ENVIRONMENTAL JUSTICE IN INDIA:

The manifestation of neo-*dharmic* jurisprudence in postmodern public law

by

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ABSTRACT

Within the last two decades, India has not only enacted specific legislation on environmental protection but has also virtually created a new fundamental right to a clean environment in the Constitution. The models and methods adopted in the Indian context appear, at first sight, similar to those in other common law systems. Yet, there are many subtle differences which have changed the structure and content of legal development in India. Indian environmental jurisprudence brings out the unique characteristics of a new legal order which has been gradually established in India.

The distinguishing nature of this jurisprudence, as this thesis shows in detail, has three interconnected elements. First, the nature of the new Indian constitutional law regime accords greater importance to public concerns than protecting private interests. Current Indian jurisprudence shows an increased assertion of public accountability by enlarging the domain of public law. This has created new dimensions of justice based on a new public law rationale which reacts constructively to established common law models.

Secondly, this jurisprudential development reflects certain aspects of Indian legal culture, through implicit and explicit reliance on autochthonous values and concepts

of law, encapsulated in the Indian juristic postulate of *dharma*. The new developments reflect distinct elements of Indian *dharmic* legal culture, which are markedly different from common law postulates evolved out of an individualistic, property-based private law culture.

Thirdly, the emerging Indian environmental jurisprudence bears testimony to the activist role of the Indian judiciary which has also had a significant impact in many areas other than environmental law. In short, the development of environmental jurisprudence in India manifests neo-*dharmic* jurisprudence in postmodern public law. It accommodates ideas currently voiced by experts around the world for protecting the environment, in forms modified by the legal culture of India.

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This thesis is not a mere product of the years spent in London, particularly at SOAS as a research student, but the fruit of a seed planted nearly a decade ago, in a little known corner of the world, the state of Kerala in India. Within this decade several personalities have helped me nurture this tender jurisprudential sapling by developing my views and thoughts on the subject in many ways.

To begin with, Dr. Leelakrishnan at Cochin University in Kerala, as a pioneering scout, led me into this then unchartered territory when I was an LL.M. student under his guidance. Dr. Armin Rosencranz, then a Visiting Professor at Cochin, put me into the international scene with the publication of our article in the Columbia Journal of Environmental Law. But most of all, the unique personality whose perception about law and society had the greatest impact on my juridical thinking is Justice V.R. Krishna Iyer. As young Advocates at the Kerala High Court, my wife and I were closely associated with him in some of his activities, to render access to justice at the grass-roots level, in which he engaged himself on his retirement from the Supreme Court of India.

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CHAPTER 1 INTRODUCTION

1.1 The focus of the study

The development of environmental jurisprudence in India may appear, at first sight, similar to what we see in other common law countries. Yet, a closer analysis reveals that India has been developing a form of environmental jurisprudence which is significantly different from other common law systems. In fact, Indian environmental jurisprudence brings out the unique characteristics of the new legal order which has been gradually established in India during the late 1970s and throughout the 1980s and early 1990s.

India not only enacted various specific laws to control environmental pollution, but has also incorporated significant provisions for the protection of the environment into its Constitution.[1] Within the last two decades, the development of environmental jurisprudence in India, following these constitutional law changes, has been remarkable in the sense that it has led to the virtual creation of a fundamental right to a clean environment in Indian law. This forms part of the public law regime established by the Constitution and appears to be based not only on modern concepts of fundamental human rights but also on indigenous notions of social justice, constituting a

unique human rights approach adopted through affirmative action.[2]

The main aim of this thesis is to bring out the distinct nature of this new Indian environmental jurisprudence by analysing its development within a broader constitutional and jurisprudential framework. In fact, the emerging Indian environmental jurisprudence has relied on three interconnected elements. First, it manifests the new Indian constitutional law rationale which now clearly accords importance to public concerns rather than to protecting private interests. Secondly, it reflects certain aspects of Indian legal culture through implicit and explicit reliance on autochthonous values based on ancient, pre-colonial indigenous notions and concepts of law. Thirdly, it bears testimony to the uniquely activist role of the higher Indian judiciary in promoting this new rationale. These three interconnected elements characterise the manner and approach adopted in the recent development of Indian environmental jurisprudence.

The major purpose of the present thesis is to analyse this recent development and to show how Indian environmental jurisprudence functions not as an adjunct to the common law systems, but as an independent and yet interconnected mechanism for the legal protection of the environment. The analysis of Indian environmental jurisprudence also shows that it proceeds closely in line with legal ideologies

towards creating a human right for a clean environment, which has been frequently voiced in international fora.[3] While this thesis cannot focus on the international legal dimension, the current Indian experience strengthens the arguments against the development of environmental law within a regulatory law paradigm adopting economic rationalisation, as found particularly in the Anglo-American common law jurisdictions.[4]

The development of environmental law in the Anglo-American common law jurisdictions has been built on a regulatory private law approach,[5] where the protection of proprietary interests tends to take precedence over public interests.[6] It is argued here that the Indian jurisprudential development counters this approach by refuting economic rationalisation as the major criterion for environmental law development. The Indian experience also shows that the problems of protecting the environment transcend mundane levels of legal, economic, political or social conceptualisations and involve the intricate problem of accommodating varied and conflicting concepts and ideologies. The present thesis argues that this is not a new predicament. It shows in detail that awareness of ancient concepts for protecting Nature and the 'environment', in a wider sense, can be and has been put to productive use in the development of a modern regime of environmental regulation and jurisprudence that implies not only pious talk but also serious action.

The fundamental question that confronts the developing economies is to establish an ideology of law to regulate society in a comprehensive manner and to set the limits and goals of development.[7] Briefly, the current global concern to protect the environment reflects a re-thinking in the West about the fundamental ideology upon which the laws to protect the environment have been built. There is growing acceptance in the West that non-Western cultures may know a great deal about the intimate links of man and environment and intricate methods to regulate them.[8] Theories of legal pluralism also assert the significance of legal cultures in the context of 'law and development'.[9] The widespread quest for developing indigenous alternative approaches to law requires the modernisation of indigenous law rather than the use of 'modern' law as an instrument of modernisation.[10] Within the current environmental crisis, where ecological despoliation is perceived as a direct threat to humanity, every aspect of modernity - science, technology, capitalism, socialism, democracy and nationalism - is now being re-examined, based on new 'eco-centric' philosophies and environmental ethics, if not a new eco-centric religion.[11]

The 1987 Report of the World Commission on Environment and Development [WCED] showed the possibility of a new era of economic growth.[12] Although sustainable development has been criticised as a catch-all phrase and a vague concept where one encounters moral convictions as a substitute for practical thought,[13] the concept has come to stay following

the Earth Summit at Rio de Janeiro in 1992 which presented a programme of action based on it.[14] The need to take into consideration environmental ethics and morals as aspects of human rights and duties is quite apparent today at the international level.[15] With the problem of environmental degradation becoming globally accepted as a matter of serious and grave concern, legal solutions to environmental problems lie not in temporary legal remedies but in fundamental ideological changes in the role and use of law.[16] The development of Indian environmental jurisprudence shows how, within a modern constitutional law framework, such a comprehensive approach can be maintained and used.[17]

1.2 The complexity of the present Indian scenario

The Indian Constitution, as a political document, laid down the imperatives of the state's responsibility towards its citizen by guaranteed fundamental rights. At the same time it required the state to carry out numerous policies to achieve several constitutional ideals for the nation's future socio-economic and legal development. Together they reflect strong aspirations towards the construction of a new legal order in which the state is placed under great responsibility as an embodiment of the collective will. Thus the Indian Constitution has gradually ushered in, particularly during the last two decades, a new constitutional law rationale which is a conscious move away

from the earlier common law-based Western legal traditions.

Although the plan for a new legal order was envisaged by the framers of the Constitution nearly half a century ago, its more perceptible beginnings emerged only within the last two decades. Several cardinal provisions of the Indian Constitution have been given interpretations quite differently from that which they were hitherto thought to imply. In particular, greater importance has been given to the Directive Principles of State Policy, including several new directives introduced by constitutional amendments in 1976, through an expanded judicial interpretation of the provisions of fundamental rights.

The concept of 'the state' has been widely enlarged to bring numerous activities into the public law domain. The concept of 'equality before law', protected under the Constitution, has led to the creation of a public law doctrine against state 'arbitrariness', resulting in a more effective check on all administrative actions. The right to life, guaranteed by the Constitution, has been expanded both substantively and procedurally. The concept of life has been interpreted to include ideals for a dignified life, clearly embracing indigenous values. Any 'procedure established by law' that could deprive an individual of this dignified life has to be judicially recognisable as just, fair and reasonable.

The cumulative effect of these various constitutional reinterpretations, discussed in more detail below, has been the evolution of a new public law rationale which asserts and emphasises public duties and public accountability and clearly accords greater importance to public interests rather than protecting private interests. In short, there has been a dramatic reorientation of legal ideologies in India within the last two decades in establishing the new public law regime.

The creation of an indigenous form of public interest litigation, also called social action litigation, has become a unique and powerful mechanism for speedy and less costly recourse to redress common human rights grievances which affect the lives of many Indians.[18] Active judicial law-making through social action litigation has brought about phenomenal changes in Indian constitutionalism which are now beginning to be analysed and debated in more detail.[19] This new development has had significant implications for the development of environmental jurisprudence in India. The judicial pronouncements on environmental issues, brought as public interest litigation under constitutional law have significantly enhanced legal growth and have set trends for the development of India's new legal regime. Since 1986, all major Indian statutes and their amendments have incorporated liberalised rules about standing and speedier procedures. The Environment (Protection) Act, 1986 is only the most relevant example in the present context.[20] However, while

there has been much statutory modification in the specific Indian environmental legislation, a critical examination reveals many defects, showing how legislative and administrative policies are yet to adapt to the significant developments initiated and directed by the judiciary.

The judiciary-led legal developments in India were achieved by resorting to the extraordinary powers of the higher courts. The extensive writ jurisdiction of the Supreme Court and the High Courts under the provisions of the Constitution allowed for the consolidation of a societal role for the judiciary.[21] This powerful position of the judiciary has enabled the higher Indian judiciary to mould new concepts and strategies and to develop the law in accordance with newly evolving legal ideologies, influenced by international legal developments as much as by South Asian values and domestic notions of law and justice. The analysis of numerous cases decided within the last decade or so shows the tremendous contribution of the Indian judiciary in directing this orientation of Indian jurisprudence. A positive yet critical analysis reveals and illustrates how what a Japanese jurist has called 'legal postulates' underpin these judicial dialectics and rhetoric.[22]

The development of Indian environmental jurisprudence by the Indian judiciary not only reflects the changes in legal ideology but also brings out the uniqueness of the Indian legal culture. The Indian legal system has been

considered to be a common law system for all practical purposes.[23] However, it has always accommodated and amalgamated legal notions and values peculiar to the socio-cultural traditions of South Asia.[24] Indian environmental jurisprudence as part of the Indian constitutional law demonstrates the greater process of constructing a new legal order in India and thus the productive application of indigenous 'legal postulates.' Some decades ago, when Professor Julius Stone challenged Indian scholars to explain what precisely other countries could learn from her "cultural heritage", the result was disappointing, according to one eminent scholar in London, who then attempted to show some elements of the *dharma* concepts for world peace.[25] The manifestation of cultural factors is increasingly apparent now, particularly but not exclusively in the protection of the environment in India.

The ancient philosophies of law in India, as far as they seem relevant to a discussion of environmental law in India today, show how in India, from very early times, the regulation of human conduct included implicit concern for Nature or the environment. The Indian way of life and in particular Hinduism as a cosmic religion envisage the intimate interlinking of all microcosmic as well as macrocosmic concerns in every aspect of human existence.[26] This kind of systemic universal view provides basic conceptual elements which are inherently relevant for ecological discussions and environmental law. For various

reasons, such conceptual elements have implicitly, rather than explicitly, been relied upon as the legal postulates of current Indian environmental jurisprudence.

There is now a rapidly growing literature on Indian traditions and philosophies relating to the environment.[27] This literature, too, seems to indicate that the Indian concept of *dharma*, which encapsulates the underlying traditional Indian legal culture, has been an important contributing force behind the current legal developments in India.[28]

As indicated, the present thesis demonstrates how the new public law rationale has been able to modify the traditional British-influenced Indian law to tackle environmental issues. I shall show in chapter 3 below how the public nuisance provisions under the civil and criminal laws of India have recently been reinterpreted to become an important part of Indian environmental jurisprudence. The powers of the magistrate to curb public nuisance, envisaged under the Criminal Procedure Code of 1973, have now become an effective mechanism to oversee the neglect of local amenities by local bodies and public authorities. Unlike the Anglo-American common law jurisdictions, in which the law of public nuisance remains an ineffective tool for the protection of the environment,[29] the Indian experience shows how this somewhat defunct law has been effectively revitalised and revived for the purpose of environmental

protection. The result is a distinctive jurisprudential outcome based on the explicit constitutional mandate to protect the environment.

