for meaningful right to life.<sup>45</sup> In *M/S Shantisar Builders vs. Narayan Khimalal Totame*<sup>46</sup>, the Indian Supreme Court observed: "The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for a shelter has to be kept in view. For the animal it is the bare protection of the body; for a human being it is a suitable accommodation which will allow him to grow in every aspect - physical, mental and intellectual ... The Constitution aims at ensuring fuller development of every child which would be possible only if an appropriate house is provided". In *A.V. Nachane vs. Union of India*<sup>47</sup> and *Begulla B. Raju vs. State of A. P.*<sup>48</sup> the Indian Supreme Court has ruled that right to life includes right to livelihood and therefore slum-dwellers and pavement-dwellers should not be displaced abruptly without giving them an opportunity of being heard or without making an alternative arrangement for them. On the other hand, in the case of *Delhi Development Horticulture Employees' Union vs. Delhi Administration, Delhi and others*<sup>49</sup>, the Indian Supreme Court observed: "This country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution. This is because the country has so far not attained the capacity to guarantee it and not because it considers it any the less fundamental to life. Advisedly, therefore, it has been placed in the chapter on Directive Principles". However, Chandrachud, C.J. speaking for a Constitution Bench of the Indian Supreme Court observed in the case of *Olga Tellis vs. Bombay Municipal Corporation*<sup>50</sup>: "The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person

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45. *Chameli Singh vs. State of U.P.*; 1996(1) Scale 101.

46. AIR 1990 SC 630 = 1990 (1) SCC 520.

47. AIR 1982 SC 1126 = 1982 Lab IC 161 = (1982) 1 SCC 205.

48. (1984) 1 SCC 66.

49. AIR 1992 SC 789 = 1992 (4) SCC 99.

50. 1985 Suppl. (2) SCR 51.

can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life". In this case it was also provided that the state may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21. However, it was observed in the case of *State of Himachal Pradesh and another vs. Umed Ram Sharma and others*<sup>51</sup> that the right to life embraces not only physical existence but the quality of life as understood in its richness and fullness by the ambit of the Constitution and for residents of hilly areas, access to road is an access to life itself, and as such necessity of road communication in a reasonable condition is a part of constitutional imperatives, because of which the direction given by the Himachal Pradesh High Court to build road in the hilly areas to enable its residents to earn livelihood was upheld by the Indian Supreme Court. In the case of *P.C. Gupta vs. State of Gujarat*<sup>52</sup>, the Indian Supreme Court observed that protection of life guaranteed by Article 21 encompasses within its ambit right to shelter to enjoy the meaningful right to life. In Bangladesh, it has been held that eviction of slum dwellers without alternative arrangements is violative of their fundamental right to life.<sup>53</sup> In the cases of *Ain-O-Salish Kendra (ASK) and others vs. Government of Bangladesh and others*<sup>54</sup>, the High Court Division of the Supreme Court of Bangladesh laid down guidelines for the rehabilitation of the slum dwellers and stated that forced eviction without any alternative accommodation and rehabilitation was unlawful. To quote the Division Bench delivering the said judgment: "Our Constitution both in the directive state policy and in the preservation of the fundamental rights provided that the state shall direct its policy towards securing that the citizens have the right to life, living and livelihood". Guidelines for the

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51. Supra note 14.

52. 1995 Supp (2) SCC 182.

53. *Ain O Salish Kendra (ASK) and other vs. Government of Bangladesh and others*; 4 MLR (HC) (1999) 358 = 19 BLD (HCD) (1999) 488.

54. 4 MLR (HC) (1999) 358 = 19 BLD (HCD) (1999) 488.

rehabilitation of the slum dwellers were also formulated in the case of *Modhumala vs. Government of Bangladesh*<sup>55</sup> as if preservation of their right to accommodation were not a concept foreign to their right to life. In another case<sup>56</sup> filed on behalf of the slum dwellers, the said Division refrained from giving any direction or guideline to the government and accepted the assurance given on behalf of it that the petitioners will not be evicted without rehabilitation.

However, right to life as implicit in the constitutional provision as to fundamental right to life does not mean that a person can nohow be evicted from his living places. In the case of *Kamal Nagar Welfare Association and others vs. Government of Andhra Pradesh and others*<sup>57</sup>, even though the identified persons on the Moosi river bed were liable to be evicted without giving any alternative accommodation as they were unauthorised occupants yet a greater latitude was shown by the government and they were assured of being rehabilitated at a more hygienic and convenient place duly making permanent residential arrangements. The Andhra Pradesh High Court held that this cannot be styled as depriving the basic rights of human life or livelihood. Jurisprudence as developed in Bangladesh is no different in this regard. Right to life under Article 31 of the Constitution of Bangladesh may be interpreted, in the facts and circumstances of a case, to mean right to accommodation without which human life cannot be protected. But that does not mean that one who is a mere trespasser in the land and property of another person is entitled to continue in such unauthorized occupation as his eviction therefrom would throw him in the street depriving him of accommodation and that might endanger his life.<sup>58</sup>

In the case of *Bijaylaxmi Tripathi vs. Managing Committee W.W. Hostel*<sup>59</sup>, the writ petitioners, who were working women, were inmates of a hostel managed by a society registered under the Societies Registration Act; the hostel authority on finding that those women didn't comply with the disciplinary conditions of the hostel asked them to leave the hostel; then the writ petitioners approached the Orissa High Court on the ground amongst others that their right to live with dignity had been violated. The court upheld the claim of the petitioners that they had the right to live in

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55. W.P. No. 59 of 1994 (unreported).

56. *Kalam and others vs. Bangladesh and others*; 21 BLD (HCD) (2001) 446.

57. AIR 2000 AP 132.

58. *Gias Uddin, son of Rahimuddin vs. Dhaka Municipal Corporation*; 49 DLR (1998) 199 = 17 BLD (HCD) (1997) 577.

59. AIR 1992 Orissa 242.

the hostel because their livelihood depended upon their living in the hostel. This judgment is often criticized for offering too wide an interpretation of the 'right to accommodation as implicit in fundamental right to life'. According to S.P. Sathe, this decision "...shows how activism of the Supreme Court can be misunderstood at the lower level. ...The hostel was a facility for working women but it could never be considered to be a concomitant of the right to livelihood. ...To hold that one's fundamental right to life included the right to live in a hostel was a travesty of the fundamental right".<sup>60</sup>

The High Court Division of the Supreme Court of Bangladesh in *Bangladesh Society for the Enforcement of Human Rights (BSEHR) and others vs. Government of Bangladesh and others*<sup>61</sup>, addressed a broad spectrum of issues including the fundamental right to life of sex workers. In this case, the right of sex workers to an occupation, to a residence compatible with the worth and dignity of a human being and their rehabilitation was viewed from a sensitive perspective. In this case, legality of the wholesale eviction by the government of the sex workers of Nimtoli and Tanbazar brothels in Narayanganj was challenged. The Court emphasized that the sex workers have a guaranteed right to life and livelihood and as such wholesale eviction of sex workers had deprived them of their livelihood, which amounts to deprivation of their right to life making the act unconstitutional and illegal.

Right to livelihood of an employee is also implicit in the constitutional provision as to fundamental right to life. The provision for payment of subsistence allowance made in the Service Rules only ensures non-violation of the right to life of the employees.<sup>62</sup> That was the reason why the Indian Supreme Court in the case of *State of Maharashtra vs. Chanderbhan*<sup>63</sup> struck down a Service Rule which provided for payment of a nominal amount of Rupee one as subsistence allowance to an employee placed under suspension. This decision was followed in the case of *Fakribhai Fulabhai Solanki vs. Presiding Officer*<sup>64</sup>, and it was held in that case that if an employee could not attend the departmental proceedings on account of financial stringencies caused by nonpayment of subsistence allowance and thereby could not undertake a journey

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60. Supra note 17, pp.117-118.

61. 53 DLR (2001) 1.

