

# ENVIRONMENT AND PUBLIC HEALTH: PRECAUTION AND FOOD SAFETY IN INDIA

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## I. INTRODUCTION

Humans are also an important component, as like plants or animals, of the environment as it always is the interrelationship between the living and the non-living constituents of the ecosystem.<sup>1</sup> If a dangerous gas leaks in the atmosphere which is injurious to humans then the courts of record and the environmental tribunals invoke Article 21 of the Constitution of India to guarantee the fundamental right to clean and healthy air for the citizens.<sup>2</sup> The statement, in a certain way, provides us the general and proportional relationship between environment protection and public health. However there arises few questions. What if the injurious thing is not inhaled involuntarily but is consumed unknowingly? What if the injurious thing is not a byproduct of commercial activity but an active ingredient of another thing that is produced for consumption? It was the year 2015, when the “Maggi” incident became popular, people started to talk about the *monosodium glutamate* and lead as an injurious additive to the foodstuff.<sup>3</sup> It, without any doubt, increased the awareness of the consumers of the things which could be harmful to their health and had earlier been consumed without any intervention. However, not surprisingly, the legislature was already aware of such harmful effects and therefore in the year 2006 passed the Food Safety and Standards Act.<sup>4</sup> This paper will try to contribute to the existing knowledge in the areas of food safety taking help of the environmental principle known as the precautionary principle.

## II. PRECAUTIONARY PRINCIPLE IN INDIA

### A. Recognition as a law

The precautionary principle is known in the national and international law as “to err on the side of caution”<sup>5</sup> “better safe than sorry”<sup>6</sup> “principle of foresight”<sup>7</sup> “prudent foresight”<sup>8</sup> and by many more terms<sup>9</sup>. The principle has been a part of the law of the land in India since 1996 when in the *Vellore Citizens Welfare Forum* case the Supreme Court of India held it to

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<sup>1</sup>See definition of “Environment” in the Environment Protection Act, 1986.

<sup>2</sup>See *MC Mehta v. Union of India*, AIR 1987 SC 1086 (Oleum Gas Leak case).

<sup>3</sup>See Reuters, “Food inspectors order recall of Maggi noodles, say it contains excess lead” *Indian Express*, May 20, 2015, available at: <https://indianexpress.com/article/india/india-others/food-inspectors-order-recall-of-maggi-noodles-say-it-contains-excess-lead/> (last visited on Oct. 02, 2019).

<sup>4</sup>See Food Safety and Standards Act, 2006, available at: <https://www.fssai.gov.in/cms/food-safety-and-standards-act-2006.php> (last visited on Oct. 02, 2019).

<sup>5</sup> Charmian Barton, “The Status of the precautionary principle in Australia: Its Emergence in Legislation as a Common Law Doctrine” 22 *Harvard Environmental Law Review* 512 (1998) (also referred in A.P. Pollution Case).

<sup>6</sup> Tim Jackson, *Material Concerns: Pollution, Profit and Quality of Life* 51-52 (Routledge, 1996).

<sup>7</sup> Konrad Von Moltke, “The Vorsorgeprinzip in West German Environmental Policy”, in Royal Commission on Environmental Pollution, *Best Practicable Environmental Option*, Twelfth Report, 1988, p.no. 57.

<sup>8</sup>*M/s Sterlite Industries (India) Ltd. v. Tamil Nadu Pollution Control Board*, NGT, Appeal No. 57 of 2013, p.no. 125.

<sup>9</sup>Due Diligence, Best Available Technology, Reasonable Anticipation, Risk Management.

be so.<sup>10</sup> After the judgement, the principle has been applied in numerous disputes relating to the environment protection.<sup>11</sup> In 2010 it got a statutory recognition, though not defined, with the enactment of the National Green Tribunal Act.<sup>12</sup> The relevant provision, section 20, states that the tribunals while deciding disputes shall apply the precautionary principle among other principles. The definition of the precautionary principle was presented by the court in *Vellore Citizens*<sup>13</sup> case and its evolution were discussed in the *A. P. Pollution* case in 1999.<sup>14</sup> These judgments could be stated as the watershed in the development of the law relating to the environment in India.