Overall, therefore, the recent Indian environmental jurisprudence, arising out of the progressive evolution of modern constitutional law rationales towards establishing a unique public law regime, combined with ancient notions of ecological balance, appears as a postmodern legal development.[30] It can, as this thesis will attempt to show, appropriately be termed as 'neo-*dharmic*' and it is immensely complex in its conceptual foundations and actual manifestations.

1.3 The structure of the thesis

To unravel this complex structure, I have decided not to proceed historically, discussing first ancient notions of legal postulates, but to focus initially on modern India's constitutional framework. Given that modern Indian environmental jurisprudence has developed as a sub-category of constitutional law rather than as a field of isolated regulatory statutes, the present thesis will need first to focus to a considerable extent on recent developments in Indian constitutional law. Without taking this approach, the recent developments in Indian environmental law could not be put to productive use for a jurisprudential analysis.

Chapter 2 brings out those aspects of the Indian constitutional law background which are relevant to the recent development of Indian environmental jurisprudence. The relevant parts of the Indian Constitution of 1950 itself are analysed first to show how they provided an important basis for current legal developments.

As we have noted already, these provisions reflect aspirations towards the construction of a new legal order. This quest to create a new order, consciously moving away from the earlier colonial domination with its common law tradition, becomes gradually stronger in the interpretations given to several cardinal provisions of the Indian Constitution. This chapter thus analyses the importance accorded to the Preamble, and investigates the crucial relationship between the guaranteed Fundamental Rights in Part III and the ideals and policies contained in the Directive Principles of State Policy in Part IV of the Constitution. Later sub-sections focus on the impact of the judicially expanded meaning of relevant Fundamental Rights provisions of the constitution which have become significant for the development of Indian environmental jurisprudence. Particularly, the expanded concepts of 'the state' in Article 12, 'equality before law' in Article 14 and 'protection of life' in Article 21 of the Constitution require some analysis.

This chapter also evaluates the extraordinary writ

jurisdictional powers of the Supreme Court and the High Courts. Many of the judiciary-led legal developments were achieved by resorting to these powers. The drive towards a new socio-legal order, coupled with the power conferred by the extraordinary jurisdiction, prompted the creation of an indigenous form of public interest litigation also called social action litigation [SAL].

But not everything has depended on the judiciary. It has been of great relevance for the development of Indian environmental jurisprudence that some new Directive Principles of State Policy, and other relevant provisions emphasising duties rather than rights, were introduced by important constitutional amendments in 1976. The chapter brings out the scope and extent of the new constitutional law regime which has been relied upon heavily for the development of environmental jurisprudence in India.

Chapter 3 traces the common law foundations of Indian environmental jurisprudence and shows how they have later given way to a public law rationale. In India, under the earlier common law tradition, the development of law against perpetrators of environmental harm often proved inadequate. It seems that this was so because the early laws, in particular the use of public nuisance law, followed to a large extent the developments under the English common law. The incorporation of public nuisance in specific provisions under the civil and criminal codes in India did not, by

itself, liberate the application of the law from its common law limitations and traditional understanding. Further, the restrictive rules on standing under the common law tradition prevented ordinary people from seeking judicial remedies to abate environmental degradation and pollution as public nuisance. Some of the early relevant cases on public nuisance are analysed in order to show the extent to which this branch of law was resorted to and to highlight its limited usefulness. The chapter then proceeds to show the impact of the new public law rationale which has been able to bring about radical changes in the meaning and usefulness of this particular area of law, linking it productively to the new constitutional law regime.

Chapter 4 evaluates the major Indian environmental legislation and its administration, pointing out the defects and the fundamental problems which have undermined the effectiveness of such legislation, as well as discussing recent changes. It focuses on the Water Act of 1974, the Air Act of 1981 and the Environment Protection Act of 1986 in order to ascertain to what extent these enactments have achieved their respective purpose of environmental protection. A critical assessment of these specific laws shows that a more effective remedial mechanism is needed particularly at the local level. This is an area in which ideals, policies and administrative realities are yet to be resolved. The present situation raises serious doubts about the appropriateness of the new legal strategies adopted for

achieving an ecological balance and ecologically sound economic development.

Chapter 5 focuses on the nature of the Indian legal system as a conceptual entity and seeks to identify the significant aspects of Indian legal culture and the place of environmental protection within this context. This task involves tracing the ancient philosophies of law in India as far as they seem relevant to a discussion of environmental law today. The chapter shows how in India, from very early times, the regulation of human conduct included implicit concern for Nature or the environment. Such universal and cosmic concerns have provided conceptual elements that have formed an integral part of Indian legal philosophy from time immemorial. These underlying conceptual elements are discussed here in order to examine their relevance for the emergence of modern Indian environmental jurisprudence.

Further, the recent literature on tradition and philosophy of ecology, with a growing number of contributions from Indian legal writers, is examined here to support the hypothesis that traditional concepts can be usefully employed today. It appears that the concept of *dharma*, which underlies traditional Indian legal culture, has been contributing to current legal development in India much more than is commonly assumed, mainly because Indian writers continue to make implicit rather than explicit use of central traditional cultural concepts and values while

analysing modern legal developments. The picture that emerges is, therefore, of a post-modernistic legal development with an anti-modernistic standpoint which rejects so-called modern practices and concepts and reverts to what is perceived as more balanced traditional and ecologically sustainable approaches.

Chapter 6 discusses in detail the recent development of Indian environmental jurisprudence by the Indian judiciary. The extensive jurisdiction of the Supreme Court and the High Courts which allowed the consolidation of an explicit societal role for the Indian judiciary has, in turn, enabled the judges to mould new concepts and strategies for environmental protection and to develop the unique jurisprudence that we are centrally concerned with here. The chapter shows how the three interlinking components which we identified have worked together in the creation of this neo-*dharmic* jurisprudence.

Our analysis focuses on the impact of three important categories of cases which manifest legal postmodernism in employing the public law rationale and the autochthonous elements for environmental justice, epitomising its neo-*dharmic* character. The first is headed by the *Ratlam* case,[31] which served as a path breaker, opening the way for a new jurisconscience. The second group of cases, known as the *Mehta* cases,[32] inducts new jurisprudential principles based on a constitution-centred Indian public law rationale.

Thirdly, the various orders and decisions made by the Indian courts in an attempt to resolve the famous *Bhopal* case,[33] authenticate the operation of a neo-*dharmic* jurisprudence for environmental justice.

The study of the three categories of cases brings out the adoption of strategies and techniques which distinguish Indian environmental jurisprudence. They show the renunciation of well-established principles and notions of laws inherited under colonial rule. The repercussions of these cases are examined by analysing numerous other reported decisions of the Supreme Court and High Courts in India. A critical analysis is carried out to highlight elements of judicial rhetoric as well as very practically-oriented suggestions in these judicial pronouncements. This analysis also helps to come to conclusions about the future course of legal developments in India.

Chapter 7, the concluding chapter, sums up the characteristic nature of the new Indian environmental jurisprudence. It demonstrates the outcome of creating a legal order based on public law rationale and making environmental law an important part of that legal order. It also reveals the prominence accorded to the environment through implicit reliance on traditional conceptual understandings of law and indigenous values related to Nature.

There is much concern in India to be seen to respond to international initiatives and standards, while at the same time developing an indigenous model. The present thesis could not include within its ambit a detailed examination of the links between the Indian development of environmental jurisprudence and international initiatives towards establishing sound and sustainable legal principles to be adopted around the world. However, the characteristic features of Indian environmental jurisprudence, as this study would show, strongly favours an universal human rights approach. Thus, this study strengthens the case for developing the general concept of a human right to a clean environment as a fundamental component in the context of sustainable development. It refutes the current Anglo-American trend to rely on economic regulation as an effective means or an holistic approach to tackle environmental issues. The Indian evidence would show that a pro-active multi-level approach to environmental protection can bring theoretical as well as practical results.

NOTES TO CHAPTER 1

1. The Constitution of India 1950 (hereafter: the Constitution) was amended in 1976 by the 42nd Amendment which incorporated, *inter alia*, Article 48A and Article 51A(g) specifically dealing with the protection of the environment. For details see chapter 2.2 below at pp.47-49.

2. See Pathak, R.S., "Human rights and the development of the environmental law in India", (1988) 14 Commonwealth Law Bulletin, 1171-1180. For earlier analyses on the development of Indian human rights jurisprudence see Menon, Madhava N.R., "The dawn of human rights jurisprudence", (1987) 1 Supreme Court Cases (Journal), 1-12; Singh, M.P., "Jurisprudential foundations of affirmative action", (1981-82) 10-11 Delhi Law Review, 39-65. For an insight into the Indian understanding of human rights see generally Kothari, S. and H. Sethi (eds.), Rethinking human rights: challenges for theory and action, 1989, New York, New Horizons Press and Delhi, Lokayan; Baxi, Upendra, "From human rights to the right to be human: some heresies", ibid, 151-166. See also Panikkar, Raimundo, "Is the notion of human rights a Western concept?", (1982) 120 Diogenes, 75-102; Chattopadhyaya, D.P., "Human rights, justice and social context", in Rosenbaum, Alan S. (ed.), The philosophy of human rights: international perspectives, 1980, Connecticut, Greenwood Press, 169-193; Chiriyankandath, James, "Human rights in India: concepts and contexts", (1993) 2 Contemporary South Asia, 245-263.

3. The World Charter for Nature declared in 1982 as its first general principle that: "Nature shall be respected and its essential processes shall not be impaired." See World Charter for Nature, (1982) UN Doc A/51. The legal principles for environmental protection and sustainable development enunciated by the World Commission on Environment and Development [WCED] in June 1986 stated in Article 1 that: "All human beings have the fundamental right to an environment adequate for their health and well being." See Report of the World Commission on Environment and Development, Our common future, 1987, Oxford and New York, Oxford University Press, at 348.

4. On the debate for and against economic rationalisation see generally Sagoff, Mark, The economy of the earth, 1988, Cambridge, Cambridge University Press; Rose, Carol M., "Environmental Faust succumbs to temptations of economic Mephistopheles, or, value by any other name is preference", (1989) 87 Michigan Law Review, 1631-1646; Braithwaite, J., "The limits of economism in controlling harmful corporate conduct", (1982) 16 Law and Society Review, 481-500, extracted in Ogus, A.I. and Veljanovski, C.G. (eds.), Readings in the economics of law and regulation, 1984,

Oxford, Clarendon Press; Mintz, Joel A., "Economic reform of environmental protection: a brief comment on a recent debate", (1991) 15 Harvard Environmental Law Review, 149-164; Lomas, Owen (ed.), Frontiers of environmental law, 1991, London, Chancery Law Publishers.

5. See generally Vogel, David, National styles of regulation: environmental policy in Great Britain and the United States, 1986, Ithaca and London, Cornell University Press; Dwyer, John P., "Contentiousness and cooperation in environmental regulation", (1987) 35 American Journal of Comparative Law, 809-826; Brickman, R., S. Jasanoff, and I. Ilgen, Controlling chemicals: the politics of regulation in Europe and the United States, 1985, Ithaca, New York, Cornell University Press; Swanson, Timothy M., "Environmental economics and regulation", in Lomas (ed.), Frontiers of environmental law, 115-150.

6. For a brief recent analysis on access to justice and the public law approach adopted in the continental civil law jurisdictions see Betlem, Gerrit, "Standing for ecosystem - going Dutch", (1995) 54 The Cambridge Law Journal, 153-170. It is noteworthy that no notice is taken of the Indian experience in the same field.

7. 'Development' is generally accepted to be a process that attempts to improve the living conditions of people. Most also agree that the improvement of living conditions relates to non-material wants as well as physical requirements. Development goals that call for the increase of human welfare or the improvement of the quality of life reflect this argument. There are numerous works on this point, see for example Seers, Dudley, Development in a divided world, 1971, Harmondsworth, Penguin; Harrison, Paul, Inside the third world, (2nd edn.), 1981, New York, Penguin Books; Seitz, J.L., The politics of development: an introduction to global issues, 1988, London, Blackwell; Somjee, G. and A.H. Somjee, Reaching out to the poor, 1988, London, Macmillan; Das Gupta, A.K., Growth, development and welfare, 1988, London, Blackwell; Mittleman, J.H., Out from underdevelopment: prospect for third world development, London, Macmillan; Carty, Anthony, Law and development, 1992, Aldershot, Dartmouth Publishing Co. On environment and development, see for example Bartlemus, Peter, Environment and development, 1986, London and Boston, Allen & Unwin; Adams, B., The environment in the developing world: the case of sustainable development, 1988, London, Routledge; Bartlemus, Peter, Environment, growth and development: the concepts and strategies of sustainability, 1994, London and New York, Routledge.