62. Bansal, B.L., *The Law Relating to Human Rights* (Capital Law House, Delhi, 2004) p.45.

63. (1983) 3 SCR 337 = (1983) 3 SCC 387 = AIR 1983 SC 803.

64. (1986) 3 SCC 131 = (1986) 2 SCR 1059 = AIR 1986 SC 1168.

away from his home to attend the departmental proceedings, the order of punishment including the whole proceedings would stand vitiated.

**Right to health, hygienic condition of life and environmental & ecological balance as implicit in the constitutional provision as to fundamental right to life**

The sweep of right to life is wide and far-reaching as to bring within its scope the right to pollution free and decent environment.<sup>65</sup> Link between environmental quality and the right to life was first addressed in this sub-continent by a constitutional bench of the Supreme Court of India in the case of *Charan Lal Sahu vs. Union of India*.<sup>66</sup> In this case, the Supreme Court of India interpreted the right to life guaranteed by Article 21 of the Indian Constitution to include the right to a wholesome environment. Thereafter the higher courts of India, Bangladesh and Pakistan in different cases have held from different dimensions that right to health, right to hygienic condition of life, right to environmental & ecological balance are implicit in the constitutional provision as to fundamental right to life. Pronouncing such progressive proposition has been eased for the courts of India since an amendment of the Indian Constitution in 1976<sup>67</sup> has embodied a directive principle of state policy which states that: "The state shall endeavour to protect and improve the environment and to safeguard the forests and wild life".<sup>68</sup> Moreover, this amendment imposes responsibility on every citizen 'to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures...'.<sup>69</sup> But in Bangladesh, no specific provision has been made anywhere in the Constitution for protection of the environment.<sup>70</sup> The Constitution of Pakistan is no exception in this regard.<sup>71</sup> Nevertheless, the Appellate Division of the Supreme Court of Bangladesh has held: "Although we do not have any provision like

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65. Supra note 13.

66. AIR 1990 SC 1480.

67. The Constitution (Forty Second Amendment) Act, 1976.

68. Article 48A of the Indian Constitution.

69. Article 51A (g).

70. Ahmed, Justice Naimuddin, "Public Interest Environmental Litigation in Bangladesh" in JATI Journal, Vol. II, May 2003, p.18.

71. Razzaque, Jona, 'Human Rights and the Environment: the national experience in South Asia and Africa', Background Paper No. 4, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, Geneva, 14-16 January 2002, available at: <<http://www.unhcr.ch/environment/bp4.html>> (accessed on July 1, 2005).

Article 48A of the Indian Constitution for protection and improvement of environment, Articles 31 and 32 of our Constitution protect right to life as a fundamental right. It encompasses within its ambit the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation, without which life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life".<sup>72</sup> Similarly in appropriate cases the higher courts of Pakistan have not hesitated to hold this progressive proposition.

In *Subhash Kumar vs. State of Bihar*<sup>73</sup>, the Court observed that 'right to life guaranteed by Article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life.' In *M.C. Mehta vs. Union of India*<sup>74</sup>, the Supreme Court of India dealt with the problem of air pollution caused by motor vehicle operating in Delhi. It was a public interest petition and the court made several directions towards the Ministry of Environment and Forests. Decisions such as this indicate a new trend of the higher courts to fashion novel remedies to reach a given result, although these new remedies seem to encroach on the domain of the executive.<sup>75</sup> In India, where the right to water is not enshrined as a fundamental right in the national constitution, courts at both state and federal level have interpreted Article 21 of the Constitution as encompassing the right to safe and sufficient water. In 1990, for example, the Kerala High Court in *Attakoya Thangal vs. Union of India*<sup>76</sup> recognized the fundamental importance of the right to water. In this case, the petitioners claimed that a scheme for pumping up ground water for supplying potable water to the Laccadives<sup>77</sup> in the Arabian Sea would upset the fresh water equilibrium, leading to salinity in the available water resources and causing more long-term harm than short-term benefits. The Kerala High Court, in its judgement, requested deeper investigation and monitoring of the scheme and the judge clearly recognised the right of people to clean water as a right to life enshrined in Article 21, observing that: "... the administrative agency cannot be permitted to function in such a manner as to make inroads into the

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72. Dr. Mohiuddin Farooque vs. Bangladesh; 1 BLC (AD) (1996) 189 = 17 BLD (AD) (1997) 1.

73. AIR 1991 SC 420 = 1991 (1) SCC 598.

74. AIR 1991 (SC) 813 = (1992) 3 SCC 25.

75. Armin Rosencranz et al, in 'Region/country report: South Asia: India' (1993) Yearbook of International Environmental Law, vol. 4. pp. 415-419.

76. 1990 (2) KLT 147.

77. Now known as the Lakshadweep Islands.

fundamental right under Article 21. The right to life is much more than a right to animal existence and its attributes are manifold, as life itself. A prioritization of human needs and a new value system has been recognized in these areas. *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>78</sup> In Pakistan, in the case of *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewara, Jhelum vs. The Director, Industries and Mineral Development, Punjab, Lahore*<sup>79</sup> it was held by the Supreme Court of Pakistan that "The word 'life'... can not be restricted to a vegetative life or mere animal existence. In hilly area where access to water is scarce, difficult or limited, the right to have water free from pollution and contamination is a right to life itself. This does not mean persons residing in another part of the country where water is in abundance, does not have such right. The right to have unpolluted water is the right to every person wherever he lives."

Hygienic condition of life is another attribute of the fundamental right to life. This is because, lack of hygienic condition of life, as held by the Supreme Court of Bangladesh, may put the 'life' of the citizen at naught.<sup>80</sup> According to the High Court Division of the Supreme Court of Bangladesh: "The expression 'life' occurring in Article 32 of the Constitution of Bangladesh does not mean merely an elementary life or sub-human life but connotes in this expression the life of the greatest creation of the Lord who has at least a right to a decent and healthy way of life in a hygienic condition".<sup>81</sup> "Hygienic environment is an integral facet of right to a healthy life", to quote the jurisprudence developed in India, "and it would be impossible to live with human dignity without a human and healthy environment".<sup>82</sup> The High Courts of Rajasthan<sup>83</sup> and Himachal Pradesh<sup>84</sup> have observed that environmental degradation violates the basic human right to life. According to Rajasthan High Court: "Maintenance of health, preservation of the sanitation and environment falls within the purview of Article 21 of the Indian

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78. Emphasis added by the author.

79. 1994 SCMR 2061.

80. *BELA vs. Bangladesh and others*; 7 MLR (HC) (2002) 157.

81. *Ibid.*

82. *Virender Gaur vs State of Haryana*, cited in Hann, Max, *The Right to Suitable Water for Agriculture: An Interpretation of the Constitution of India*, available at: < [http://www.ruaf.org/no11/37\\_india.html](http://www.ruaf.org/no11/37_india.html) > (accessed on July 9, 2005).

83. *L.K. Koolwal vs. State of Rajasthan*; AIR 1988 Raj 2.

84. *Kinaru Devi vs. State of Himachal Pradesh*; AIR 1988 HP 4.

Constitution as it adversely affects the life of the citizens and it amounts to slow poisoning and reducing the life of the citizens because of the hazards created, if not checked".<sup>85</sup> In *Kirloskar Bros. Ltd vs. ESI Corporation*<sup>86</sup>, the Indian Supreme Court opined that the expression 'life' assured in Article 21 has a much wider meaning which includes a right to livelihood, better standard of living, hygienic conditions in the workplace and leisure facilities and opportunities to eliminate sickness and physical disability of the workmen. In this case, the court used right to life to protect the health of the workmen by providing them with medical facilities and health insurance. Similar view was expressed in *State of Punjab vs. Ram Lubhaya Bagga*.<sup>87</sup> In the case of *Consumer Education and Research Centre vs. Union of India*<sup>88</sup>, the Indian Supreme Court was concerned with the occupational health hazards and held: "The expression 'life' assured in Article 21 of the Constitution ... includes ... hygienic conditions in work place". In *CESC Ltd. vs. Subhas Chandra*<sup>89</sup>, it has been opined by His Lordship Ramaswamy, J. in his dissenting judgment that physical and mental health have to be treated as integral part of right to life because without good health the civil and political rights assured by our Constitution cannot be enjoyed. In the case of *M.K. Sharma vs. Bharat Electronics Ltd.*<sup>90</sup>, the Indian Supreme Court issued directions as to checks and safeguards to be adopted to guard against radiation where the workers were exposed to the ill effects of x-ray radiation. According to the Supreme Court of Pakistan a person is entitled to protection of law for being exposed to hazard of electro-magnetic field or any other such hazards which may be due to installation and construction of any grid station, any factory power station or such like installations.<sup>91</sup> Similarly, it has been held by the High Court Division of the Supreme Court of Bangladesh that when health and normal longevity of an ordinary human being is endangered by the use or possibility of use of any contaminated foods, then it can be said that fundamental right to life of a person has been threatened or endangered.<sup>92</sup> The High Court Division

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85. Supra note 83.