### ***B. Constituents Explained***

The court in *Vellore Citizens Welfare Forum* case was faced with balancing the economic need of the developing country with the need of the environment to keep it free from pollution and degradation which in turn, if not checked, will again cause, were already causing too, grave problems to the current, immediate and the future generations of the country. It recognized precautionary principle as a part of the balancing concept known as the sustainable development. Further it held that “*precautionary principle is the law of the land*” and the principle means:

“(i) *Environment measures - by the State Government and the statutory Authorities must anticipate, prevent’ and attack the causes of environmental degradation.*

(ii) *Where there are threats of serious and irreversible damage lack of scientific certainty should not be used as the reason for postponing, measures to prevent environmental degradation.*

(iii) *The "Onus of proof" is on the actor or the developer/industrial to show that his action is environmentally benign.*”<sup>15</sup>

In *A. P. Pollution Control Board* case the balancing to be found was not as tough as in the *Vellore* case as the matter was for only few industries which were asking a relief to be located near the twin lakes in Hyderabad.<sup>16</sup> Therefore the court without even discussing the contribution of the industries to the GDP of the country discussed in detail the reason for the emergence of the precautionary principle.<sup>17</sup> It discussed the shift from the *assimilative capacity principle* to the precautionary principle and also stated that the inadequacies of science was the real basis of the precautionary principle.<sup>18</sup> It also provided that the threats which are identifiable and non-negligible will ask for the application of the precautionary principle incorporating the reversal of the burden of proof element of the principle as stated in the *Vellore Citizens* case.<sup>19</sup>

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<sup>10</sup>The principle was nowhere mentioned expressly in any of the legislations till the date of the judgment.

<sup>11</sup>*M.C. Mehta v. Union of India*, AIR 1997 SC 734 (Taj Mahal case); *Research Foundation for Science v. Union of India*, (2005) 10 SCC 510 (Ship Breaking Case); *Murli. S. Deora v. Union of India*, (2001) 8 SCC 765 (Smoking in Public Place case) etc.

<sup>12</sup> National Green Tribunal Act, 2010, s. 20.

<sup>13</sup> AIR 1996 SC 2715 18.

<sup>14</sup> AIR 1999 SC 812 26.

<sup>15</sup> *Supra* note 13 at 12

<sup>16</sup> *Supra* note 14 at 2.

<sup>17</sup> In *Vellore* case the issue revolved around tanneries which were stated to contribute greatly to the GDP of the country.

<sup>18</sup> *Supra* note 14 at 11, 12.

<sup>19</sup> *Id.* at 13.

### III. THE FOOD ACT AND MAGGI

#### A. Authorities and their powers under the Food Safety and Standards Act

The year 2006 saw the enactment of the Food Safety Act in India.<sup>20</sup> One of the main contributions of this act is the establishment of the food authority popularly known as the FSSAI.<sup>21</sup> However apart from this, it importantly provides in its preamble that it establishes the authority “to lay down science based standards for articles of food and to regulate” its “manufacture, storage, distribution and sale purchase and to ensure safe and wholesome food for human consumption”.<sup>22</sup> The act reaffirms the above aspiration and states that the “food authority shall regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food” as one of the duties or functions of the authority.<sup>23</sup> In the chapter for the enforcement of the Act it mentions the “food authority, state food authorities, food safety officers, Commissioner of food safety and designated officers as responsible for the enforcement of the Act”.<sup>24</sup>

The commissioner of food safety is to be appointed by the state government for the efficient implementation of food safety and standards and other provisions of the Act.<sup>25</sup> It is also expressly provided that the officer “shall prohibit in the interest of public health manufacture storage distribution or sale of food articles notified in the official gazette”.<sup>26</sup> The officer can also sanction for prosecution for offences made punishable under the Act.<sup>27</sup> The Commissioner of Food Safety has to appoint in each district of the state, mandated for each district<sup>28</sup>, officers for food safety administration, known as “Designated Officer, who shall not be below the rank of a Sub-Divisional Officer”.<sup>29</sup> The designated officer is also provided with the power to grant or reject licenses, prohibit manufacture, sale and distribution of food articles, recommend for, for offences for which punishment is imprisonment, and sanction or launch prosecution, for offences for which punishment is fine, as mentioned in the Act.<sup>30</sup> The commissioner of food safety shall also appoint food safety officers in local areas for the implementation of the provisions of the Act.<sup>31</sup> The “Food Safety Officer” can take a “sample, seize any article of food which appears to the officer is in breach of the provisions of the Act” and keep in its custody the food article on a reasonable doubt as per involvement in “any offence related to food and thereafter inform the Designated officer of the actions” undertaken by the officer.<sup>32</sup> The food safety officer shall send the sample to the food analyst who in return sends the report of the analysis to the Designated Officer and its copy to the Commissioner of food Safety.<sup>33</sup> The designated officer after analyzing the report sends his recommendation to the commissioner of food safety for launch of prosecution if the

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<sup>20</sup> Food Safety and Standards Act, 2006, available at: <https://www.fssai.gov.in/upload/uploadfiles/files/FOOD-ACT.pdf>.