8. On this point see generally Devall, Bill, "The deep ecology movement", (1980) 20 Natural Resources Journal, 299-333; McNeely, Jeffrey A. and David Pitt (eds.), Cultures and conservation: the human dimension in environmental planning, 1985, London, Croom Helm; Pitt, David C. (ed.),

The future of the environment, 1988, London, Routledge; Harrison, Paul, The third revolution: environment, population and a sustainable world, 1992, London and New York, I.B. Tauris & Co.; Gore, Al, Earth in the balance: forging a new common purpose, 1992, London, Earth Scan.

9. For details on legal pluralism see, Griffiths, John, "What is legal pluralism?", (1986) 24 Journal of Legal Pluralism and Unofficial Law, 1-56. See also Hooker, M.B., Legal pluralism: an introduction to colonial and neo-colonial laws, 1975, Oxford, Oxford University Press; Chiba, Masaji, Legal pluralism: towards a general theory through Japanese legal culture, 1989, Tokyo, Tokai University Press; Varga, Csaba, Comparative legal cultures, 1992, Aldershot, Dartmouth Publishing Co.

10. For an interpretation of these two criteria see Kulcsar, Kalman, Modernisation and law [theses and thoughts], 1987, Budapest, Institute of Sociology, Hungarian Academy of Sciences. 'Modernisation' came into increasing use to identify a general process comprising both 'economic development' and 'cultural change'; the latter, in the wide anthropological sense of the term, comprising social structure as well as beliefs, values and norms. For details see Moore, Wilbert E., World modernization: the limits of convergence, 1979, New York, Elsevier.

11. See Engel, R., "Ethics", in Pitt, The future of the environment, 23-45. Engel refers to the argument of Arnold Toynbee that a new eco-centric religion is likely to take its place in the pantheon of the world's post-modern faiths to save human civilisation. Ibid, at 27. For details see Toynbee, Arnold, "The religious background of the present environmental crisis", (1972) 3 International Journal of Environmental Studies, 141-146. The Jesuit theologian and palaeontologist Teilhard de Chardin (1881-1955) said many decades ago that the fate of mankind, as well as religion, depends upon the emergence of a new cosmic faith by the end of this century. See Teilhard de Chardin, Pierre, The phenomenon of man, (rev. edn.), 1977, London, Fontana Paperbacks.

12. In essence, sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development and institutional change are in harmony and enhance both current and future potential to meet human needs and aspirations. See Report of the WCED, Our common future, at 46.

13. For details see Redclift, M., Sustainable development: exploring the contradictions, 1987, London, Routledge.

14. For details see Johnson, Stanley P. (gen. ed.), The earth summit: the United Nations conference on environment and development (UNCED), 1993, London/Dordrecht/Boston, Graham

& Trotman/Martinus Nijhoff, 118-122. Principle 1 of the Rio Declaration in 1992 stated: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." Ibid, at 118. See also Pallemaerts, Marc, "International environmental law from Stockholm to Rio: back to the future?" in Sands, Phillippe (ed.), Greening international law, 1993, London, Earthscan, 1-19; Porras, Ileana, "The Rio Declaration: a new basis for international cooperation", ibid, 20-33.

15. See Lammers, J.G. and R.D. Munro (eds.), Environmental protection and sustainable development: legal principles and recommendations adopted by the Expert Group on Environmental Law of the World Commission on Environment and Development, 1987, London, Graham and Trotman; Boyle, Alan E., "Book review", (1991) 40 International and Comparative Law Quarterly, 230-231; Singh, Nagendra, "Right to environment and sustainable development as a principle of international law", (1987) 29 Journal of the Indian Law Institute, 289-320. See also Sands, Phillippe, "Human rights aspects of environmental law", (1993) 7 Interights Bulletin, 63 (based on Chapter 6 of his forthcoming book, Principles of international environmental law, 1995, Manchester, Manchester University Press); Brown-Weiss, Edith (ed.), Environmental change and international law, 1992, Tokyo, United Nations University Press; Birnie, Patricia, "Book review", (1995) 44 International and Comparative Law Quarterly, 240-241.

16. For example, in the context of land reforms in Asia and Africa, it has been shown recently that the use of law has often impeded reforms and is therefore not a sufficient response to inequitable national and global economic policies. See McAuslan, Patrick, "Law and urban development: impediments to reform", (1994) 11 Cities, 402-408.

17. Within the newly evolving structure of international environmental law, the Indian development, particularly the Indian Supreme Court's use of environmental provisions of the Constitution and the explicit adoption of a right to life approach, has been taken note of by two well-known experts in the field. See Birnie, Patricia W. and Alan E. Boyle, International law and the environment, 1992, Oxford, Clarendon Press, 188-214 at 195, footnote 24.

18. For early studies on this see Bhagwati, P.N., "Judicial activism and public interest litigation", (1985) 23 Columbia Journal of Transnational Law, 561-567; Baxi, Upendra,"Taking suffering seriously: social action litigation in the Supreme Court of India", in Dhavan, R., R. Sudarshan and S. Khurshid (eds.), Judges and the judicial power, 1985, Bombay, Tripathi, 289-315; Agrawala, S.K., Public interest litigation in India: a critique, 1985, New Delhi, Indian Law Institute; Gandhi, P.K. (ed.),

Social action through law, 1987, New Delhi, Concept Publishing Co.; Cunningham, Clark D., "Public interest litigation in Indian Supreme Court: a study in the light of American experience", (1987) 29 Journal of the Indian Law Institute, 494-523.

19. For more recent studies and debates see Hurra, Sonia, Public interest litigation: in quest of justice, 1993, Ahmedabad, Mishra and Co.; Singh, Parmanand, "Public interest litigation", (1991) 27 Annual Survey of Indian Law, 35-55; Bhatia, K.L., Judicial activism and social change, 1990, New Delhi, Deep & Deep Publications; Sachar, Rajindar, "Social action litigation: activist & traditionalist judges", (1987) 1 Supreme Court Cases (Journal), 13-16; Menski, Werner F., "On the limits of public interest litigation", (1990) 2 Kerala Law Times (Journal), 45-47; Menski, Werner F., "Bottlenecks of justice? further note on the limits of public interest litigation", (1992) 1 Kerala Law Times (Journal), 57-60; Kishwar, Madhu, "Public interest litigation: one step forward, two steps back", (1994) 81 Manushi, 11-23; Saxena, Shoba, "Judicial activism: instrument of environmental protection", (1995) All India Reporter (Journal), 1-5.

20. For a recent study on the related field of consumer protection see Singh, Gurjeet, Consumer protection law in India: a socio-legal study, 1993, London, SOAS, University of London, [unpublished Ph.D thesis].

21. On this particular aspect about India's apex judiciary see generally, Gadbois, George H., "The Supreme Court of India as a political institution" in Dhavan *et al.*, Judges and judicial power, 250-267; Singh, Bakhsish, Supreme Court of India as an instrument of social justice, 1976, New Delhi, Sterling; Dube, M.P., Role of Supreme Court in Indian constitution, 1987, New Delhi, Deep & Deep.

22. On the peculiar legal notions and values that underpin the development of law in the context of various Asian jurisdictions and the concept of 'legal postulates', see Chiba, Legal pluralism and Chiba, Masaji (ed.), Asian indigenous law: in interaction with received law, 1986, London and New York, KPI Ltd., chapters 1, 5, 7 and 8. See also Chiba, Masaji, "Legal pluralism in Sri Lankan society: towards a general theory of non-Western law", (1993) 33 Journal of Legal Pluralism, 197-212.

23. See generally Setalvad, M.C., Common law in India, 1960, London, Stevens & Sons; David, Rene and John E.C. Brierley, Major legal systems in the world today (2nd edn.), 1978, London, Stevens & Sons, 462-476; Minattur, Joseph (ed.), The Indian legal system, 1978, Delhi, Indian Law Institute; Zweigert, Konrad and Hein Koetz, Introduction to comparative law (2nd rev. ed.), 1994, Oxford, Clarendon Press, 226-245.

24. On the place of Indian legal traditions see generally Derrett, J.D.M., "Indian cultural traditions and the law of India", in Sharma, Ram Avtar (ed.), Justice and social order in India, 1984, New Delhi, Intellectual Publishing House, 1-21; Derrett, J.D.M., "Tradition in modern India: the evidence of Indian law", in Park, Richard L. (ed.), Change and the persistence of tradition in India, 1971, Ann Arbor, University of Michigan, 17-34. Note the recent search for ancient roots by Indian jurists. See Dhavan, Rajeev, "Dharmasastra and modern Indian society: a preliminary exploration", (1992) 34 Journal of the Indian Law Institute, 515-540; Singh, Chhatrapati, "Dharmasastra and contemporary jurisprudence", (1990) 32 Journal of the Indian Law Institute, 179-188.

25. Derrett, J. Duncan M., "Indian traditions and the rule of law among nations", (1962) 11 International and Comparative Law Quarterly, 266-272 at 267.

26. See Menski, Werner F., "Hinduism and democracy", in The encyclopedia of democracy, 1995, Washington D.C., Congressional Quarterly Books (forthcoming).

27. See generally Callicott, Baird J. and Roger T. Ames (eds.), Nature in Asian traditions of thought: essays in environmental philosophy, 1991, Delhi, Indian Books Centre; Engel, Ronald J. and Joan Gibb Engel (eds.), Ethics of environment and development: global challenge, international response, 1990, Tucson, University of Arizona Press. More particularly see Dwivedi, O.P., "Satyagraha for conservation: awakening the spirit of Hinduism", ibid, 201-211. See also Mukherjee, Amitava and V.K. Agnihotri (eds.), Environment and development, 1993, New Delhi, Concept Publishing Company; Sarre, Philip, "Environmental values: western, eastern or global?", ibid, 279-289; Sen, Geeti (ed.), Indigenous vision: peoples of India attitudes to the environment, 1992, New Delhi, Sage Publications; Bandyopadhyay, J. *et al.* (eds.), India's environment: crises and responses, 1985, Dehra Dun, Natraj Publishers.

28. See Purohit, S.K., Ancient Indian legal philosophy: its relevance to contemporary jurisprudential thought, 1994, New Delhi, Deep and Deep Publications; Jois, Rama, Seeds of modern public law in ancient Indian jurisprudence, 1990, Lucknow, Eastern Book Company.

29. See generally Spencer, J.R., "Public nuisance - a critical examination", (1989) 48 Cambridge Law Journal, 55-84; Silver, Larry D., "The common law of environmental risk and some recent applications", (1986) 10 Harvard Environmental Law Review, 61-98; Birtles, William, "Protecting the environment by using the criminal law", (1992) 136 Solicitors Journal, 569-574. A recent example of a nuisance action against environmental pollution in the UK is the House of Lords decision in Cambridge Water Co Ltd v Eastern Counties Leather plc, [1994] 1 All ER 53. For a critical

comment on this case see Wilkinson, David, "Cambridge Water Company v Eastern Counties Leather plc: diluting liability for continuing escapes", (1994) 57 The Modern Law Review, 799-811.

30. The term 'postmodern' is used here as it attracts particularly the two characteristic features of postmodernism in the socio-political setting: (a) the rejection of many theories and practices which are considered as 'modern' and (b) the reversion to more traditional approaches. See generally Docherty, Thomas (ed.) Postmodernism: a reader, 1993, New York, London, Harvester Wheatsheaf, 1-31; Connor, Steven, Postmodernist culture: an introduction to theories of the contemporary, 1989, Oxford, Basil Blackwell. Connor shows that postmodernity and post-coloniality are closely connected, see ibid, at 231 and 237. See also, Jameson, Fredric, Postmodernism, or, the cultural logic of late capitalism, 1991, London, Verso. The arrival of postmodernism can be viewed from an essentially antimodernist standpoint. See ibid, 297-418 at 313-318. The term 'postmodern' is also employed here to describe the change within the current socio-political setting in India which reflects the progression drawing from both capitalist and socialist ideologies. For example, note the use of the term by a former activist judge of the Supreme Court of India, see Iyer, V.R. Krishna, "India, Islam and the pall of postmodernism", (1992) 27 Economic and Political Weekly, 2417-2419. For a recent article exploring the manifestation of postmodernism in judicial practice and legal scholarship in U.S. see Feldman, Stephen M., "Diagnosing power: postmodernism in legal scholarship and judicial practice (with an emphasis on the *Teague* rule against new rules in Habeas Corpus cases)", (1994) 88 Northwestern University Law Review, 1046-1105.