86. (1996) 2 SCC 682.

87. (1998) 4 SCC 117.

88. AIR 1995 SC 922 = 1995 (3) SCC 42 = 1995 LIC 1368.

89. 1992 (1) SCC 441.

90. AIR 1987 SC 1792 = (1987) 3 SCC 231.

91. Supra note 10.

92. Dr. Mohiuddin Farooque vs. Bangladesh and others; 48 DLR (HCD) (1996) 438 = 16 BLD (HCD) (1996) 490.



of the Supreme Court of Bangladesh has made it clear that right to life in Article 31 means right to sound life and health.<sup>93</sup> In the case of *Muniswamy Gowda vs. State of Karnataka*<sup>94</sup>, the rice mill situated near the residential house of the petitioners, causing health hazard by emitting husk and dust in the entire atmosphere in derogation of the fundamental right to life of the petitioners, was directed to be shut down. According to the Indian Supreme Court: "The Government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21. ... It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people".<sup>95</sup> Similarly in the case of *Pt. Parmanand Katara vs. Union of India*<sup>96</sup>, the Indian Supreme Court has observed: "Article 21 of the Constitution casts the obligation on the State to preserve life. ... A doctor at the Government hospital positioned to meet this State obligation is, therefore, duty-bound to extend medical assistance for preserving life".

In the case of *Murli S. Deora vs. Union of India and others*<sup>97</sup>, the Indian Supreme Court held that smoking in public places is indirectly depriving a non-smoker of his right to life without any process of law and as such issued direction to prohibit smoking in public places. In the case of *Ramkrishna vs. State of Kerala and others*<sup>98</sup>, the Kerala High Court has held that public smoking of tobacco in any form, whether in the form of cigarettes, cigars, beedies or otherwise is violative of constitutional provision of right to life. In Pakistani jurisdiction, the case of *Pakistan Chest Foundation and others vs. Government of Pakistan and others*<sup>99</sup> is an authority in this regard. In this case, it was held that cigarette advertisement on TV/Radio are steps which can be termed detrimental to life and as such directions were issued so that the Pakistan Television

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93. Supra note 5.

94. AIR 1998 Karnataka 281.

95. Paschim Banga Khet Mazdoor Samity vs. State of West Bengal; 1996 SOL Case No. 169. Available at : [www.supremecourtsonline.com](http://www.supremecourtsonline.com) (accessed on May 21, 2004).

96. 1989 SOL Case No. 003. Available at : [www.supremecourtsonline.com](http://www.supremecourtsonline.com) (accessed on May 21, 2004).

97. 2001 SCCL.COM 831, available at <<http://www.supremecourtcaselaw.com>> (accessed on March 12, 2005).

98. 1992 (2) KLT 725.

99. 1997 CLC 1379.

Corporation doesn't telecast any cigarette related commercial programme nor show any programme/ advertisement which may have the effect of promoting/ propagating cigarette smoking among the people. Similar view was adopted in the case of *Amanullah Khan vs. Chairman, Medical Research Council*.<sup>100</sup> The High Court Division of the Supreme Court of Bangladesh in the case of *Professor Nurul Islam vs. Government of Bangladesh and others*<sup>101</sup> has dealt with hazards and effects of smoking and its advertisement in the background of constitutional provision regarding fundamental right to life and held that advertisement of cigarette or tobacco related products in media is definitely designed to the detriment of right to life of the citizens and accordingly issued several directions, namely- (a) the government shall take steps phase by phase to stop production of tobacco leaves in tobacco growing districts of Bangladesh, giving subsidy to the farmers and to rehabilitate the tobacco workers engaged in tobacco production, if possible with alternative beneficial jobs; (b) the government shall restrict issuance of licence for setting up tobacco industry or bidi factory and direct the existing tobacco and bidi companies to switch over to some other industry to prevent production of cigarette, bidi and other tobacco related products, specifying a reasonable period for the purpose; (c) the government shall prohibit importation of cigarette or tobacco related product within a reasonable period and meanwhile impose heavy tax for the import; (d) the government, the concerned ministries or the broadcasting television authority, newspaper and bill-board authority or any other agencies engaged in advertisement shall not advertise or telecast any cigarette/ bidi related advertisement or commercials and shall not undertake any show/programme propagating cigarette/bidi smoking among the citizens; (e) the government and/or any concerned authority shall not undertake or encourage any promotional ventures like 'Voyage of Discovery' and those shall be strictly prohibited and (f) the government shall direct the appropriate authorities to take steps prohibiting smoking in public and public places like train, railway station, bus, bus station, ferry ghat, steamer and in any public gathering/meeting/assembly making the atmosphere noxious to health taking resort to strict compliance of the existing provisions of penal laws.

In Indian jurisdiction, the problem of noise pollution has also been addressed in the backdrop of constitutional provision regarding fundamental right to life. In the case of *Rabin Mukherjee and others vs. State*

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100. 1995 SCMR 202.

101. Supra note 39.

of *West Bengal and others*<sup>102</sup>, the Calcutta High Court held that noise pollution arising from the use of loud horns is injurious to health and was among the different causes of environmental pollution and accordingly directed the state authorities to issue notifications immediately regarding the removal of electric or air horns which create a loud or shrill sound.

Converting the open space meant for park and enjoyed by allottees of a planned township into residential area is violative of the fundamental right to life of the allottees concerned.<sup>103</sup> The Appellate Division of the Supreme Court of Bangladesh in *Rajdhani Unnayan Kortripokkho (RAJUK) and another vs. Mohshinul Islam and another*<sup>104</sup> gave directions for protecting the environment of Dhaka City and providing an environment-friendly interpretation of urban development. In an interesting case decided by the Madhya Pradesh High Court, it was held that right to life also includes the right to live with human dignity and healthy environment. Since an open drainage would endanger public health, the municipal corporation was directed to take the necessary measures to eradicate the menace.<sup>105</sup>

Sometimes different development projects and running of commercial or industrial concerns are challenged as being threats to environment & ecology and thereby violative of fundamental right to life. In such circumstances, essence of the projects or concerns under challenge to the extent that they are in furtherance of the protection and better preservation of fundamental right to life may outweigh the contention that they are threats to environment & ecology and thereby violative of fundamental right to life and vice versa. Being faced with such a situation, the Supreme Court of India in 1994 made a fruitful reference to the principle of sustainable development and tried to balance the social, economic and ecological aspects.<sup>106</sup> In *People United For Better Living in Calcutta - Public and another vs. State of West Bengal and others*<sup>107</sup> the petition was filed to prevent encroachment of wetlands in Calcutta. The Calcutta High Court observed that: 'there should be a proper balance between the protection of the environment and the development process: the society shall have

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102. AIR 1985 Calcutta 222.

103. Mr. M Saleem Ullah, Advocate and others vs. Bangladesh and others; 7 MLR (HC) (2002) 446 = 23 BLD (HCD) (2003) 58 = 55 DLR (2003) 1.

104. 53 DLR (AD) (2001) 79.