<sup>21</sup> *Id.*, s. 4.

<sup>22</sup> *Id.*, Preamble to the Act.

<sup>23</sup> *Id.*, s. 16.

<sup>24</sup> *Id.*, s. 29.

<sup>25</sup> *Id.*, s. 30(1).

<sup>26</sup> *Id.*, s. 30(2)(a).

<sup>27</sup> *Id.*, s. 30(2)(e).

<sup>28</sup> *Id.*, s. 36(2).

<sup>29</sup> *Id.*, s. 36(1).

<sup>30</sup> *Id.*, s. 36(3).

<sup>31</sup> *Id.*, s. 37(1).

<sup>32</sup> *Id.*, ss. 38(1) and 41.

<sup>33</sup> *Id.*, s. 42(1) and (2).

offence is punishable with imprisonment.<sup>34</sup> The “commissioner of food safety sends its decision to the designated and the food safety officer who then launches the prosecution in the courts of jurisdiction”.<sup>35</sup> It is also provided that the “Commissioner of food Safety and the Designated officer can exercise the same powers which are conferred upon the Food Safety Officer”.<sup>36</sup>

### ***B. The application in the MAGGI case<sup>37</sup>***

#### ***(i) Background of the case***

Nestle India filed petition in the Bombay High Court for an appropriate writ to be issued against the order of the Commissioner of Food Safety. It all started when a food inspector in Uttar Pradesh in Barabanki district after he became suspicious about its claim that it doesn't have MSG in it, sent a packet for analysis in the laboratory recognized by the state.<sup>38</sup> After knowing of the result that showed that the package contained MSG contrary to the claim sent the report to the petitioner, the Food Safety Authority and the Chief Executive Officer.<sup>39</sup> On the request of the Nestle India the sample was also sent to a laboratory in Kolkata which in its report also stated the level of lead in the product, at 17 ppm, which was higher than the allowed limit i.e. 2.5 ppm.<sup>40</sup> The petitioner after publication of a news item on the excess quantity of lead in its product in a press release withdrew its products from the market.<sup>41</sup> The petitioner was asked to meet the Chief Executive Officer and the same day it ordered for the ban of the product.<sup>42</sup> The Commissioner of Food Safety also issued an order prohibiting the product in the Maharashtra state.<sup>43</sup> On the basis of averments made by the petitioner and the respondents in the case many issues were framed by the High Court of Bombay which included right of being heard as a principle of natural justice not followed by the authority and the recognition of the laboratories by NABL etc. In almost all of the issues the respondents could not present a case in their favour and therefore the claims of the petitioner were accepted by the Court. The court passed the order in the favour of the petitioner.

#### ***(ii) The relevant legal issue***

Irrespective of the result of the petition in the High Court it is important to assess one of the determinations to an issue framed by the Court. The issue framed is as follows: -

*“(VII)What is the source of power under which the impugned orders were passed and whether such orders could have been passed under sections 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act?”<sup>44</sup>*

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<sup>34</sup>*Id.*, s. 42(3).

<sup>35</sup> *Id.*, s. 42(5).

<sup>36</sup>*Id.*, s. 29(6).

<sup>37</sup>*Nestle India Ltd. v. Food Safety Authority of India*, WPL/1688/2015, Bombay High Court.

<sup>38</sup>*Id.* at 11, para. 11.

<sup>39</sup>*Id.* at 12.

<sup>40</sup>*Id.* at 12, paras. 11,13.

<sup>41</sup>*Id.* at 14, para. 16.

<sup>42</sup>*Id.* at 14, para. 17.

<sup>43</sup>*Id.* at 15, para. 18.

<sup>44</sup>*Id.* at 23.