31. Municipal Council, Ratlam v Vardhichand, AIR 1980 SC 1622; (1980) 4 SCC 162.

32. There are more than ten reported decisions and orders of the Supreme Court under the title M.C. Mehta v Union of India, they are reported as follows: (1986) 2 SCC 176; (1986) 2 SCC 325; (1987) 1 SCC 395; (1987) 4 SCC 463; (1988) 1 SCC 471; (1991) 2 SCC 137; (1992) Supp (2) SCC 85; (1992) Supp (2) SCC 86; (1992) 3 SCC 256; (1992) 1 SCC 358; (1992) Supp (2) SCC 633; (1992) Supp (2) SCC 637; (1993) Supp (1) SCC 434.

33. The various orders resolving the *Bhopal* case are reported as follows: Union Carbide Corporation and others v Union of India and others, (1989) 1 SCC 674; (1989) 1 SCC 676; (1989) 1 SCC 677; (1989) 3 SCC 38, see also, Charan Lal Sahu v Union of India, (1990) 1 SCC 613 and Union Carbide Corporation and others v Union of India and others, (1991) 4 SCC 584.

CHAPTER 2 THE CONSTITUTIONAL FOUNDATIONS OF INDIAN ENVIRONMENTAL JURISPRUDENCE

As indicated in the introduction, the legal development for the protection of the environment in India is firmly based on a constitutional rationale. This constitutional rationale seeks to establish a new public law regime in India. The present chapter, therefore, shows how the foundations and wider parameters of Indian environmental jurisprudence are closely linked with the significant constitutional law developments that India has witnessed within the last two decades.

This chapter initially focuses on the increased importance accorded to the aims and ideals contained in the Preamble and the shift in emphasis between the Fundamental Rights and the Directive Principles of State Policy. In this context, the chapter investigates the scope of judicial review, expanded consequent to judicial interpretations which changed the meaning particularly of Articles 12, 14 and 21 of the Indian Constitution. We then proceed to analyse the changes in procedural doctrines which have turned standard constitutional remedies into effective public law strategies within the specificities of the Indian setting. This chapter also deals with the manner in which Indian public interest litigation, as a unique mechanism, has enhanced the operation of the new constitutional

rationale. The cumulative effect of these constitutional law developments, which has pervaded the current legal development as a whole, indicates the permeation of a legal ideology and philosophy which focuses on the common good and has given much impetus to the development of Indian environmental jurisprudence.

2.1 The significance of the aims and ideals of the Constitution

It would appear, at first sight, that the Indian Constitution of 1950 established a legal order based on the earlier British common law tradition. Yet, the aims and ideals envisaged by the Constitution called for the creation of a new legal order. The Constitution conveys the spirit of independence and envisages a process of decolonisation and reconstruction. The Preamble, the Fundamental Rights [FR], the Directive Principles of State Policy [DPSP] and the incorporation of the Fundamental Duties [FD] in 1976, brought about distinguishable changes to the ideology and rationale of Indian constitutionalism. These vital parts of the Constitution have, even if this was not initially obvious, laid the foundations for a new public law regime. This development has depended on gradual evolution through a process of modification and accommodation, rather than any radical revolutionary eruption.

After independence in 1947, the struggle to live as an independent nation centred upon the framing of the Constitution itself.[1] The Constitution, as a legal document, marked the birth of 'modern India'.[2] The framework of the Indian Constitution was apparently built upon the British Government of India Act of 1935.[3] At the same time it is well-known that one can discern in the Indian Constitution the influence of several modern constitutions. The Parliamentary form of government broadly follows the British model but Indian federalism relies on principles from the American, Canadian and Australian constitutions.[4] The American Bill of Rights had its impact on the formulation of the Fundamental Rights and the inspiration for the Directive Principles of State Policy has come from the Irish Constitution.[5] At the time of drafting the Constitution itself, it was observed by Dr. Ambedkar, the Chairman of the constitutional drafting committee, that:

> "The only new things, if there can be any, in a constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country."[6]

The Fundamental Duties, incorporated into the Constitution in 1976, which are significant for our study and analysed in detail later in this chapter, have been shown to be similar to those found in the Constitutions of Japan and China; they are also in line with the Universal Declaration of Human Rights.[7] Several earlier writers on

Indian jurisprudence have pointed out that the Indian Constitution reflects the eclectic nature of Indian legal culture, taking in everything which is deemed suitable to its needs.[8]

The initial main aim of constitution making was to establish a democracy based on the ideals of justice, liberty, equality and fraternity. The need for a new constitution forming the basic law of the land for the realisation of these ideals was paramount at that time.[9] How exactly those aims were to be achieved might not have appeared clear at that time. The general direction as stated by Dr. Ambedkar was:

> "Now, having regard to the fact that there are various ways by which economic democracy may be brought, we have deliberately introduced ... something which is not fixed or rigid. We have left enough room for people of different ways of thinking, ... It is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing and must ... keep on changing."[10]

The above statement of Dr. Ambedkar indicates how the framers of the Indian Constitution aimed to create a new economic and social order, which also necessarily calls forth a new legal order, not by prescribing a particular way but leaving further development to be determined through the democratic process. Implicit in this strategy is the

instinctive non-acceptance of so-called 'modern' ideologies in their entirety - whether it be the individualistic capitalist order or the communist or socialist order. As a result, the process of Indian constitution-making prepared the ground for the evolution of a new indigenous order which, it is argued here, relies upon traditional Indian understandings of social, economic, political and legal order. A general indication of the direction was laid down in the DPSP. Ambedkar stated that:

> "It is therefore, no use saying that the directive principles have no value. In my judgment, the directive principles have a great value, for they lay down that our ideal is economic democracy. Because we did not want merely a parliamentary form of government to be instituted through the various mechanisms provided in the constitution, without any direction as to what our economic ideal or as to what our social order ought to be, we deliberately included the Directive Principles in our constitution..."[11]

The deliberate inclusion of the Directive Principles did not by itself bring about any significant legal change for several decades because they had to operate under the earlier legal tradition and remained incompatible with actual realities and the then prevalent legal culture of India. Even a recent analysis on Ambedkar's prophecies, by a well-known Indian legal writer, shows that Indian life is full of contradictions, producing burdens of inequality,

which threaten to destroy the political structure built by the Constitution.[12] Dhavan appears optimistic, although he seems a bit disillusioned, raising the question whether the Constitution would secure a new jurisprudence whose impact would be felt as social fact.[13]

Before we proceed to investigate the gradual shift in emphasising the importance of the DPSP, we focus on the preamble of the Constitution. The original resolution to constitute India into a Sovereign, Democratic Republic was modified by the 42nd amendment of 1976 which made India a sovereign, socialist, secular, democratic republic.[14] It appears that the concept of socialism, added by the 42nd amendment, merely brought out explicitly what was already implicit in the preamble. However, the 1976 amendments gave greater momentum to steer a course of political, economic and legal development away from an individualistic, private property-based approach.

The preamble was earlier not considered so important for the interpretation of various provisions of the Constitution and in resolving constitutional issues in India.[15] In Keshavananda Bharati v State of Kerala,[16] which marks the beginning of the great change, the preamble was interpreted as setting forth the goals of the political society in India. It has also been pointed out that the preamble has to be invoked to determine the ambit of the FR and DPSP and that the preamble to the Constitution is of

extreme importance for judicial interpretation of the Constitution, so that "the constitution should be read and interpreted in the light of the good and noble vision expressed in the preamble".[17] The role of these ideals has been seen as forming "the trinity" of the Constitution and has been summed up in the following words by the Supreme Court in a case decided a few years ago:

> "In deciding a case which may not be covered by authority courts have before them the beacon light of the trinity of the constitution and the play of legal light and shade must lead on the path of justice social, economical and political. Lacking precedent, the court can always be guided by that light and the guidance thus shed by the trinity of our Constitution. Public policy can be drawn from the constitution."[18]

The significance accorded to the aims and ideals envisaged by the Indian Constitution calling forth the creation and embellishment of a new legal order shows a perceptible ideological change. It is therefore the case, as our later analysis of environmental cases will confirm, that legal development in India, especially more recently, has been very much guided by such resolute if general ideals. The following parts of this chapter analyse specific areas of constitutional law changes to illustrate this gradual evolution. We concentrate first on the DPSP to show how they have gradually transformed themselves from pious obligations to positive policies.

2.2 The importance of the Directive Principles of State Policy

The DPSP, which were incorporated by the framers of the Indian Constitution to lay down cherished socio-economic and political ideals and values, have been shown to be closely linked to the Indian social and cultural life.[19]

The legislative history of the Constitution shows that the initial draft included the DPSP along with the FR in Part III itself.[20] There was also a move to give primacy to directive principles over fundamental rights in cases of conflict; amendments were suggested to this effect, but they were not adopted by the drafting committee.[21] The minutes of the drafting committee show that between those who wanted to make the DPSP justiciable and those who wanted to make them non-justiciable, the latter won the day.[22] If such moves had prevailed then there would have been more radical legal change within the first few decades itself. Instead the path chosen was one of gradual change through adopting the processes of accommodation.

The fact that, in their nature and effect, Fundamental Rights and Directive Principles are apparently different, has resulted in their separation in Parts III and IV. This has given rise to the belief that fundamental rights were for the most parts rights of the individual and that directive principles were intended for the welfare of the

public.[23] In view of the earlier ambivalent approaches and unresolved conflicts, it comes as no surprise that there has been a constant debate as to the position of the DPSP.

From the start quite divergent views were voiced as to what ideals should be expressed in what parts of the Constitution. Faced with wide gulfs of differences of opinion about the right path, the making of the Indian constitution has been a process where the framers were often caught between two fundamentally divergent approaches and ended up accommodating both. Principally, the issue was how the public interest can be strengthened in view of powerful private concerns. Although the discourse about the FR-DPSP complex was not originally conducted in those terms, this is what lies at the core of the complex discussions about developments in Indian constitutional law. Seervai points out that it would be inaccurate rewriting of history to say now that the framers of the Constitution gave primacy to the DPSP over the FRs, because the Directive Principles have only gradually received increasingly greater importance.[24]

The importance of the Directive Principles vis-a-vis the Fundamental Rights which has changed considerably from what it was understood to be a few decades ago came about, according to Seervai, in three periods.[25] During the first period, there was no question of critical analysis of Part III in conjunction with Part IV; it was taken as the obvious view that fundamental rights must always prevail.[26] The

second period saw several attempts to harmonise the two parts of the Constitution.[27] This period has generated much ambivalence which got resolved in the third period with the decision in *Minerva Mills* in 1980.[28] The last decade or so of the present period shows how the policies incorporated into the DPSP are given effect through more activist interpretations of the provisions in the FR articles.

Thus one can say that the importance given to the DPSP makes the Indian Constitution as a political document create a legal ideology that forms the background for all further legal development in India. By guaranteeing fundamental rights and at the same time requiring the state to carry out very many policies to achieve the ideals of a more perfect state, the basic legal ideology appears to be centred on public duty rather than on individual rights. The provisions in Part III check the state's authority over individuals, while Part IV provides the positive policies containing the aspirations of the people, as well as the ideals and values cherished by them. The DPSP which have been seen as the 'potential stuff' out of which public policies of the government are made in India,[29] have now become the guiding principles of law.[30]

Several decades ago, when Granville Austin described the characteristic nature of the FR and DPSP as constituting the 'conscience' of the Constitution, he surmised the roots of DPSP in the following words:

"It is not unreasonable to conjecture also that the placing on the government of a major responsibility for the welfare of the mass of Indians had an even deeper grounding in Indian history. Under a petty ruler, a Mogul emperor, or the British Raj, responsibility for both initiation and execution of efforts to improve the lot of the people had lain with the government. What the government did not do, or see done, usually was not done. The masses had, generally speaking, looked to the ruler for dispensations both evil and good. Heir to this tradition, Assembly members believed that the impetus for bringing about the social revolution continued to rest with the government."[31]

Austin has also noted the words of Alladi Krishnaswami Ayyar, a prominent member of the Constituent Assembly, summing up the debate on the right to property and compensation.