105. Dr. Malhotra vs. State of H.P.; AIR 1994 MP 48.

106. Law Society of India vs. Fertilizers & Chemicals Travancore Ltd.; AIR 1994 Ker 308.

107. AIR 1993 Cal. 215.

to prosper, but not at the cost of the environment and in the similar vein, the environment shall have to be protected but not at the cost of the development of the society'. In *Goa Foundation and another vs. Konkan Railway Corporation*<sup>108</sup> it was held that 'no development is possible without some adverse effect upon the ecology and environment but the project utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment. A balance has to be struck between the two interests and this exercise must be left to the persons who are familiar and specialised in this field'. Similarly, in the case of *Bombay Environmental Action Group & another vs. State of Maharashtra*<sup>109</sup>, the Court stated that 'the needs of the environment require to be balanced with the needs of the community at large and the needs of a developing country'. However, in *Vellore Citizens Welfare Forum vs. Union of India and others*<sup>110</sup> the Indian Supreme Court noted that although the industry concerned generates foreign exchange and provides employment, the court, citing the principle of sustainable development, concluded that the industry has 'no right to destroy the ecology, degrade the environment and pose a health hazard'. *Rural Litigation and Entitlement Kendra vs. State of U.P.*<sup>111</sup> (popularly known as 'Doon Valley Case') led to the closure of a certain lime stone quarries on the ground that these quarries were a great hazard and were affecting the ecology of the area adversely. *H.C. Mehta vs. UOI*<sup>112</sup> resulted in the closure of tanneries which were polluting Ganga. While dealing with development project, a similar approach has been adopted by Bangladeshi judiciary.<sup>113</sup> In the cases of *Sharif N Ambia vs. Bangladesh*<sup>114</sup> and *Khushi Kabir and others vs. Bangladesh*<sup>115</sup> the High Court Division of the Supreme Court of Bangladesh had to balance between unplanned development project and ecological protection. In the case of *Ms. Shehla Zia and others vs. WAPDA*<sup>116</sup>, the Supreme Court of Pakistan indirectly applied the concept of sustainable development while dealing with the construction of high voltage grid station which was likely to cause serious health hazard to the local

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108. AIR 1992 Bom 471.

109. AIR 1991 Bom 301.

110. AIR 1996 SC 2715.

111. (1985) 2 SCC 481.

112. (1987) 4 SCC 463.

113. Supra note 71.

114. Writ Petition No. 937 of 1995.

115. Writ Petition No. 3091 of 2000.

116. Supra note 10.

people. In this case, the court balanced the safety and welfare of the citizens and the importance of commerce and industry. In the court's view, 'a method should be devised to strike [a] balance between economic progress and prosperity and to minimize possible hazards. In fact, a policy of sustainability should be adopted.'

So far environmental litigations are concerned, in Indian jurisdiction, another very important aspect of the right to life is the application of public trust doctrine to protect and preserve natural resources.<sup>117</sup> This doctrine serves two purposes: it mandates affirmative state action for effective management of resources and empowers the citizens to question ineffective management of natural resources.<sup>118</sup> Moreover, not only can it be used to protect the public from poor application of planning law or environmental impact assessment<sup>119</sup>, it also has an intergenerational dimension that deters the present generation to decrease the environmental quality of the natural resources and prevents the future generation from altering that use no matter how pressing the public need.<sup>120</sup> When the Indian courts applied the public trust doctrine, they have considered it not only as an international law concept, but also as one which is well established in their national legal system. Accepting public trust doctrine as part of common law, the Indian courts have applied this explicitly in *M.C. Mehta vs. Kamal Nath and Others*<sup>121</sup>, *Th. Majra Singh vs. Indian Oil Corporation*<sup>122</sup> and *M.I. Builders Pvt. Ltd vs. Radhey Shyam Sahu*.<sup>123</sup> According to this doctrine the Government is the trustee of all natural resources which are by nature meant for public use and enjoyment. In *M.C. Mehta vs. Kamal Nath and Others*<sup>124</sup> it has been held that '[public trust doctrine] would be equally appropriate in controversies involving air pollution, the dissemination of pesticides, the location of rights of ways for utilities, and strip mining of wetland filling on private lands in a state where governmental permits are required.' In both *Th.*

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117. Razzaque, Jona, 'Case Law Analysis: Application of Public Trust Doctrine in Indian Environmental Cases' (2001) *Journal of Environmental Law*, Vol. 13: 2, pp. 221-234.

118. C.M. Rose, 'Joseph Sax and the Idea of the Public Trust' (1998) 25 *Ecology L.Q.* 351.

119. C. Redgwell, *Intergenerational Trusts and Environmental Protection* (OUP, Oxford, 1999) p. 68.

120. *Supra* note 71.

121. (1997) 1 SCC 388.

122. AIR 1999 J&K 81.

123. AIR 1999 SC 2468.

124. *Supra* note 121.

*Majra Singh vs. Indian Oil Corporation*<sup>125</sup> and *M.I. Builders Pvt. Ltd vs. Radhey Shyam Sahu*<sup>126</sup> the courts reconfirmed that public trust doctrine 'has grown from Article 21 of the constitution and has become part of the Indian legal thought.' This doctrine has not been expressly and explicitly applied in any environmental litigation in Bangladesh or Pakistan. In environmental litigations, another development of this doctrine is 'Polluter Pays Principle', according to which the financial costs of preventing or remedying damage lie with those who cause the pollution. The Supreme Court of India, over the years, has applied this principle to award compensation under its original jurisdiction against the offender, (a) to reverse the environmental damage and (b) to compensate the victims of the disaster in environmental pollution cases.<sup>127</sup> The leading cases in this regard are *Indian Council for Enviro-Legal Action and others vs. Union of India and others*<sup>128</sup>, *Vellore Citizens Welfare Forum vs. Union of India and others*<sup>129</sup> and *M.C. Mehta vs. Kamal Nath and others*.<sup>130</sup> While applying this principle the courts have frequently shifted the cost of remediation from the government to the polluting industries. It has been observed in the case of *Vellore Citizens Welfare Forum vs. Union of India and others*<sup>131</sup> that: "Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology." In the case of *Kinkari Devi and another vs. State of Himachal Pradesh and others*<sup>132</sup>, the petitioners sought an order of the court to have a mining lease cancelled, to restrain the respondents from operating the mines covered by the lease in such a manner as to pose a danger to the adjoining lands, water resources, pastures, forests, wildlife, ecology, environment and the inhabitants of the area, and for compensation for the damage caused by the uncontrolled quarrying of

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125. Supra note 122.

126. Supra note 123.

127. Supra note 71.

128. AIR 1996 SC 1446.

129. Supra note 110.

130. AIR 2000 SC 1997.

131. Supra note 110.

132. AIR 1988 HP 4.

the limestone. The court observed that in Articles 48A<sup>133</sup> and 51A(g)<sup>134</sup> there is both a constitutional pointer to the state and a constitutional duty of the citizens not only to protect but also to improve the environment and to preserve and safeguard the forests, the flora and fauna, the rivers and lakes and all the other water resources of the country, and went on to state: "To ensure the attainment of the constitutional goal of the protection and improvement of the natural wealth and environment. and to protect the people inhabiting the vulnerable areas from the hazardous consequences of the arbitrary exercise of the power of granting mining leases and of indiscriminate operation of mines on the strength of such leases without due regard to their life, liberty and property, the court will be left with no alternative but to intervene effectively by issuing appropriate writs, orders and directions including the direction as to the closure of the mines, the operation whereof is proving to be hazardous and the total prohibition of the grant or renewal of mining leases till the government evolves a long-term plan based on a scientific study with a view to regulating the exploitation of the minerals in the state without detriment to the environment, the ecology, the natural wealth and resources and the local population. However, the need for judicial intervention may not arise even in those cases where the court's jurisdiction is invoked, if the administration takes preventive, remedial and curative measures". The Supreme Court of Pakistan seems to apply this principle in the case of *Dr. Amjad H. Bokhari vs. Federation of Pakistan*.<sup>135</sup> Moreover, the Indian courts have also developed 'precautionary principle'. This principle follows that in cases where environmental impacts are uncertain, action should err on the side of caution. Leading case in this regard is *Vellore Citizens Welfare Forum vs. Union of India and others*<sup>136</sup> wherein it has been held that where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. Thereafter, in the *Taj Trapezium Case*<sup>137</sup> the Indian Supreme

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133. According to Article 48A of the Indian Constitution: "The States shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country".