The Court answered the issue in this manner: -

*“In our view, from the perusal of the aforesaid provisions it is difficult to accept that the Food Authority can pass the impugned orders under these provisions. It is difficult to trace the origin of the power to ban the product on emergency basis to sections 10(5), 16(1), 16(5), 18, 22, 26, 28, 29 of the Act.”<sup>45</sup>*

Before deciding the abovementioned issue, the court explained some of the provisions of the Food Safety and Standards Act. The court stated that the food authority, Commissioner, designated officer and the food inspector has been provided powers under the Act with ascending order of coercion.<sup>46</sup> It further stated that the powers of the food authority can be divided into three forms i.e. suspension of license, imposition of ban or prohibition and launch of prosecutions.<sup>47</sup> The court was at this juncture assessing the order passed by the Chief Executive officer which stated that the food authority under subsection (1) of section 16 and clauses (a), (b), (c), (f) and (g) of subsection (1) of section 18 and further read with sections 26 and 28 directs the company to withdraw and recall its products from the market and stop its manufacture, distribution and sale.<sup>48</sup> The court stated that under subsection (1) of section 16, calling it “*an omnibus provision*”, the Act imposes “*a duty and obligation on the food authority to regulate food business to ensure food safety and does not empower the food authority to ban a product*”.<sup>49</sup> It referred to subsection (5) of the section 16 and stated that the it only empowers the food authority to pass directions to the commissioner of food safety and nothing else.<sup>50</sup>

The court then referred to subsection (1) and (2) of the section 18 and stated that it enumerates guiding principle for implantation of the provisions of the Act and guiding principle for framing regulations under the Act respectively.<sup>51</sup> It stated that the section is no more than guidelines and cannot be said to be the source of power.<sup>52</sup> The words are: -

*“We fail to understand as to how these guiding principles can be said to give power to the Food Authority or Commissioner of Food Safety in passing the impugned order at Exhibit-A. This section also cannot be said to be a source of power since it only lays down the guidelines.”<sup>53</sup>*

Finally, the court stated that under section 26 and 28 the food authority has no power to issue the impugned order as these section only enumerates the responsibilities of the food business operation and imposes a duty and obligation upon them and therefore the food authority cannot trace its powers under these provisions.<sup>54</sup>

#### IV. THE CODEX AND EU LEGISLATION

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<sup>45</sup>*Id.* at 60, para. 65.

<sup>46</sup>*Id.* at 18, para. 25.

<sup>47</sup>*Id.* at 18, para. 26.

<sup>48</sup>*Id.* at 28, para. 38.

<sup>49</sup>*Id.* at 61, para. 67.

<sup>50</sup>*Id.* at 62, para. 69.

<sup>51</sup>*Id.* at 63, para. 73.

<sup>52</sup>*Ibid.*

<sup>53</sup>*Ibid.*

<sup>54</sup>*Id.* at 67-72, paras. 72-74.

### A. Codex: What it has?

The “Codex Alimentarius Commission” was formed jointly by the FAO and the WHO which can be said to be the result of the *Codex Alimentarius Europaeus* formed in 1958. In 1961 the *Council of the Codex Europaeus* passed a resolution that its working shall be taken over by the FAO and WHO and in the 11<sup>th</sup> Conference of the FAO the Commission was formed.<sup>55</sup>The Codex is the “collection of internationally adopted food standards” which aim at protecting human health and is “intended to guide and promote the elaboration of definitions and requirements to assist in their harmonization”.<sup>56</sup>India is the member of the Codex Alimentarius Commission since 1964.<sup>57</sup> India is also currently the regional coordinator for the Codex Coordinating Committee for Asia (CCASIA).<sup>58</sup>The commission publishes a working manual which provides the guiding principles to be applied in food safety. The 27<sup>th</sup> edition of the manual in its Seventh Section contains the working principle for risk analysis adopted in 2003 to be applied in the framework of the Codex and the definition of risk analysis terms relating to food safety adopted in 1997 among other things.<sup>59</sup> It mentions that risk analysis is composed of three elements i.e., risk assessment, risk management and risk communication.<sup>60</sup> It also states as follows: -

*“Precaution is an inherent element of risk analysis. Many sources of uncertainty exist in the process of risk assessment and risk management of food related hazards to human health. The degree of uncertainty and variability in the available scientific information should be explicitly considered in the risk analysis.”*<sup>61</sup>

### B. EU legislation on Food Safety

The European Parliament in 2002 passed a regulation, No. 178/2002, laying own the “general principles and requirements of food law” which established the “European Food Safety Authority”.<sup>62</sup> The regulation states that it is for providing the basis “for the assurance of a high level of protection of human health” by a strong science based procedures and efficient organizational arrangements for “decision making” in matters for food safety.<sup>63</sup> Further that, for the purposes mentioned above, it lays down the general principle and that it shall apply to all stages of production, processing and distribution of food.<sup>64</sup> Article 2 of the regulation defines food :-

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<sup>55</sup>See Codex Alimentarius, “About Codex: History”, available at: <http://www.fao.org/fao-who-codexalimentarius/about-codex/history/en/> (last visited on Oct., 02, 2019).