"The law, he said, 'must reflect the progressive and social techniques of the age'. Dharma and the duty the individual owed to society were the basis of India's social framework, he continued; capitalism as practised in the West was 'alien to the root idea of our civilization. The sole end of property is Yagna and to serve a social purpose', he concluded."[32]

Our discussion in chapter 5 below on the traditional conceptual understanding of law, particularly on property

which bears great relevance for environmental protection, show that the concept of property in India was always envisaged for the common good and was not primarily meant for individual enjoyment. It also shows that a juridical rationale emphasising common duty rather than individual rights forms the basis of *dharmic* jurisprudence. Recent writing on the policy perspectives of the DPSP leads to the conclusion that the DPSP are the equivalent of *Rajadharma*, the fundamental principles of governance under the traditional Indian legal culture,[33] analysed in more detail in chapter 5. Any approach that would have sought to divide the two elements or give less importance to the DPSP, would have been less productive for the development of India's unique environmental jurisprudence.

Especially after 1972, following the 25th amendment of the Constitution, the DPSP assumed greater importance in the scheme of the Constitution.[34] In Kesavananda Bharati v State of Kerala,[35] the Supreme Court emphasised that there was no disharmony between the DPSP and the FR as they supplemented each other in aiming at the same goal of bringing about a social revolution as envisaged in the Preamble. It was held that the courts have a responsibility in so interpreting the Constitution as to ensure implementation of the DPSP and to harmonise the social objectives underlying them with individual rights. By 1980 the confusion that had prevailed about the DPSP had been resolved. In Minerva Mills v Union of India,[36] it was held that:

"In other words, the Indian Constitution is founded on the bed-rock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the Constitution."[37]

Here Bhagwati, J. expressed the view that no part of the constitution is more important than Part IV by distinguishing the Indian concept of a legal right and duty from the Western rights-based jurisprudential perspectives and stated that:

"I may also point out that simply because the Directive Principles do not create rights enforceable in a court of law, it does not follow that they do not create any obligations on the State. We are so much obsessed by the Hohfeldian Classification that we tend to think of rights, liberties, powers and privileges as being invariably linked with the corresponding concept of duty, no-right, liability and immunity. We find it difficult to conceive of obligations or duties which do not create corresponding rights in others."[38]

He then went on to hold that:

"It is therefore, to my mind, clear beyond doubt that merely because the Directive Principles are not enforceable in a court of law, it does not mean that they cannot create obligations or duties binding on the

State. The crucial test which has to be applied is whether the Directive Principles impose any obligations or duties on the State; if they do, the State would be bound by a constitutional mandate to carry out such obligations or duties, even though no corresponding right is created in any one which can be enforced in a court of law."[39]

The position as stated in *Minerva Mills* above remains the same after all the debates of the early decades about the working of the Constitution. The Fundamental Rights and the Directive Principles which were seen to constitute the 'conscience' of the Indian Constitution,[40] are now on a much clearer footing. It can now be said that the Directive Principles prescribe the goals to be attained and the Fundamental Rights provide the means by which the goals are to be achieved.

Thus when the importance of environmental protection became a great concern globally by the mid-1970s, it soon found its place in the DPSP following the 42nd amendment of 1976. Our analysis in later chapters shows that in effect some of the DPSP, including the policy to protect the environment, have been treated virtually as fundamental rights for the purpose of remedial action.

There has been a growing feeling in the country that there should be a reordering of priorities and, as a result,

the idea of protecting the environment has become significantly important.[41] The changes made by the 42nd amendment of the Constitution in 1976 have been much more than the addition of a few new clauses or provisions. The conceptual underpinnings requiring greater attention to the public interest, giving less importance to private legal rights and proprietary interests were brought out more explicitly and clearly. It is most relevant for this thesis that the new constitutional law amendments also included specific provisions for the protection of the environment, which could then be relied on by the Indian judiciary.

A new article that formed a new Part IV A of the Constitution, called the Fundamental Duties, was also incorporated into the Constitution which prescribed *inter alia* the duty of every citizen to protect and improve the natural environment. Both Article 48A in the DPSP and Article 51A (g) in the fundamental duties contain the policy of environmental protection in very broad terms to cover all aspects of environmental degradation and conservation. The new Article 48A reads as follows:

> "The State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country."

The specific provision of 51A (g), in the new Part IVA dealing with the Fundamental Duties, reads as follows:

> "It shall be the duty of every citizen of India - ...(g) to protect and improve the natural environment

including forests, lakes, rivers and wildlife, and to have compassion for living creatures;"

Prior to this amendment there were no specific provisions dealing with environmental protection in the Constitution. There were, however, provisions for the improvement for public health (Article 47), for the organisation of agriculture and animal husbandry (Article 48), and for the protection of national monuments (Article 49).

The incorporation of the specific provisions in the Constitution was the result of the initiatives of the then Prime Minister, Mrs. Gandhi, whose approach towards the environment involved a Third World perspective.[42] At the United Nations Conference on Human Environment at Stockholm in 1972, she championed the cause of environment and development by emphasising the view that environmental degradation in less developed countries is the direct result of underdevelopment and that it would not be correct to equate their problem with that of the developed countries.

It has been shown that when the new provisions came up for consideration in both Houses of Parliament, a general concern was expressed by a cross section of members about the deteriorating environment.[43] It is significant to note the statement of Mrs. Gandhi at that time:

"So far, the feeling of responsibility towards nature

was absent all over the world. It was not absent in our old ancient books; but came about because we adopted the Western viewpoint. Now the time has come to go back to the source of strength of the human race and to try to preserve and revitalise them."[44]

One can say that the new perspective for the development of environmental law in India which has been accorded by the specific constitutional provisions in 1976 is a response to the social and political needs of the country to move closer to traditional Indian legal ideology, which is discussed in detail in chapter 5 below.[45] The following discussion here is focused on the formation of India's new public law rationale as a basic legal ideology which is most relevant for the current legal development for the protection of the environment.

2.3 The evolution of the Indian public law regime

The importance and emphasis accorded to the aims and ideals of the Constitution, as we saw in chapter 2.1 and 2.2 above, has gradually led to the evolution of a public law regime through a decade of judicial activism which began in the mid-1970s. Three significant areas of this development are analysed here, as they are particularly relevant for the development of Indian environmental jurisprudence. Our analysis also shows that these three major areas of change

are closely linked in expanding judicial review in India. First, the scope of judicial review under Article 13 has been enlarged by the expanded judicial interpretation of the definition of 'the state' under Article 12 of the Constitution, so as to include a very wide range of governmental and administrative bodies and their activities. Secondly, the scope of judicial review under Article 14 of the Constitution has been redefined and modified to curtail any arbitrary action by the administration. Thirdly, the scope of judicial review for any infringement of the right to life, protected by Article 21 of the Constitution, has also been widely expanded to include any substantive infringements to the quality of life and the mandatory requirement of a reasonable, fair and just procedure. Below we discuss these issues in turn, showing their relevance for the development of environmental jurisprudence.

The definition of 'the state' in Article 12 is exclusively meant for the purposes of Parts III and IV of the Constitution. However, the meaning of 'the state' in Article 12 which is directly related to the scope of judicial review under Article 13 gives insight into the concept of law and the meaning of state as understood in India generally. Article 12 provides a general definition of 'the state' and reads as follows:

> "In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of

the States and all local or other authorities within the territory of India or under the control of the Government of India."

Clause 2 of Article 13, which is relevant in this context, reads as follows:

"The state shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

In 1975 the Supreme Court of India in Sukhdev Singh v Bhagatram[46] interpreted the definition of 'the state' in Article 12 to include within its fold a wide range of governmental bodies. In 1979 this was further developed and the expanded scope of Article 12 was laid down in R.D. Shetty v International Airports Authority.[47] Consequently, a body, whether a registered society or a corporation exercising commercial or non-commercial activities, could be regarded to come within the scope of 'the state' within Article 12. A line of decisions following these two important cases included within the meaning of 'the state' several entities and enterprises and their activities.[48] Thus one can say that by expanding the concept of 'the state' there has been a gradual diminution in the distinction between a private enterprise and a public entity. This change, which has been seen as the 'dynamics of Article 12',[49] expanding the scope of judicial review, in effect seeks to establish a public law domain.

This expanded scope of judicial review has made it possible to include the state as a necessary party in almost all the environmental issues adjudicated before the courts in India. Further below, when we analyse the well-known *M.C. Mehta* cases, discussed in detail in chapter 6.2, we shall see how even the activities of private enterprises could be controlled by the extraordinary writ jurisdiction of the Supreme Court.[50] Thus it is now possible in practice to implead the state as a necessary party in environmental issues before the courts.[51] In other words, the constitutional remedies envisaged to protect individual rights from direct state action can now be extended to curb even indirect action or inaction. The underlying rationale is that by regulating the regulator the object of regulation can be achieved more effectively. This rationale, which lies at the core of the new Indian public law regime, and which has been gradually established through this particular set of constitutional provisions, has been described as a 'watershed' in Indian administrative law.[52]

Secondly, the power of judicial review has been extended more generally to check administrative discretion through a unique logical interpretation of Article 14. This interpretation has given a new dimension to the concept of equality in Article 14 of the Constitution. Article 14 reads as follows:

> "The State shall not deny to any person equality before the law or the equal protection of the laws within the

territory of India."

This Article has been seen as an anti-discriminatory provision for over two decades as it merely states that the State shall not deny to any person equality before the law or the equal protection of the laws. In 1974, 'equality' was interpreted in E.P. Royappa v State of Tamil Nadu[53] as follows:

> "Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14 ..."[54]

Since arbitrary actions are by their very nature antithetical to the notion of equality, a check on the administration is notably established through Article 14. The reasoning in *Royappa* of 1974 gave rise to a tactical concept that would further enhance judicial scrutiny and public accountability as a constitutional requirement.[55] This was developed further in *Maneka Gandhi* in 1978,[56] *R.D. Shetty* in 1979[57] and *Ajay Hasia* in 1981[58] to establish an

effective public law guarantee against administrative arbitrariness in India.

The dynamic concept of the Rule of Law as understood in India added a new dimension to the concept of equality contained in Article 14 of the constitution. It has been noted that the Rule of Law in India has an explicit ideological content.[59] Massey shows that the concept in India in its ideological sense represents an ethical code for the exercise of public power.[60] Baxi, in his analysis of Justice Mathew's conception of the state, also draws the conclusion that the growing power of social groups in the form of giant corporations, trade unions or associations needs to be equally constrained by the rule of law and justice requirements.[61] Thus the second facet of the Indian constitutional law regime, relevant for our study, was developed not only to check but also to guide administrative discretion. The significance of judicial guidelines on the exercise of administrative discretion has also become an important aspect of Indian environmental jurisprudence. It is discussed in detail when we discuss specific environmental cases in chapters 3 and 6 below.

Thirdly, perhaps the most important development of modern India's constitutional law regime for the purpose of this study is evidenced by the expanded protection accorded to life and personal liberty under Article 21. Article 21 of the Constitution states as follows:

"No person shall be deprived of his life and personal liberty except according to procedure established by law."

The scope and ambit of this cardinal provision of the Indian Constitution has to be understood in two parts - the meaning of the concept of life and the nature of the procedural law which infringes the quality of life in general. By 1978 the FRs were held "to represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent."[62] *Maneka Gandhi* led the way for the gradual transformation of the meaning of the right to life.

Thus in Francis Coralie Mullin v Administrator, Union Territory of Delhi,[63] the right to life has been perceived to include the right to live with human dignity and decency. The Supreme Court interpreted the right to life in the following words:

"... the question which arises is whether the right to life is limited to only the protection of limb or faculty or does it go further and embrace something more. We think that the right to life include[s] the right to live with human dignity and all that goes along with it, ... 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 the basic necessities of life and also the right to carry on such functions and activities as constitutes the bare minimum expression of the human self."[64]

In Bandhua Mukti Morcha v Union of India,[65] the right to life enshrined in Article 21 of the Constitution underwent a quantum leap, most significant for our study, by linking it with the ideals contained in the DPSP. As a result, it was held that:

"The right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and ... These are minimum requirements which must exist in order to enable a person to live with human dignity and no State - neither the Central Government or the State Government - has the right to take any action which would deprive a person of the enjoyment of these basic essentials."[66]

Any doubts or judicial trepidation that might have been felt at that time seem to have disappeared now as can be seen from recent Supreme Court judgments about how the concept of reasonableness relevant for the interpretation of the fundamental rights finds manifestation and expression in the DPSP. Thus in Union of India v Hindustan Development Corporation,[67] it was stated:

"Now coming to the test of reasonableness which

pervades the constitutional scheme, this Court in several cases particularly with reference to Articles 14, 19 and 21 has considered this concept of reasonableness and has held that the same finds its positive manifestation and expression in the lofty ideal of social and economic justice which inspires and animates the Directive Principles and that Article 14 strikes at arbitrariness in State action."[68]

Other recent cases also indicate how values and ideals that were not considered as fundamental rights earlier but remained as DPSPs are now gradually seen as part of the concept of life protected by the Constitution. For instance, in Mohini Jain v State of Karnataka,[69] the Supreme Court, while holding that the right to education flows directly from the right to life held that:

"'Right to life' is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue .... The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompained by the right to education."[70]

It can be argued that the concept of the right to life as developed under the Indian Constitution clearly lies in the values attached to the meaning of life as a

philosophical and cultural concept. This inevitably conveys a subtle yet perceptible difference in its meaning and content. In the above case the court justified the right to education as a concomitant to the FRs by stating:

> "Indian civilisation recognises education as one of the pious obligations of the human society .... Education in India has never been a commodity for sale."[71]

Although the above observation may appear as mere pious talk, it nonetheless illustrates an implicit attempt by the Indian courts to attach autochthonous values to the constitutionally protected right to life. A perceptibly different conceptual understanding, emphasising cultural ideals and values, is given protection as part of the right to life in the current Indian juridical discourse.