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

135. Constitutional Petition 45/2003.

136. *Supra* note 110.

137. (1997) 2 SCC 353.

Court ordered a number of industries in the area surrounding the Taj Mahal to relocate or introduce pollution abatement measures in order to protect the Taj from deterioration and damage. In the case of *S. Jagannath vs. Union of India and others*<sup>138</sup> the precautionary approach was relied on to curtail commercial shrimp farming in India's coastal areas. The commercial user of agriculture lands and salt farms were discharging highly polluting effluents, and causing pollution of water. Normal traditional life and vocational activities of the local population of the coastal areas were being seriously hampered. In *M.C. Mehta vs. Union of India and others*<sup>139</sup> this principle was used when the court wanted to relocate 550 polluting tanneries operating in Calcutta. A recent application of the precautionary principle is found in *suo motu* proceedings in *Re: Delhi Transport Department*<sup>140</sup> where the Supreme Court dealt with air pollution in New Delhi. In the Supreme Court's view, the precautionary principle which is a part of a concept of 'sustainable development' has to be followed by state governments in controlling pollution. In the case of *A.P. Pollution Control Board vs. Prof. M.V. Nayudu*<sup>141</sup> the Supreme Court of India reaffirmed the customary status of the precautionary principle and added that the principle is entrenched in the Constitution. Similarly, in *Th. Majra Singh v. Indian Oil Corporation*<sup>142</sup> it was held that the court could only examine as to whether authorities have taken all precautions with a view to see that pollution have been given due care and attention. However, in *A.P. Pollution Control Board vs. Prof. M.V. Nayudu*<sup>143</sup> the Supreme Court of India commented that, although precautionary principle is accepted as part of international customary law, it is still evolving and applies according to the situation and circumstances of each case. The court also stated that the burden of proof in environmental cases is reversed and 'burden as to the absence of injurious effect of the proposed action is placed on those who wants to change status quo'. In Bangladesh, this principle found application in *Radioactive Milk case*<sup>144</sup> wherein the petitioner, a potential consumer, submitted the writ petition in public interest stating that the consumption of the imported food item containing radiation level higher than the acceptable limit is injurious to public health and is a threat to the life of the people of the country. The

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138. (1997) 2 SCC 87.

139. (1997) 2 SCC 411.

140. (1998) 9 SCC 250.

141. (1999) SOL Case No. 053. Available at: <[www.supremecourtonline.com](http://www.supremecourtonline.com)> (accessed on July 16, 2005)

142. *Supra* note 122.

143. *Supra* note 141.

144. *Dr. Mohiuddin Farooque vs. Bangladesh and others*; Writ Petition No. 92 of 1996.



court simply assumed that such injury either had occurred or were 'likely to occur' and proceeded to issue remedial directions. The Supreme Court of Pakistan applied this principle in the case of *Ms. Shehla Zia and others vs. WAPDA*.<sup>145</sup> In this case, the construction of a high voltage grid station by WAPDA in a residential area of Islamabad was challenged on the ground that the electronic magnetic radiation of the grid station could be harmful to the residents' health, but there was no certainty that this would happen. While extensive scientific literature was produced to show the likelihood of harm, the respondent produced equally impressive scientific documentation to show that there would be no harm. Nevertheless, the court in its celebrated judgment invoked the precautionary principle to prevent WAPDA from constructing the said grid station. The *Salt Miners Case*<sup>146</sup> involved the rights of the residents to have clear and unpolluted water. The Supreme Court of Pakistan, by taking into account the seriousness of danger that the people in that area are exposed, ordered that all mining activities should take measures to the satisfaction of the court appointed commission which will prevent pollution of the reservoir, stream and catchment area. In *Environment Pollution in Balochistan case*<sup>147</sup> the Supreme Court of Pakistan took account of a news item which contended that certain businessmen were planning to purchase coastal areas of Balochistan, a province in Pakistan, and turn the area into a dumping grounds for waste material. The authorities were ordered by the court to insert a clause in the allotment letter/license/lease that the allottee or the tenants shall not use the land for dumping, treating, burying or destroying by any devise, waste of any nature including industrial or nuclear waste in any form. These cases from Bangladeshi and Pakistani jurisdiction specifically applied a precautionary approach, though the courts never mentioned the principle itself. It is worth of mentioning in this regard that though most of the recent environmental legislation has incorporated the precautionary principle, the court in Bangladesh and Pakistan can refuse to apply this principle if the matter in front of them is not covered by any of the legislation.<sup>148</sup>

### **Right to education as implicit in the constitutional provision as to fundamental right to life**

In *Mohini Jain vs. State of Karnataka*<sup>149</sup>, it has been held by the Indian Supreme Court that the right to education flows directly from right to

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145. Supra note 10.

146. Supra note 79.

147. HR case No. 31-K/92(Q). See also, Compendium of Summaries of Judicial Decisions in Environment Related Cases (SACEP, Sri Lanka, 1997) at 80.

148. Supra note 71.

149. 1992 (5) SLR 1 (SC).

life. This decision was followed by a Full Bench of the Andhra Pradesh High Court in *Kranti Sangram Parishad vs. N.J. Reddy*.<sup>150</sup> But the question is what is the content of this right? How much and what level of education is necessary to make the life meaningful? Does it mean that every citizen of the country can call upon the state to provide him education of his choice? In other words, whether the citizens of the country can demand that the state should provide adequate number of medical colleges, engineering colleges and other educational institutions to satisfy all their educational needs? *Mohini Jain vs. State of Karnataka*<sup>151</sup> seems to say: 'Yes'. With full respect to the said decision, the Indian Supreme Court in the case of *Unni Krishnan, J.P. vs. State of Andhra Pradesh*<sup>152</sup> declined to agree with such a broad proposition. In this case, the contents and extents of right to education as implicit in the constitutional provision of fundamental right to life was illustrated as such: "Right to education ... means: (a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the state and its development." However, critics argue that "[it] is not for the Court to convert a directive principle of state policy into a fundamental right. ... Where the literacy rate has been around fifty percent, to say that all Indian people have a fundamental right to primary education is an exercise in romanticism".<sup>153</sup> The higher courts of Bangladesh and Pakistan are yet to decide whether right to education is implicit in the constitutional provision as to fundamental right to life.

### **Fundamental right to life vs. death penalty**

On several occasions the constitutionality of the imposition of death sentence have come to be questioned in the context of the fundamental right to life. The examination of the validity of death sentence clearly showed that the Court went into penal policy also because such policy was alleged to be violative of the right to life.<sup>154</sup> In *Jagmohan Singh vs. State of U.P.*<sup>155</sup> and in *Bachan Singh vs. State of Punjab*<sup>156</sup>, the Indian Supreme Court has on a detailed consideration, held that the capital punishment does not violate Article 21 of the Constitution. In the case of *Shashi Nayar*

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150. 1992 (3) ALT 99.

151. *Supra* note 149.

152. *Supra* note 7.

153. *Supra* note 17, p.119.

154. *Ibid*, p.113.

155. AIR 1973 SC 947 = (1973) 1 SCWR 20 = (1973) MLJ (Cr.) 554 = (1973) 2 SCJ 169.

156. 1979 (3) SCC 727.