<sup>56</sup> FAO and WHO, *Codex Alimentarius Commission: Procedural Manual* 21, para. 1 (Rome, 27<sup>th</sup> edn., 2019).

<sup>57</sup>See Codex Alimentarius, “About Codex: Members”, available at: <http://www.fao.org/fao-who-codexalimentarius/about-codex/members/en/> (last visited on Oct., 02, 2019).

<sup>58</sup>*Ibid.*

<sup>59</sup>*Supra* note 56 at 121.

<sup>60</sup>*Id.*, para. 5.

<sup>61</sup>*Id.* at 122, para. 11.

<sup>62</sup>Regulation (EC) No. 178/2002 of the European Parliament and of the Council (Jan. 28, 2002), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0178&qid=1572287272009&from=EN> (last visited on Oct. 02, 2019).

<sup>63</sup>*Id.*, art. 1 para. 1.

<sup>64</sup>*Id.*, art. 1 paras. 2,3.

*“as any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans and includes drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment and does not include feed, live animals unless they are prepared for placing on the market for human consumption, plants prior to harvesting, medicinal products, cosmetics, tobacco and tobacco products, narcotic or psychotropic substances and residues and contaminants”.*<sup>65</sup>

Under Article 5 the regulation provides that the objective of the food law “*is high level of protection of human life and health and also consumers interests including fair practices in trade*” and “*where appropriate taking in account animal health and welfare, plant health and environment*”.<sup>66</sup> It also lays down that international standards shall be taken into consideration except when it is ineffective or inappropriate for the fulfillment of the legitimate objectives.<sup>67</sup> Further it lays down that in order to ensure the high level of protection food law shall be based on “*risk analysis except when not appropriate*”.<sup>68</sup> It states that risk assessment shall be based on available scientific evidence and the precautionary principle as laid down in Article 7(1).<sup>69</sup> The Article 7, with the heading “precautionary principle” states as follows:-

*“1. In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment.”*<sup>70</sup>

The Article further provides that if any measure is adopted under the above principle then such actions shall be proportionate and shall also take into consideration the economic and technical feasibility.<sup>71</sup> The regulation under Article 22 establishes the European Food Safety Authority with one of the missions to contribute to the high level of protection of human health and life, plant health and environment.<sup>72</sup> It consists of a management board, executive director, scientific committee and scientific panels and an advisory forum.<sup>73</sup>

## V. NATIONAL GREEN TRIBUNAL AND GOA

The National Green Tribunal established in 2010 is a judicial body which decides on matters or disputes relating to environment. The jurisdiction of the tribunal is provided in section 14 of Act which states that “*the tribunal has jurisdiction over all civil cases where*

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<sup>65</sup>*Id.*,art. 2.

<sup>66</sup>*Id.*,art. 5 para. 1.

<sup>67</sup>*Id.*, art. 5 para. 3.

<sup>68</sup>*Id.*,art. 6 para. 1.

<sup>69</sup>*Id.*,art. 6 para. 2,3.

<sup>70</sup>*Id.*, art. 7 para. 1.

<sup>71</sup>*Id.*, art. 7 para. 2.

<sup>72</sup>*Id.*, art. 22 paras. 1,3

<sup>73</sup>*Id.*, art.24.