Along with the transmutation of the meaning of the 'right to life', the interpretation of the term 'procedure established by law' by the Supreme Court also underwent great transformation. It has, according to a constitutional law commentator, "made the amplest use of the engine of judicial review, undaunted by the cramping language of the Article, so much so, the resultant today is just the opposite of what it was in the beginning".[72]

Thus both the substantive and procedural aspects of the American constitutional law concept of 'due process', which were avoided by the framers of the Indian Constitution, were

in effect read into this Article by *Maneka Gandhi*[73] and the line of decisions following *Francis Coralie Mullin*.[74]

The above development is best illustrated in Bachan Singh v State of Punjab.[75] While interpreting Article 21, Bhagwati J. took the view that the word 'procedure' in that Article includes both substantive and procedural due process. He held that:

> "... the word 'procedure' in Article 21 is wide enough to cover the entire process by which deprivation is effected and that would include not only the adjectival but also the substantive part of the law... Every facet of the law which deprives a person of his life or personal liberty would, therefore, have to stand the test of reasonableness, fairness and justness in order to be outside the inhibition of Article 21."[76]

The expanded scope of Article 21 due to the interpretation given to the word 'procedure' has had a wide-ranging impact on Indian legal developments, particularly in the area of human rights.[77] The scope of this exemplified expansion can be seen for instance when the Supreme Court struck down provisions under the Indian Penal Code of 1860, prescribing mandatory death sentence, as unreasonable and unjust,[78] or when the Supreme Court assessed the reasonableness of the National Security Act, 1980, the primary legislation to protect national security and to curb terrorism.[79]

There has been a gradual shift in the legal ideology from A.K. Gopalan v State of Madras,[80] and A.D.M. Jabalpur v Shivakant Sukla,[81] to *Maneka Gandhi*,[82] and *Francis Coralie Mullin*.[83] The adherence to judicial restraint, based on the earlier legal tradition which was found in *A.K. Gopalan* and which reached a highwater mark with the judicial 'hands off' position in *A.D.M. Jabalpur*, has been radically transformed following *Maneka Gandhi*, an important case which supports judicial intervention and activism.

The origin of the new legal rationale in India lies in the active judicial interpretation of cardinal fundamental rights provisions of the Constitution. The gradual establishment of a public law domain is the outcome of combined effects of the interpretation given to them particularly in the cases discussed above. Indian environmental jurisprudence now clearly manifests this newly evolved philosophy of Indian constitutionalism, based on constitutional provisions, but led by an activist judiciary. The following sub-chapter explores the mechanism for judicial activism as provided by the Constitution and the implications of this new scenario.

2.4 The extraordinary remedial powers and their modifications

We have already seen how the ideals of the Constitution have encouraged the Indian judges to assume more explicitly a societal and thus necessarily a political role.[84] The extraordinary constitutional powers of the higher Indian judiciary have greatly enhanced the evolution of the new constitutional rationale. Here the technicalities of these specific powers are analysed to illustrate how they operate. The focus is on the modification brought about within the last two decades in the operation of these remedial provisions of the Constitution, without delving elaborately into the scope of these provisions. Their strategic importance has been relied upon heavily for the development of Indian environmental jurisprudence, details of which are discussed in later chapters.

The enforcement of fundamental rights through the extraordinary constitutional remedies is an important facet of the entire operational gamut of Indian constitutional law development. The main remedial provisions in the Constitution which are relevant for this study are the extraordinary jurisdiction of the Supreme Court under Article 32 and of the High Courts under Article 226. We focus our investigation here on how the scope of the remedies has been modified to meet social needs.

These provisions confer power on the superior courts to issue directions, orders or writs including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of a fundamental right. The power under Article 32 is twofold in nature, in the sense that the right to move the Supreme Court for the enforcement of the fundamental rights is guaranteed, and at the same time the Supreme Court is empowered to grant any appropriate remedies.[85] The scope of Article 226, although it does not guarantee a right to move the High Courts, is in fact wider than that of Article 32, as it provides greater discretion to the courts for the enforcement not only of the fundamental rights but also for any other purposes.

Since the early 1980s, the established rules of common law on *locus standi* have been modified for the purpose of giving effect to the new constitutional rationale. This was at first achieved by extending procedures followed under writs of *habeas corpus*. In the case of a *habeas corpus* writ, the remedy against human rights violations, any concerned person can file a petition to secure the release of a person in illegal detention. To some extent the writ of *quo warranto* also allowed any person to challenge the appointment of a person to a public office. However, the general rule that only a person whose right had been infringed could seek relief governed the issue of the writs of *mandamus* and *certiorari* challenging administrative

actions.[86]

Two Supreme Court rulings in the mid-1970s provided the starting point for the gradual expansion of the concept of *locus standi* in *mandamus* and *certiorari* writ proceedings. In Bar Council of Maharashtra v M.V. Dabholkar,[87] and J.M. Desai v Roshan Kumar,[88] the Supreme Court indicated that the concept of standing varies with circumstances; while in private law its ambit was narrow, it had to be given wider import in public law matters. Although a 'meddlesome interloper' would have no *locus standi*, a stranger may have standing where circumstances involving a grave miscarriage of justice had an adverse effect on public interest.[89] Apart from these two rulings, one can see that generally, in matters involving public interest, the High Courts in various states have often shown a liberal attitude.[90]

Considerable legal movement occurred at the beginning of the 1980s. In Fertilizer Corporation Kamgar Union v Union of India,[91] Krishna Iyer J. relied upon the *Dabholkar* case[92] to support a broad-based application of the principle of *locus standi* necessary to challenge administrative actions. In ABSK Sangh (Railways) v Union of India,[93] while recognising the *locus standi* of an unrecognised association, Justice Krishna Iyer held that:

> "Our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions access to justice

through 'class actions', 'public interest litigation', and 'representative proceedings'. Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigation, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions."[94]

This judicial policy became crystallised by 1981, in an important case concerning the transfer of judges, S.P. Gupta v Union of India.[95] In this case, Bhagwati, J. stated that:

"... where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right ... and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 of the constitution and in case of a breach of fundamental right of such person or determinate class of persons, in the Supreme Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of

persons."[96]

In People's Union for Democratic Rights (PUDR) v Union of India,[97] known as the *Asiad* case, the expanded doctrine of standing was applied by the court to allow civil rights organisations to maintain a petition alleging violations of fundamental rights of labourers employed for certain construction works. In Sheela Barse v State of Maharashtra,[98] a journalist was heard by the Supreme Court to remedy the condition of women in police custody. The Court directed that there should be special provisions for women prisoners in police custody.

In Bandhua Mukti Morcha v Union of India,[99] a social organisation had sent a letter to a judge of the Supreme Court stating that large numbers of labourers were working in stone quarries as bonded labourers under inhuman conditions. The Supreme Court treated the letter as a writ petition, issued notice and appointed an advocate as Commissioner to investigate the matter and to report back to the court. In this case the Supreme Court rejected the objections raised by the Union Government on the maintainability of the petition. The court interpreted the scope of Article 32 widely, stating that the Court could adopt such procedure as it thought fit in the exercise of its jurisdiction for the enforcement of fundamental rights.

The above cases show how the extaordinary powers of

the courts under the Constitution have been modified. This expansion of the remedial powers in the Constitution has led to the evolution of a new type of litigation to meet the social needs of the country.

2.5 The effect of social action litigation

The above cases expanding the scope of standing gave way to a new judicial process of social action litigation (SAL) or Indian public interest litigation.[100] The terminology is often intermixed in judicial pronouncements.[101] It is basically a non-adversarial justice delivery process in which the judge is an active participatory figure rather than a passive umpire.

SAL has been used as an important vehicle to resolve environmental issues and has contributed much to the development of Indian environmental jurisprudence. SAL is in addition to civil actions which could be brought before ordinary courts to redress public interest grievances, either as representative suits under Order I Rule 8 proceedings or civil actions under section 91 of the Civil Procedure Code of 1908 after the 1976 Amendment, discussed in chapter 3.3 below.

The essence of the SAL strategy is a unique human rights approach which has been extended into various realms

of administrative law such as environmental law. The constant resort to the judiciary for resolving major environmental issues through SAL has become a characteristic feature of Indian environmental jurisprudence. The development of environmental jurisprudence has made full use of all these techniques developed to protect the human rights of the people of India.

Cunningham's study on public interest litigation in India distinguished it from traditional litigation by focussing on the expanded standing, non-adversarial procedures and the attenuation of rights from remedies.[102] Writers have shown that SAL provided the vehicle to change the common law doctrine of *locus standi* and the doctrine of *stare decisis*.[103] The former restricts access to law and the latter restricts changes in the law and the judicial process itself.

One could say that both the doctrine of *locus standi* and the doctrine of *stare decisis*, which form the pillars of the common law tradition, have now become antithetical to the new Indian public law rationale. By entertaining an action of a representative or through a *pro bono publico* action, the court takes into consideration the importance of the public cause rather than seeing the issues brought only as a matter between the parties involved in the litigation. Cunningham shows that by providing remedies where there are no rights, the courts are in effect showing the need to

depart from the fundamental principles of the traditional common law system and to develop a process of 'creative legislation'.[104]

SAL has been used as an instrument for providing speedy remedies for the enforcement of the FRs arising out of gross human rights violations and thus it marks the dawn of human rights jurisprudence in India.[105] One of the early reported cases in this context is Sunil Batra v Delhi Administration.[106] The court ordered a probe into the activities inside Tihar jail in Delhi on the basis of a letter written by one of the inmates of the prison, alleging gross atrocities committed by a jail warden against a prisoner. *Sunil Batra I and II*[107] were soon followed by a series of probing directions issued against the Bihar government to ameliorate the condition of undertrial prisoners in Hussainara Khatoon v State of Bihar I-IV[108] and in Khatri v State of Bihar,[109] where prisoners who were subjected to torture were directed to be released and paid compensation. These early cases brought out gross human rights violations meted out to men in custody.

One could therefore say that SAL has been developed to achieve practical results. The relaxation of procedural rules regarding standing requirements, the introduction of epistolary jurisdiction, the exercise of *suo moto* powers and the use of Commissions to redress imbalance of evidence have all radically changed the ideology of the legal order, the

operation of the judicial process, and they have yielded tangible results. Some of the leading SAL cases show a certain democratisation of the judicial process for the benefit of the poor, ignorant and oppressed classes of the society.[110]

There has, however, been much criticism as to the use of SAL techniques to wider areas of social regulation. It has been pointed out that courts may not be in a position to enforce directions laid down by them in most of these cases.[111] It has also been argued that SAL is entering a limitless field leading to mere ubiquitious law games.[112] At the same time it has been noted that the courts are becoming wary of the limits of SAL and have often shown astuteness and vigilance in not allowing the abuse of SAL strategies for litigously inclined strongmen.[113]

Among non-legal circles Indian public interest litigation still faces much criticism.[114] The role of the Supreme Court in environmental litigation has also been criticised in a business fortnightly as "arbitratory".[115] Notably, a recent judgment of the Kerala High Court analyses the inherent limitations of public interest litigation and highlights how a court has to be extremely circumspect in such matters.[116]

The major effect of these cases for the development of environmental jurisprudence in India has been the greater

emphasis placed on the accountability of state administration by exposing state actions and inactions to public scrutiny through judicial processes. Thus the public law domain, developed through a constitutional law rationale, places the primary responsibility upon the state to enhance the quality of the life of its citizens. Consequently, the legislature has also stepped in, after 1986, to affirm the legitimacy of extended standing requirements and class action techniques. The changes brought about in the standing procedures in specific legislation related to the protection of the environment are discussed further in chapter 4.4 below. Thus the judiciary in India has assumed a unique role in shaping the future development of laws in India.