*vs. Union of India*<sup>157</sup>, the mode of execution of death sentence by hanging was challenged as being violative of Article 21. But, the Court relying on *Deena alias Deen Dayal and others vs. Union of India and others*<sup>158</sup> held that hanging by neck is a scientific and one of the least painful methods of execution of the death sentence and as such not violative of Article 21. However, in the case of *Attorney General of India vs. Lachma Devi and others*<sup>159</sup>, the Indian Supreme Court has held that execution of death sentence by public hanging would be a barbaric practice clearly violative of Article 21 of the Constitution. The Indian Supreme Court has already held that mandatory death sentence violates the fundamental right to life.<sup>160</sup> Accordingly section 303<sup>161</sup> of the Indian Penal Code<sup>162</sup> has been struck down as *ultra vires* the Constitution. But unfortunately, a number of penal provisions exist in the statute books of Pakistan and Bangladesh which prescribe mandatory death sentence. For example, in Pakistan, the punishment for *qatl-i-amd*<sup>163</sup>, when punished as *qisas*<sup>164</sup>, is death.<sup>165</sup> This sentence is mandatory. However, a person accused of *qatl-i-amd* shall not be liable to *qisas* if he is a minor or insane or if he causes the death of his child or grandchild, how lowsoever or when the *wali* of the victim is his direct descendent, how lowsoever.<sup>166</sup> Similarly, a person accused of *qatl-i-amd* shall not be liable to *qisas* if the *wali* voluntarily and without

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157. 1991 SOL Case No. 057. Available at : [www.supremecourtonlie.com](http://www.supremecourtonlie.com) (accessed on May 17, 2004).

158. 1983 (4) SCC 645.

159. AIR 1986 SC 467.

160. *Mithu vs. State of Punjab*; AIR 1983 SC 473 = 1983 CrLJ 811 (SC) = (1983) 1 SCJ 327.

161. This section provides that 'Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death'.

162. Act XLV of 1860.

163. *Qatl-i-amd*: 'Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit *qatl-i-amd*'. See, section 300, The Pakistan Penal Code, 1860 (XLV of 1860).

164. *Qisas*: '*Qisas*' means punishment ... by causing his (the convict) death if he has committed *qatl-i-amd* in exercise of the right of the victim or a *wali*. See, section 299 (k), The Pakistan Penal Code, 1860 (XLV of 1860). *Wali* means a person entitled to claim *qisas*. See, section 299 (m), The Pakistan Penal Code, 1860 (XLV of 1860). In such a case (*qatl-i-amd*) *wali* shall be the heirs of the victim, according to his personal law and the Government, if there is no heir. See, section 305, The Pakistan Penal Code, 1860 (XLV of 1860).

165. Section 302 (a), The Pakistan Penal Code, 1860 (XLV of 1860).

166. Section 306, The Pakistan Penal Code, 1860 (XLV of 1860).

duress, to the satisfaction of the court, waives or compounds his right of *qisas*.<sup>167</sup> Example may also be given in this regard from the statute books of Bangladesh. For dowry death, section 11 (a) of the Nari-O-Shishu Nirjatan Daman Ain, 2000<sup>168</sup> provides for only one punishment, i.e., death. The higher courts of Pakistan and Bangladesh have not yet been approached to answer whether these penal provisions prescribing mandatory death sentence violate the fundamental right to life as guaranteed by the constitution or not.

### Waiver of fundamental right to life

The Indian Supreme Court in *Olga Tallis vs. Bombay Municipal Corporation*<sup>169</sup> has held that a fundamental right cannot be waived. Distinguishing the said view, the said court in another case<sup>170</sup> has held that right encompassed or conferred by Article 21 can be waived. According to the court: "... a person cannot be forced to enjoy right to life to his detriment, disadvantage or disliking". The question whether fundamental right to life can be waived or not brings forward another question whether punishing an attempt to suicide is constitutional or not. As a matter of fact, an attempt to suicide is a crime under the laws of India<sup>171</sup>, Bangladesh<sup>172</sup> and Pakistan.<sup>173</sup> The question whether punishing an attempt to suicide by penal provision is constitutional or not was first raised in this sub-continent before a Division Bench of Delhi High Court in *State vs. Sanjay Kumar*<sup>174</sup> in which the Court observed: "It is ironic that Section 309 IPC<sup>175</sup> still continues to be in our Penal Code ... Strange paradox that in the age of votaries of euthanasia, suicide should be criminally punishable. Instead of the society hanging its head in shame that there should be such social strains that a young man (the hope of tomorrow) should be driven to suicide, compounds its inadequacy by treating the boy as a criminal. Instead of sending the young boy to psychiatric clinic it gleefully sends him to mingle with criminals. ... The continuance of Section 309 IPC<sup>176</sup> is an anachronism unworthy of a human society like ours". Soon came the Division Bench decision of Bombay High Court in *Maruti Shripati Dubal*

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167. Section 307 (b), The Pakistan Penal Code, 1860 (XLV of 1860).

168. Act No. 8 of 2000.

169. AIR 1986 SC 180.

170. P. Rathinam/Nagbhusan Patnaik vs. Union of India; (1994) 3 SCC 394.

171. Section 309 of the Indian Penal Code, 1860 (Act No. XLV of 1860).

172. Section 309 of the Penal Code, 1860 (Act No. XLV of 1860).

173. Section 325 of the Pakistan Penal Code, 1860 (Act No. XLV of 1860).

174. 1985 CrLJ 931.

175. Indian Penal Code, 1860 (Act XIV of 1860).

176. Ibid.

*vs. State of Maharashtra*<sup>177</sup> in which the Bench on being approached for quashing a prosecution launched against the petitioner under Section 309 of the Penal Code on the ground of unconstitutionality of the section, took the view that the section was *ultra vires* being violative of Articles 14 and 21 and was therefore struck down. In this case, the Court also held that Article 21 has conferred a positive right to live which carries with it the negative right not to live. Close on the heels was the decision of a Division Bench of Andhra Pradesh High Court in *Chenna Jagadeeswar vs. State of Andhra Pradesh*<sup>178</sup> in which the Division Bench on being approached against the conviction of the appellants under Section 309, inter alia, on the ground of the section being violative of Articles 14 and 21 of the Constitution held that the section was valid as it did not offend any of these Articles. In this case, the Bombay view was dissented to. Delhi High Court in an unreported decision<sup>179</sup> pointed out to the futility of creating criminal liability in suicide cases, but instead of striking down the section or declaring it invalid, quashed all the 119 proceedings pending in the trial courts on the ground that dragging of the prosecutions for years when the victims have had enough of misery and the accused also belonged to poorer section which added further insult to the injury, would be abuse of the process of the court. Being of this view, each of the accused was directed to be acquitted. Justice R. A. Jahagirdar of Bombay High Court in an article published in the *Illustrated Weekly of India*<sup>180</sup> took the view that section 309 was unconstitutional for four reasons: (1) neither academicians nor jurists are agreed on what constitutes suicide, much less attempted suicide; (2) *mens rea*, without which no offence can be sustained, is not clearly discernible in such acts; (3) temporary insanity is the ultimate reason of such acts which is a valid defence even in homicides, and (4) individuals driven to suicide require psychiatric care. This view was cited with approval by the Indian Supreme Court in *P. Rathinam/Nagbhusan Patnaik vs. Union of India*.<sup>181</sup> Later on, the Indian Supreme Court in the case of *Gian Kaur vs. Punjab*<sup>182</sup> overruled its earlier decision and held that section 309 of the Penal Code was not unconstitutional and void as being violative of the right to life. In this case, it was held that 'Right to die' is inherently inconsistent with 'right to life'. In another case it was held that the offence of abetment of suicide does not suffer from any vice and is not violative of Article 21 of the

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177. 1987 CrLJ 743 Bom.

178. 1988 CrLJ 549 AP.

179. Court on its own Motion vs. Yogesh Sharma (Criminal Revision No. 230/85).

180. September 29, 1985.

181. (1994) 3 SCC 394.

182. AIR 1996 SC 946 = 1996 (3) Supreme 1.

Indian Constitution.<sup>183</sup> In this regard, Indian Supreme Court has addressed the constitutionality of euthanasia in the background of fundamental right to life and held that permission to receive mercy killing cannot be granted despite the petitioner's suffering from serious ailment.<sup>184</sup> The higher courts of Bangladesh and Pakistan are yet to decide any case on the issue of constitutionality of waiver of fundamental right to life.