*substantial question relating to environment is involved*” and what is a substantial question is defined in clause (m) of Section 2. However, it is important for the discussion for this paper to refer to a decision of the National Green Tribunal where it has explained its jurisdiction as warranted by the Act in addition to Section 14 or included impliedly under it. The case is *Goa Foundation v. Union of India* in which the petitioners asked the tribunal to pass an order restraining the responsible authorities from granting any consent or environmental clearance for any project in the region of the Western Ghats.<sup>74</sup> One of the legal issues that was discussed was that the tribunal does not have jurisdiction to pass such an order and therefore the petition was not maintainable.<sup>75</sup> It was the contention on the part of the state that there is no dispute in this case which could be related to section 14 and also that no legal injury had been stated to be inflicted upon any person and therefore there was no cause of action under the rules of practice.<sup>76</sup> In order to answer the issue the tribunal referred to GP Singh’s *Principles of Statutory Interpretation* and stated that the preamble to the Act is a percept to gather legislative intent and an instrument guiding a prudent legislative interpretation.<sup>77</sup> It then states:-

*“The essence of the legislation, like the NGT Act, is to attain the object of prevention and protection of environmental pollution and to provide administration of environmental justice and make it easily accessible within the framework of the statute. The objects and reasons of the scheduled Acts would have to be read as an integral part of the object, reason and purposes of enacting the NGT Act.”*<sup>78</sup>

The tribunal then referred to Section 20 of the Act and stated that “*precautionary principle would operate where actual injury has not occurred*” and would constitute sufficient cause of action as the “*principle is permissible and is opposed to actual injury or damage*”.<sup>79</sup> It also stated that the application of the precautionary principle is a statutory command and even an apprehended violation would be actionable under the principle. It stated further that “inaction could itself be a violation of the precautionary principle” and thus bring it under the jurisdiction of the Tribunal. Further that, when the above provision is read with subsection (1) of Section 3 and Section 5 placing statutory obligations on the government, it shows that the intention of the legislature was to provide a wider jurisdiction to the tribunal and any violation of the obligations will be a “*substantial question of relating to environment*”.<sup>80</sup> Finally the tribunal held that the petition was maintainable as the applicant was able to make a case of “*non-performance of the statutory obligation*” under the precautionary principle.<sup>81</sup>

## VI. “GUIDING PRINCIPLE” OR “A SOURCE OF POWER”

In the previous part of the paper, it was stated that the High Court of Bombay in the “Maggi” case, when discussing about the section 18, held the section to be only guidelines

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<sup>74</sup>M.A. No.49 of 2013 in Application No. 26 of 2012, NGT.

<sup>75</sup>*Id.* at 15, para. 14.

<sup>76</sup>*Id.* at 16, para. 15.

<sup>77</sup>*Id.* at 18-20, paras. 17-19.

<sup>78</sup>*Id.* at 24, para. 24.

<sup>79</sup>*Id.* at para 42 page 37.

<sup>80</sup>*Id.* at para 42 page 38.

<sup>81</sup>*Id.* at para 43 page 40.

and not a provision which can provide power to the authorities to take any action. However, it is pertinent to note that Europe in its jurisdiction does use the similar and almost the same statute in a different manner. In this regard, it is regularly stated in literature relating to the precautionary principle that precaution is not for the Americans but for the Europeans whenever a comparative study is presented.<sup>82</sup> It is because of the fact that European Union has in its treaty forming the Union declared that they will be applying the principle of precaution in protecting the environment and public health.<sup>83</sup> In the year 2000 it also issued a communication on the principle for the better implementation of the principle.<sup>84</sup> It will be surprising to know that the precautionary principle became popular at the level of the European Union when the European Court of Justice delivered a judgment against the plea of United Kingdom to hold a ban invalid which prohibited the export of beef, as a food, on the basis of the principle.<sup>85</sup> It was stated in the judgment that in cases “where there are uncertainties” regarding the “existence of risks” then in these cases protective measures shall be taken without even “waiting for the proof” that such a risk is “fully established”. The words are: -

*“Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.”<sup>86</sup>*

After this judgment the principle has been repeatedly applied to question many issues relating to food trade and business in order to protect the health of the Europeans. The communication on the precautionary principle also holds that it is a part of the general international law and reads the principle to be included in the Sanitary and Phytosanitary agreement of the WTO.<sup>87</sup> Imperative to be mentioned here is that European Union while defending the status of the principle in WTO Dispute Settlement Body referred to the judgments of the Supreme Court of India to state that countries have adopted the principle and have been using it in domestic matters.<sup>88</sup> The Section I of the EU legislation, discussed earlier, mentions the precautionary principle in Article 7 under the heading of “general principles of food law”.<sup>89</sup> The Section 18 of the Indian Food Safety Act incorporates the same Article. Therefore, something which has given so much power to authorities like the European Commission/Union, cannot provide power to authorities under the Indian Act appears to be unacceptable.