2.6 The societal role of the Indian judiciary

Several important socio-legal studies focused on the Indian Supreme Court have shown the unique role of the Indian judges and the use of their judicial power.[117] According to Gadbois, the power of judicial review, enabling the courts to set limits not only on executive actions but also on legislative power, both in theory and in practice, makes the Indian Supreme Court wield a form of political power unknown elsewhere.[118] Judicial review in India is an explicitly politically assigned role, as the provisions for judicial review sanction the courts' involvement in the ongoing

political process.

We have already seen in chapter 2.4 and 2.5 above that the limitation placed upon the people's access to justice through the courts' earlier status quoist adherence has been radically modified in the last two decades through the process of judicial activism and public interest litigation.[119] Thus the constitutional rationale seeks to make judicial processes work for the common people rather than being an arena of legal quibbling for men with long purses. The *raison d'etre* of this new legal rationale has been expressed by one of the most active judges of that time, Krishna Iyer J., as:

> "If law must serve life - the life of the many million masses whose lot has been blood, toil, tears and sweat - the crucifixion of the Indo-Anglican system and the resurrection of the Indian system is an imperative of independence."[120]

The lectures and writings by some Indian judges show how they have balanced the conflicting claims of legislative need, social purpose and doing justice. One judge has asserted that it is the duty of judges to carry out their task without losing their philosophical outlook.[121] The need to achieve the ideals set in the Constitution, coupled with the powers conferred upon the judiciary, has in effect created this characteristic role for the judges in India. To a well-known English public law expert, what has guided the

judicial discretion of activist Indian judges appear to be extra legal factors.[122]

The extensive jurisdiction conferred upon the superior courts by the Constitution was gradually expanded further by the judges themselves.[123] It can be said that after the political controversy raised by the *Golak Nath* case[124] and its aftermath in judicial supersession,[125] Keshavananda Bharati v State of Kerala[126] puts the Indian judiciary clearly in a position where "the last word on the question of justice and fairness does not rest with the legislature".[127]

The central role played by the court has also been explained as an exercise of rule making power by the court in the absence of legislative guidance.[128] Cunningham has been able to show how the courts' actions in some cases appear to be typically legislative in nature.[129] Court decisions have resolved several controversial and sensitive policy issues where even legislative attempts had failed earlier. For instance in Laxmi Kant Pandey v Union of India,[130] the Supreme Court in the process of resolving a controversial and sensitive policy issue on how foreigners should be allowed to adopt Indian children, laid down detailed guidelines carrying the force of law. Rural Litigation Entitlement Kendra, Dehra Dun v State of U.P.[131] and other environmental cases analysed in chapters 3 and 6 below show how the Supreme Court considered, balanced and

resolved weighty competing policies, priorities and issues of resources. In rendering judgment, the court reviewed highly technical reports and sociological material and then issued comprehensive directions and guidelines.

Not surprisingly, it has been argued that the role of the higher judiciary in India has gradually become more overtly political.[132] The new role of the higher judiciary has been summed up recently in an important decision of the Supreme Court[133] on the independence of the judiciary in India in the following words:

> "In the experience of the working of the constitution and the judicial system it becomes manifest that what was traditionally a non-political field, when courts were deciding disputes between citizen X and citizen Y, there grew additions of conflicts between the citizen and the state, enforcement of fundamental rights violations, public interest litigation, enforcement of policy matter and the like. Any matter under the sky, subject to inherent limitation, is open for judicial review in the higher judiciary. Not only do we strike down in judicial review executive, administrative or quasi judicial action and dismantle what appears to us to be offensive, still in numerous cases we have gone further to lay guidelines and done affirmative action. In doing so, have we not taken over political fields? Have we not in many an instance guided the functioning of a particular wing of the government and directed it

to be run in a particular fashion and monitor its progress? Have we not sitting on the couch of Article 14 been telling the executive what is right from our point of view, and had it done by our way? Multiplication of examples would hardly be necessary to hammer the point. There is nothing to feel shy in stating that the traditional role of the court of remaining apolitical is a thought of the past."[134]

The above words of a Supreme Court judge show how the working of the Constitution and the judicial system in India have brought about the transformation of an inherited common law system into a unique Indian public law system. The new rationale compels the legal system to function in many unique ways rejecting its adjudicatory posture and the mystery and mystique of the inherited common law-like judicial processes.

This new role of the higher judiciary has been seen as a case of 'enchantment'.[135] The survey conducted by Gadbois and Sharma indicates the wide support for the Supreme Court's activist role among the legal community in order to retain the confidence of the people.[136] The consolidation of a societal role of the judiciary through the processes of judicial review and judicial activism has enabled the courts to direct future legal development. This is particularly the case in the development of Indian environmental jurisprudence. This has facilitated constant resort to the

judiciary to resolve major environmental issues through the unique strategies of SAL or Indian public interest litigation.

This chapter has laid out relevant aspects of Indian constitutional law which have created, through their cumulative effect, a new public law rationale. Thus, within the last two decades, there has been perceptible change in the constitutional law of India and this has provided a strong background for the development of Indian environmental jurisprudence. The specific provisions which were added to the Constitution in 1976 made it explicitly clear that protection of the environment operates very much as a part of the Indian constitutional regime.

Before the advent of the new constitutional rationale and the incorporation of specific provisions for the protection of the environment, the only regime in this area was the defunct common law regime which sought to police the environment through public nuisance doctrines adhering to British criminal law strategies and private property principles. The next chapter analyses how the new constitutional rationale has now modified the Indian law on public nuisance.

NOTES TO CHAPTER 2

1. For details on the process of constitution-making see Rau, B.N., India's constitution in the making, 1960, Delhi, Orient Longmans; Rao, B. Shiva *et al.*, The framing of India's constitution, vols.1-5, 1966-1968, New Delhi, The Indian Institute of Public Administration. For a critical insight into the early decades of independent India's political and economic development see Rudolph, Lloyd I. and Susanne H. Rudolph, The modernity of tradition: political development in India, 1967, Chicago, Chicago University Press; Frankel, Francine R., India's political economy 1947-1977: the gradual revolution, 1978, Princeton, Princeton University Press; Nayar, Baldev Raj, India's mixed economy: the role of ideology and interest in its development, 1989, Bombay, Popular Prakashan.

2. The standard works on Indian constitutional law which I referred to are: Austin, Granville, The Indian constitution: cornerstone of a nation, 1966, Oxford, Clarendon Press; Pylee, M.V., Constitutional government in India, (3rd rev. edn.), 1977, Bombay, Asia Publishing House; Seervai, H.M., Constitutional law of India, (3rd edn.), vols.1-2 and supp.1, 1983, 1984, 1988, Bombay, Tripathi; Jain, M.P., Indian constitutional law, (4th edn.), 1987, Bombay, Tripathi; Pandey, J.N., Constitutional law of India, (20th edn.), 1989, Allahabad, Central Law Agency; Basu, Durga Das, Constitutional law of India, (6th edn.), 1991, New Delhi, Prentice-Hall of India.

3. On this Act see in particular Anand, C.L., Constitutional law and history of government of India, (6th edn.), 1990, Allahabad, The University Book Agency, 305-930. For historical details see Seervai, Constitutional law of India, vol.1, chapter 1; Rao *et al.*, Framing of the Indian constitution: a study, vol.5, 1-92.

4. For authoritative early analysis of Indian federalism see Jain, M.P., "Federalism in India", (1965) 6 Journal of the Indian Law Institute, 355-379; Jacob, Alice, "Centre-state governmental relations in the Indian federal system", (1968) 10 Journal of the Indian Law Institute, 583-636.

5. Seervai, Constitutional law of India, vol.2, at 1577. Bhagwati J. distinguished the Indian modifications of the Irish provisions, which made them more effective, in Minerva Mills Limited v Union of India, AIR 1980 SC 1789 at 1847-1850.

6. See Jain, M.P., Indian constitutional law, at 6 referring to the Constituent Assembly Debates, vol.7, 35-56.

7. See Basu, Constitutional law of India, at 134.

8. This point is frequently made. See Minattur, Joseph, "Introduction", in Minattur, Joseph (ed.), The Indian legal system, 1978, New York, Oceana Publications and New Delhi, Indian Law Institute, xi-xviii; Deshpande, V.S., "Nature of the Indian legal system", ibid, 1-17; see also Derrett's comment on the acclimatisation of the Anglo-Indian legal system, compared to rabbits in Australia, Derrett, J.D.M., "Indian cultural traditions and the law of India", in Sharma, Ram Avtar (ed.), Justice and social order in India, 1984, New Delhi, Intellectual Publishing House, 1-21 at 11.

9. Pylee, Constitutional government in India, at 24.

10. See Pandey, Constitutional law of India, at 239-240.

11. Id.

12. Dhavan, Rajeev, "Ambedkar's prophecy: poverty of human rights in India", (1994) 36 Journal of the Indian Law Institute, 8-36.

13. Ibid, at 10.

14. The Preamble of the Indian Constitution after the 42nd Amendment of 1976 reads as follows:
WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY of status and of opportunity; and to promote among them all
FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;
IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

15. See for example, Ref. by President of India u/Art.143(1) - in re: the Berubari Union and exchange of enclaves, AIR 1960 SC 845.

16. AIR 1973 SC 1506.

17. Ibid, at 1579-80; see also Excel Wear v Union of India, AIR 1979 SC 25; cf. Ref. by President of India u/Art.143(1) - in re: the Berubari Union and exchange of enclaves, AIR 1960 SC 845.

18. Delhi Road Transport Corpn. v DTC Mazdoor Congress, AIR 1991 SC 101 at 193.

19. See generally Sharma, Sudesh Kumar, Directive principles and fundamental rights: relationship and policy perspectives, 1990, New Delhi, Deep & Deep; Narain, Jagat, "Judicial law making and the place of directive principles

in Indian constitution", (1985) 27 Journal of the Indian Law Institute, 198-222; Baxi, Upendra, "Directive principles and sociology of Indian law", (1969) 11 Journal of the Indian Law Institute, 245-272; Sharma, G.S., "Concept of leadership implicit in the directive principles of state policy in the Indian constitution", (1965) 7 Journal of the Indian Law Institute, 173-188.

20. Rau, India's constitution in the making, at 66 and 249.

21. Rao *et al.*, Framing of the Indian constitution, vol.3, at 326.

22. Seervai, Constitutional law of India, vol.2, at 1584; for details see, Rao *et al.*, Framing of the Indian constitution, vol.2, 1-234.

23. Seervai, Constitutional law of India, vol.2, at 1585-1586. In Minerva Mills v Union of India, AIR 1980 SC 1789 at 1848 Bhagwati J. endorsed the view of Hegde J. who had stated in a lecture that:
"Unfortunately an impression has gained ground in the organs of the State not excluding judiciary that because the Directive Principles set out in Part IV are expressly made by Art 37 not enforceable by courts, these directives are mere pious hopes not deserving immediate attention. I emphasize again that no part of the Constitution is more important than Part IV. To ignore Part IV is to ignore the sustenance provided for in the constitution, the hopes held out to the nation and the very ideals on which our Constitution is built up".

24. Seervai, Constitutional law of India, vol.2, at 1584.

25. Ibid, at 1578.

26. Ibid, at 1578-1580.

27. Ibid, at 1580.

28. Ibid, at 1618.

29. For details see Maheshwari, S.R., "Public policy making in India", (1987) 48 The Indian Journal of Political Science, 336-353; Ali, Sofi, "Public policy-making in India", (1992) 38 The Indian Journal of Public Administration, 109-121 at 111-113.

30. The DPSP are now seen to manifest the concept of reasonableness for Articles 14, 19 and 21 of the constitution. See Union of India v Hindustan Development Corporation, AIR 1994 SC 988 at 999.

31. Austin, The Indian Constitution, at 76.

32. Ibid, at 99.

33. Sharma, Directive principles and fundamental rights, at 57 and 103. See also, Narain, "Judicial law making and the place of directive principles in Indian constitution", at 201-205.

34. An important provision inserted by the 25th Amendment was Article 31C which provided for the saving of laws giving effect to certain Directive Principles.

35. AIR 1973 SC 1506.

36. AIR 1980 SC 1789.

37. Ibid, at 1806.

38. Ibid, at 1848.

39. Ibid, at 1849.

40. This is also the term used by Granville Austin in the heading of the chapter on the Fundamental Rights and Directive Principles of State Policy. See Austin, The Indian constitution, at 50.

41. D'Monte, Darryl, Temples or tombs?, 1985, New Delhi, Centre for Science and Environment, at 12-20.

42. Ibid, at 9-10; see also Kaushal, Jagan Nath, "Environmental jurisprudence" in Diwan, Paras (ed.), Environment protection, 1987, New Delhi, Deep & Deep, 29-33 at 31-32.