### **Remedies for infringement of fundamental right to life**

The Indian judiciary has made several successful directions to create experts and special committees in several environmental cases involving the interpretation and enforcement of fundamental right to life. For example: in India, in the case of *M.C. Mehta vs. Union of India and others*<sup>185</sup> special committee was created to monitor air quality and traffic congestion, in the case of *M.C. Mehta (Calcutta Tanneries Matter) vs. Union of India*<sup>186</sup> the court directed the subordinate green bench to monitor the compliance of the previous order and in another case<sup>187</sup> the court directed to the archaeological survey to set up automatic monitoring system. Moreover, the Indian courts have made several directions on unconditional closure and relocation of tanneries<sup>188</sup>, payment of compensation for reversing the damage<sup>189</sup>, payment of costs required for the remedial measures<sup>190</sup>, necessary measures to be adopted by the relevant ministry to broadcast information relating to environment in the media<sup>191</sup>, attracting the attention of the government where there is a necessity of legislation<sup>192</sup>, setting up a committee to monitor the directions of the court.<sup>193</sup> According to the Karnataka High Court: "The right to life does not fall short of the requirements of qualitative life which is possible only in an environment of quality. Where, on account of human agencies, the quality of air and the quality of environment are threatened or affected, the Court would not hesitate to use its innovative power within its epistolary jurisdiction

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183. *Naresh Marotrao Sakhre vs. Union of India*; 1995 (1) Crimes 212 (Bom).

184. *Pranjali vs. Chief Secretary, Union of India*; 2000 (3) Crimes 374 (Bom).

185. *Supra* note 140.

186. *Supra* note 139.

187. (1998) 3 SCC 381.

188. *M.C. Mehta (Calcutta Tanneries Matter) vs. Union of India*; (1997) 2 SCC 411.

189. *M.C. Mehta vs. Kamal Nath and Others*; (1997) 1 SCC 388 and *Vellore Citizen Welfare Forum vs. Union of India*; (1996) 5 SCC 647.

190. *Indian Council for Enviro-Legal Action vs. Union of India*; (1996) 3 SCC 212.

191. *M.C. Mehta vs. Union of India*; AIR 1992 SC 382.

192. *Research Foundation for Science, Technology and Ecology and others vs. Ministry of Agriculture and others*; (1999) 1 SCC 655.

193. *M.C. Mehta vs. Union of India and others*; (1998) 9 SCC 93.

to enforce and safeguard the right to life to promote public interest. Specific guarantees in Article 21 unfold penumbras shaped by emanations from those constitutional assurances which help give them life and substance".<sup>194</sup> Suffice is to say in this regard that there is ample opportunity for the judiciary of Bangladesh and Pakistan to make a similar sort of innovative direction.<sup>195</sup> However, several directions were made by the High Court Division of the Supreme Court of Bangladesh in the cases of *Dr Mohiuddin Farooque vs. Bangladesh*<sup>196</sup> & *Professor Nurul Islam vs. Government of Bangladesh and others*<sup>197</sup> and by the Supreme Court of Pakistan in the cases of *Pakistan Chest Foundation and others vs. Government of Pakistan and others*<sup>198</sup> and *Environment Pollution in Balochistan case*.<sup>199</sup> The Supreme Court of Pakistan also appointed a commission in the case of *Salt Miners Case*.<sup>200</sup> Award of compensation for infringement of fundamental right to life is another remedy innovated by the higher courts of India, Bangladesh and Pakistan. In Indian jurisdiction, the idea of awarding compensation for violation of right to life was first invented and carried to a new dimension in the case of *Rudal Sah vs. State of India*.<sup>201</sup> In the opinion of the Court, this was one of the telling ways in which gross violation of right to life could reasonably be prevented and due compliance with the mandate of Article 21 secured. Later on, in a number of cases, e.g., *M. Hongray vs. Union of India*<sup>202</sup>, *Bhim Singh vs. State of J & K*<sup>203</sup>, *People's Union for Democratic Rights vs. Police Commissioner, Delhi Police Headquarter*<sup>204</sup>, *Saheli vs. Commissioner of Police*<sup>205</sup> and *Nilabati vs. State of Orissa*<sup>206</sup>, the India Supreme Court has awarded compensation for infringement of fundamental right to life. In the case of *M.C. Mehta vs. Union of India*<sup>207</sup>, the India Supreme Court while enforcing fundamental right to life of the petitioner held a private corporation liable for

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194. V. Lakshmi pathy vs. State of Karnataka; AIR 1992 Karnataka 57.

195. Supra note 71.

196. Writ Petition No. 92 of 1996.

197. Supra note 39.

198. Supra note 99.

199. Supra note 147.

200. Supra note 79.

201. (1983) 4 SCC 141.

202. AIR 1984 SC 1826.

203. AIR 1986 SC 494.

204. (1989) 4 SCC 730.

205. AIR 1990 SC 513.

206. AIR 1992 SC 1960.

207. (1987) 1 SCC 395.

compensation. This is a new development because the process of making the fundamental rights under Article 21 applicable to the private sector, with the assistance of public policy doctrine under the law of contracts has been started.<sup>208</sup> At the same time, in this case the India Supreme Court has spelled the limit of the doctrine of compensation. The Court said: "The power of the Court to grant such remedial relief may include the power to award compensation in appropriate cases. We are deliberately using the words 'in appropriate cases' because we must make it clear that it is not in every case where there is a breach of a fundamental right committed by the violator that compensation would be awarded by the Court". In the case of *Shahnewaz vs. Bangladesh*<sup>209</sup>, the High Court Division of the Supreme Court of Bangladesh and in the case of *Dr. Amjad H. Bokhari vs. Federation of Pakistan*<sup>210</sup> the Supreme Court of Pakistan have awarded compensation for infringement of right to life.

### **Status of fundamental right to life during emergency**

Almost all national constitutions contain emergency provisions<sup>211</sup>. Constitutions of India, Bangladesh and Pakistan are no exception in this regard. Jurisprudence behind such provision is the need for upholding national security or public order. But, experiences of Bangladesh, India and Pakistan show that on several occasions recourse to the constitutional provisions regarding emergency power of the executive have been taken and exercise of this extraordinary power have been extended both in time and in scope beyond what is strictly required by the exigencies of the circumstances and situations. It is widely recognised that the worst human rights abuses occur in cases where individual rights can be curtailed on the excuse that the security of state requires such curtailment.<sup>212</sup> As such the question may arise as to whether the concept and of national security or public order can be so large as to swallow the fundamental right to life of the subjects.

Under the Indian Constitution, the President is vested with the authority to proclaim emergency if he is satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion.<sup>213</sup>

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208. Kulshreshtha, V.D., *Landmarks in Indian Legal and Constitutional History*, (Eastern Book Company, Lucknow, 1992) p.438.

209. 50 DLR (1998) 633.

210. *Supra* note 135.

211. Huda, Shahnaz, '*Human Rights under Emergency Situations*' in *The Dhaka University Studies*, Part – F, Vol. III (1), June 1992, p.106.

212. *Ibid*, p.101.