## VII. CONCLUSION

The question here is whether precaution is for Indians also or not? The Food Safety and Standards Act under section 18 provide the guiding principles which is to be referred to while implementing the provisions of the Act by the governments, food authority and other

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<sup>82</sup> Joakim Zander, *The Application of the Precautionary Principle in Practice: Comparative Dimensions* 267 (Cambridge University Press, 2010).

<sup>83</sup> Maastricht Treaty, Part XVI, Article 130r, 1992.

<sup>84</sup> Communication on Precautionary Principle, 2000, available at: <https://publications.europa.eu/en/publication-detail/-/publication/21676661-a79f-4153-b984-aeb28f07c80a/language-en> (last visited on Oct. 02, 2019).

<sup>85</sup> C-180/96, *United Kingdom v. Commission*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61996CJ0180&from=EN> (last visited on Oct., 02, 2019).

<sup>86</sup> *Id.* at 2298.

<sup>87</sup> *Supra* note 84 at 10, para. 4.

<sup>88</sup> See WT/DS291/R, *Biotech Case*.

<sup>89</sup> *Supra* note 70.

agencies. It would be interesting to note that whole Section 18 is the combination of the Article 5,6 and 7 of the regulation “178/2002” which is the “EU Food Law” as discussed in the earlier part of the paper. This particular article of the “EU Food Law” appears to be the outcome of the developments in the food safety decisions of the European Court of Justice and the principle is being applied in the same manner as was applied in the BSE case of 1998. Therefore, the precautionary principle has seen its development in food safety and environmental issues taken together and if Indian courts and tribunals have contributed to the development of the principle in the area of environment protection then the same shall, in proportionate manner, be applied in the food safety issues also. If the undefined but the words itself “precautionary principle” can give additional jurisdiction to the National Green Tribunal then it is paradoxical that a defined, outlined, detailed procedure of precautionary principle, provided in section 18 of the Food Act, where measures are required to be taken does not provide power to the responsible agencies to take precautionary action in the interests of public health just because the marginal note of the section does not say precautionary principle but only guiding principle.

In the A.P. Pollution case the court talks about effective state institutions while discussing the weakness of the then existing Acts which had created authorities to solve disputes regarding environmental degradation. The court discussed the above because Good Governance was seen as an important policy for the state to see that inaction on the part of the state is not a reality in future. The question then is how an institution can be effective. Is it not correct to say that unless and until, an authority endowed with an object, clearly mentioned in the preamble of the Act which has created it follows it in its true spirit, it cannot be an effective institution? Further that when such an authority takes an action in pursuance of the object for which it has been created should the adjudicating authorities also give a wider and purposive interpretation of the statute under which it has acted as the question involves an important aspect which is the right to healthy life or public health concerns. The author is not shy in claiming that in the context of environmental disputes the courts have proceeded to give directions against the erring parties acting under the pretext of breaches of the fundamental right to healthy environment even when they are not states under Article 12 of the Constitution of India. Importantly, the question whether it is a state or not is not all discussed, and all thanks goes to the judgment of the *Oleum Gas Leak case* which started a new jurisprudence in the context of environmental law in the country. Shall we wait for another Oleum to get a landmark judgment is a question that does not need an answer.

As said in the introduction to the paper a pollutant is as equally dangerous as an adulterant because one is inhaled and the other is consumed. The route of assimilation may be different but the consequence of both may be same or it is the same. When the country is moving forward with schemes directed towards fit and improved India then the courts shall also not lose sight of the developments which are happening internationally in the regime of food safety. The courts should, at every opportunity, give more power to the regulatory authorities in cases of breach by the industrial conglomerates who are still oblivious towards the environment and also now towards food safety. The author takes the opportunity to state that one of the origins of the precautionary principle is the result of arsenic poisoning in England in 1899 when the Royal Commission in 1900 decided to provide a minimum level of arsenic allowed in beer after scientific studies could not present a safe level.<sup>90</sup> Therefore, even

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<sup>90</sup> See for details Akash Anand, Evolution and Development of Precautionary Principle in Furtherance of Environment Protection, Chapter 2 (Thesis submitted in Faculty of Law, University of Delhi).

the origin of the precautionary principle overlaps between environment protection and food safety.

India is a country still struggling to become a developed nation and international corporates see the country as a huge market for their products. If the authorities responsible for food safety are not made powerful with provisions already mentioned in the statutes, then it may lead to a situation from where there may be no reversal. So, the time is ripe with the provisions already existing and the thing needed is foresight and anticipation.