213. Article 352 (1) of the Indian Constitution.



In exercise of this authority, the President could also suspend the right to move any court for the enforcement of fundamental rights specified in his order.<sup>214</sup> In the case of *A.D.M. Jabalpur vs. Shiv Kant Shukla*<sup>215</sup>, popularly known as the 'Fundamental Rights Case', the Indian Supreme Court by a majority of four against one held that during emergency the executive can suspend the enforcement of fundamental right to life as guaranteed by Article 21 of the Indian Constitution. Later on, by the Constitution (Forty-Fourth Amendment) Act, 1978 the authority of the President to suspend enforcement of fundamental right to life as guaranteed by Article 21 of the Indian Constitution was curtailed.<sup>216</sup>

"During the British colonial rule and then 23 years constitutional history of Pakistan the arbitrary application of ... emergency was so bitter that it left a good teaching ... that such provisions which are contradictory to the concept of nourishing living democracy, would never allow to build normal democratic system."<sup>217</sup> Accordingly, no provisions for emergency and suspension of fundamental rights were placed in the original constitution of Bangladesh. But, the Constitution of 1972, ideal at its inception soon turned into something less than perfect where the executive could use its sweet will to curtail the basic rights of those for whose protection provisions had been made in part III of the Constitution of Bangladesh.<sup>218</sup> Just nine months after commencement of the original constitution, by the Constitution (Second Amendment) Act, 1973<sup>219</sup> emergency provisions were inserted in the constitution.<sup>220</sup> Accordingly, if the President is satisfied that a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance, he may issue a Proclamation of Emergency.<sup>221</sup> During emergency, certain fundamental rights shall remain suspended but not fundamental right to life as guaranteed by Articles 31 and 32 of the constitution.<sup>222</sup> But, more important is the fact that during emergency enforcement of all fundamental rights

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214. Article 359 of the Indian Constitution.

215. AIR 1976 SC 1207.

216. Section 40 of the Constitution (Forty-Fourth Amendment) Act, 1978.

217. Halim, Md. Abdul, *Constitution, Constitutional Law and Politics: Bangladesh Perspective*, (Dhaka, 2nd edition, 2003), p.104.

218. *Supra* note 211, p.113.

219. Act No. XXIV of 1973.

220. Section 6 of Act No. XXIV of 1973.

221. Article 141A (1) of the Constitution of Bangladesh.

222. See Article 141B of the Constitution of Bangladesh for list of fundamental rights that stand suspended during emergency.

including fundamental right to life may be suspended.<sup>223</sup> However, imposition of emergency and suspension of fundamental rights for a certain period does not mean that an Act or Ordinance passed in that period cannot be declared *ultra vires* of the Constitution. It is merely the enforcement of fundamental rights through court that remains suspended for a limited period, and nothing more.<sup>224</sup>

Emergency provisions of the Constitution of Pakistan are identical with those of Bangladesh Constitution. Under the Constitution of Pakistan if the President is satisfied that a grave emergency exists in which the security of Pakistan, or any part thereof, is threatened by war or external aggression, or by internal disturbance beyond the power of a Provincial Government to control, he may issue a Proclamation of Emergency.<sup>225</sup> During emergency, certain fundamental rights shall remain suspended but not fundamental right to life as guaranteed by Article 9 of the constitution.<sup>226</sup> But, during emergency enforcement of all fundamental rights including fundamental right to life may be suspended.<sup>227</sup>

Therefore, under the constitutional arrangements of India, Bangladesh and Pakistan the fundamental right to life remains operative during emergency but in Bangladesh and Pakistan enforcement of this vital right may be suspended during emergency. The position of India is more progressive in this regard.

### **Interpretation of the constitutional provision as to fundamental right to life vis-à-vis second generation human rights**

The constitutions of India, Bangladesh and Pakistan contain a list of second generation human rights. This list is categorized as 'Directive Principles of State Policy' in India<sup>228</sup>, as 'Fundamental Principles of State Policy' in Bangladesh<sup>229</sup> and as 'Principles of Policy' in Pakistan.<sup>230</sup> This categorization indicates that second generation human rights are not 'right' in the constitutional framework of these countries; they are 'principles'. Moreover, they are not judicially enforceable according to

223. See, Article 141C (1) of the Bangladesh Constitution.

224. *Shahriar Rashid Khan vs. Bangladesh*, represented by the Secretary, Ministry of Law and Parliamentary Affairs and others; 49 DLR (1997) 133.

225. Article 232 (1) of the Constitution of Pakistan.

226. See, Article 233 (1) of the Constitution of Pakistan for list of fundamental rights that stand suspended during emergency.

227. See Article 233 (2) of the Pakistan Constitution.

228. Part IV of the Indian Constitution (Articles 36-51).

229. Part II of the Bangladesh Constitution (Articles 8-25).

230. Part II, Chapter 2 of the Pakistan Constitution (Articles 29-40).

the constitutional provisions of India<sup>231</sup>, Bangladesh<sup>232</sup> and Pakistan.<sup>233</sup> Nevertheless, the higher courts of these three countries have on various occasions taken these second general human rights into consideration to supply a meaning to the interpretation of the constitutional provision as to fundamental right to life. Accordingly, various rights which were at a time regarded as judicially not enforceable are now being construed as implicit in fundamental right to life and thus being judicially enforced. In this way, fundamental right to life is constantly being enriched in its contents by progressive pronouncements of the higher courts of India, Bangladesh and Pakistan. These progressive pronouncements give an impression that right to life is not an end in itself but a means to attain the end and the end is enshrined in the fundamental or directive principles of state policies. In *Bandhua Mukti Morcha vs. Union of India*<sup>234</sup>, His Lordship Bhagwati, J. while affirming the proposition that Article 21 must be construed in the light of the Directive Principles of the State Policy observed: "This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers men and women, and of the tender age of children against abuse, opportunities and facilities of children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions to work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity ...". In another case it was held by the Indian Supreme Court that: "It is true that life in its expanded horizons today includes all that give meaning to a man's life including his tradition, culture and heritage, and protection of that heritage in its full measure would certainly come within the encompass of an expanded concept of Article 21 of the Constitution".<sup>235</sup> In the case of *Unni Krishnan, J.P. vs. State of Andhra Pradesh*<sup>236</sup> while holding that right to primary education is implicit in Article 21 of the Indian Constitution, the Indian Supreme Court relied upon some of the directive principles set out in Part IV of the Constitution. However, at the same time the court pronounced a caution to the effect that "... just because we have relied upon some of the directive principles to locate the parameters of the right

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231. Article 37 of the Indian Constitution.

232. Article 8(2) of the Bangladesh Constitution.

233. Article 30(2) of the Pakistan Constitution.

234. 1984 (2) SCR 67.

235. *Ramsharan vs. Union of India*; AIR 1989 SC 549.

236. *Supra* note 7.

to education implicit in Article 21, it does not follow automatically that each and every obligation referred to in Part IV gets automatically included within the purview of Article 21. We have held the right to education to be implicit in the right to life because of its inherent fundamental importance". Reliance upon fundamental or directive principles of state policies in interpreting fundamental right to life is often criticised by some scholars. To quote one critic: "It could be said that mere judicial declaration of such rights creates an illusion in the minds of the people that those rights are already in existence – that might diminish their will to fight for them through political action. The government too is happy that the judiciary is doing everything for it and it does not have to do anything".<sup>237</sup> Nevertheless, the reality that cannot be denied is that by now, probably right to life is one of few fundamental rights which has taken such a healthy shape that we can conceive that the web of rights is unbroken in fabric, we can realize that unenforceability of economic, social and cultural rights is being given a revolutionary second thought. This revolutionary thought on the part of the higher courts of India, Bangladesh and Pakistan has led them to adopt new, less familiar modes of judicial reasoning while extending the scope of fundamental right to life. An analytical look at these progressive judgements reveals that humanistic approaches of the judges have shifted the focus from censorial jurisprudence to expository jurisprudence.

### Conclusion

From the foregoing discussion it is clear that in various decisions of the higher courts of India, Bangladesh and Pakistan, the concept of 'life' has been explained in a manner which has infused life into the letters of constitutional provisions guaranteeing life as a fundamental right. With wide extension of the meaning and contents of the constitutional provisions of Bangladesh, India and Pakistan regarding fundamental right to life and continuing innovative explanations concerning this fundamental right in the background of somewhat similar social and economic context by the higher courts of these countries have injected a self-executory character into this invaluable fundamental right and therefore in different cases and litigation various guidelines are being formulated, prohibitions are being imposed and obligations are being bestowed even in the absence of any positive legislation to those effects. In these three countries day by day fundamental right to life is being more and more effectively used as an instrument for achieving social purposes and during the days to come this trend will hopefully contribute to the development of a more vibrant public sphere.

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237. *Supra* note 17, p.120.