43. Kaur, Dilbir, "Environmental protection in India: constitutional conspectus" in ibid, 126-135 at 131.

44. Id. Kaur refers to the Lok Sabha Debates, Eighteenth Session, Fifth Series, vol.LXV, No.3, 27 October 1976, column 143.

45. For a recent analysis on interpreting Indian environmentalism, its theories and tactics, see Gadgil, Madhav and Ramachandra Guha, "Ecological conflicts and environmental movements in India", in Ghai, Dharam (ed.), Development and environment: sustaining people and nature, 1994, Oxford, Blackwell Publishers, 101-136 at 119-136.

46. AIR 1975 SC 1331.

47. (1979) 3 SCC 489.

48. See for example Som Prakash Rekhi v Union of India, AIR 1981 SC 212; Ajay Hasia v Khalid Mujib, AIR 1981 SC 487; Central Inland Water Transport Corpn. v Brojo Nath, AIR 1986 SC 1571; Lamba Industries v Union of India, (1991) 2 SCC 407; Delhi Road Transport Corpn. v DTC Mazdoor Congress, AIR 1991 SC 101.

49. Lakshminath, A. and Sumitra Sripada, "Dynamics of Article 12", (1989) All India Reporter (Journal), 17-28; see also Takwani, C.K., "Other authorities within the meaning of Article 12 of the Constitution", (1986) 4 Supreme Court Cases (Journal), 1-10.

50. Massey's suggestion that the relevant test to be applied here should not be the "type of agency" but rather the "threat to fundamental rights" has been praised by Upendra Baxi. See, Baxi, Upendra, "Introduction", in Massey, Administrative law, (3rd edn.), xv-xxxvi, at xxxi footnote 35.

51. See M/s. Jothi & Com. v Tamil Nadu Pollution Control Board, AIR 1994 Mad 50 at 53. Although the Madras High Court rejected the contention that the private limited company in this case is amenable to the writ jurisdiction, the possibility cannot be ruled out in an appropriate case.

52. Massey, Administrative law, at 17.

53. (1974) 4 SCC 3. The early beginings of this new "non-arbitrariness" doctrine of Indian public law can be seen as early as 1967 in State of Andhra Pradesh v Raja Reddy, where Subba Rao J., observed that: "..official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all direction indiscriminately." See AIR 1967 SC 1458 at 1468.

54. (1974) 4 SCC 3 at 38.

55. A former Attorney-General of India is of the opinion that Edmund Burke's classical dictum, "Law and arbitrary power are in dreadful enmity," might have influenced Indian judicial thinking. See Sorabjee, Soli J., "Obliging government to control itself: recent developments in Indian administrative law", in (1994) Public Law, 39-50 at 44.

56. Maneka Gandhi v Union of India, (1978) 1 SCC 248.

57. R.D. Shetty v International Airport Authority, (1979) 3 SCC 489.

58. Ajay Hasia v Khalid Mujib, AIR 1981 SC 487.

59. Massey, Administrative law, 23-35.

60. Ibid, at 27. See also, Baxi, Upendra (ed.), K.K. Mathew on democracy, equality and freedom, 1978, Lucknow, Eastern Book Company, 171-174.

61. Baxi, Upendra, "Introduction", ibid, i-lxxxvi at lxxxiii-lxxxvi.

62. Per Bhagwati J., in Maneka Gandhi, AIR 1978 SC 597 at 619.

63. (1981) 1 SCC 608.

64. Ibid, at 618-619.

65. (1984) 3 SCC 161.

66. Ibid, at 183.

67. AIR 1994 SC 988.

68. Ibid, at 999.

69. (1992) 2 SCC 666; see also, Unnikrishnan J.P. v State of Andhra Pradesh and Others, (1993) 1 SCC 645.

70. (1992) 2 SCC 666, at 680.

71. Id.

72. Basu, Constitutional law of India, at 73.

73. (1978) 1 SCC 248.

74. (1981) 1 SCC 608.

75. (1982) 3 SCC 24.

76. Ibid, at 55.

77. An important area of its impact is the law of preventive detention, about which I have written in a comparative survey. See Abraham, C.M., "India - an overview", in Harding, Andrew and John Hatchard (eds.), Preventive detention and security law: a comparative survey, 1993, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 59-70.

78. In Mithu v State of Punjab, (1983) 1 SCC 277.

79. In A.K. Roy v Union of India, (1982) 1 SCC 271.

80. AIR 1950 SC 27.

81. (1976) 2 SCC 521.

82. (1978) 1 SCC 248.

83. (1981) 1 SCC 608.

84. Sharma, G. S., "Concept of leadership implicit in the directive principles of state policy in the Indian constitution", (1965) 7 Journal of the Indian Law Institute, 173-188; Gadbois, George H., "The Supreme Court of India as a political institution" in Dhavan *et al.*,

Judges and the judicial power, 250-267; Dube, M.P., Role of Supreme Court in Indian constitution, 1987, New Delhi, Deep and Deep; Pandey, Jitendra and R.K. Dubey, Civil liberty under the Indian constitution, 1992, New Delhi, Deep and Deep, 28-80.

85. Jain, Indian constitutional law, at 703.

86. For details see Markose, A.T., Judicial control of administrative action in India, 1956, Madras, Madras Law Journal Office, 308-315; Jain, M.P. and S.N. Jain, Principles of administrative law, (3rd edn.), 1979, Bombay, Tripathi, 376-472; Sathe, S.P., Administrative law, (4th edn.), 1984, Bombay, Tripathi, 304-390; Ramachandran, V.G., Administrative law, (2nd edn.), 1984, Lucknow, Eastern Book Co., 445-458; Massey, P., Administrative law, (3rd edn.), 1990, Delhi, Eastern Book Co., 203-240.

87. (1975) 2 SCC 702.

88. (1976) 1 SCC 671.

89. Jain and Jain, Principles of administrative law, at 197.

90. Some notable examples of early cases decided by various High Courts are, N.N. Chakravarty v Corporation of Calcutta, AIR 1960 Cal 102; Nabaghan Naik v Sadananda Das, AIR 1972 Ori 188; R. Vardarajan v Salem Municipal Council, AIR 1973 Mad 55.

91. AIR 1981 SC 344.

92. (1975) 2 SCC 702.

93. AIR 1981 SC 298.

94. Ibid, at 317.

95. (1981) Supp SCC 87.

96. Ibid, at 210.

97. (1982) 3 SCC 235.

98. (1983) 2 SCC 96.

99. (1984) 3 SCC 161.

100. See generally, Singh, Parmanand, "Public interest litigation", (1991) 27 Annual Survey of Indian Law, 35-55; Menon, Madhava N.R., "The dawn of human rights jurisprudence", (1987) 1 Supreme Court Cases (Journal), 1-12; Sachar, Rajindar, "Social action litigation: activist & traditionalist judges", (1987) 1 Supreme Court Cases (Journal), 13-16; Bhagwati, P N., "Judicial activism and public interest litigation", (1985) 23 Columbia Journal of

Transnational Law, 561-567; Baxi, "Taking suffering seriously" in Dhavan *et al.*, Judges and the judicial power, 289-315.

101. The term 'social action litigation' has been preferred by some Indian jurists like Baxi to distinguish the Indian version from the American public interest litigation. See Baxi, "Taking suffering seriously", at 290; see also Bhagwati, "Judicial activism and public interest litigation", at 566.

102. Cunningham, Clark D., "Public interest litigation in Indian Supreme Court: a study in the light of American experience", (1987) 29 Journal of the Indian Law Institute, 494-523 at 514-515.

103. See for example Sathe, S.P., "Judicial process: creativity and accountability," in Bhatia, K.L. (ed.), Judicial activism and social change, 1990, New Delhi, Deep & Deep, 90-105 at 93-94.

104. Cunningham, "Public interest litigation in Indian Supreme Court", at 514, footnote 108.

105. See Menon, "The dawn of human rights jurisprudence", 5-7.

106. AIR 1978 SC 1675.

107. AIR 1978 SC 1675 and (1980) 3 SCC 488.

108. (1980) 1 SCC 81; 98; 108; 115.

109. (1981) 1 SCC 627.

110. Typical cases of this kind are, *inter alia*, Azad Rickshaw Pullers Union Amritsar v State of Punjab, AIR 1981 SC 14; People's Union for Democratic Rights v Union of India, AIR 1982 SC 1473; Sheela Barse v Union of India, AIR 1986 SC 1773; Upendra Baxi v State of U.P., AIR 1987 SC 191.

111. On this aspect see, Agrawala, S.K., Public interest litigation in India: a critique, 1985, New Delhi, The Indian Law Institute.

112. Singh, "Public interest litigation", at 35-55.

113. Menski, Werner F., "On the limits of public interest litigation", (1990) 2 Kerala Law Times (Journal), 45-47. See however, Menski, "Bottlenecks of justice? a further note on the limits of public interest litigation", (1992) 1 Kerala Law Times (Journal), 57-60.

114. For a recent example, see Kishwar, Madhu, "Public interest litigation: one step forward, two steps back", in (March-April, 1994) 81 Manushi, 11-23.

115. Nagasaila, D. and V. Suresh, "Arbitrator, not authority", in (August 16-29, 1993) Business India, at 132.

116. C.K. Rajan v State of Kerala and others, AIR 1994 Ker 179 at 198-208.

117. See generally, Gadbois, George H., "The Supreme Court of India as a political institution", in Dhavan *et al.*, Judges and the judicial power, 250-267; Singh, Bakshish, Supreme Court of India as an instrument of social justice; Dube, Role of Supreme Court in Indian constitution and Baxi, Upendra, Courage, craft and contention: the Indian Supreme Court in the eighties, 1985, Bombay, Tripathi.

118. Gadbois, "The Supreme Court of India as a political institution", in Dhavan *et al.*, Judges and the judicial power, at 250-251.

119. For further details see Bhatia, K.L., Judicial activism and social change, 1990, New Delhi, Deep & Deep; Bhagwati, P.N., "Judicial activism and public interest litigation", (1985) 23 Columbia Journal of Transnational Law, 561-567.

120. Iyer, V.R. Krishna, "Quo vadis Indian justice" in Judicial justice - a new focus towards social justice, 1985, Bombay, Tripathi, at 627.

121. Shivmohan, M.V.K. (ed.), Law and society: lectures and writings of Justice P Jaganmohan Reddy, 1986, Delhi, Ajantha Publications, at 43.

122. Pannick, David, "Judicial discretion", in Dhavan *et al.*, Judges and the judicial power, 41-53 at 50-51.

123. Baxi, "Taking suffering seriously", ibid, at 289.

124. I.C. Golaknath v The State of Punjab, AIR 1967 SC 1643.

125. For details see Das, Gobind, Supreme Court in quest of identity, 1987, Lucknow, Eastern Book Company.

126. (1973) 4 SCC 225.

127. Mithu v State of Punjab, AIR 1983 SC 473 at 479.

128. Cunningham, "Public interest litigation in Indian Supreme Court", at 513-515.

129. Ibid, at 515.

130. AIR 1984 SC 489.

131. AIR 1985 SC 652.

132. Das, Supreme Court in quest of identity, at 246-257.

133. S.C. Advocates on Record Assn. v Union of India, (1993) 4 SCC 441.

134. Ibid, at 504.

135. Gadbois, George H. and Mool Chand Sharma, "Law students evaluate the Supreme Court - a case of enchantment", (1989) 31 Journal of the Indian Law Institute, 1-48.

136. Ibid, at 40.

CHAPTER 3 PUBLIC NUISANCE AND INDIAN ENVIRONMENTAL JURISPRUDENCE: FROM COMMON LAW FOUNDATIONS TO PUBLIC LAW MODELS

In the previous chapter, relevant areas of Indian constitutional law which have formed the basic foundation of Indian environmental jurisprudence were analysed. The cumulative result of the changes, particularly the meaning and importance accorded to different parts of the Constitution, pointed to the evolution of a new public law rationale. The gradual modifications and changes which are significant for the unique development of Indian environmental jurisprudence showed how this development has now steered away from the earlier legal order based on the common law rationale. In the present chapter, the common law foundations particularly relevant for the protection of the environment are analysed. The chapter initially shows the inherent deficiency of the common law on public nuisance for the purpose of environmental protection. It then focuses on the relevant provisions of law in India and illustrates the manner in which they operated in the past. Finally we analyse the modifications and strategies adopted in India within the last decade or so to make the public nuisance law work within the new public law rationale.

3.1 Public nuisance and the common law foundations in India

Before the terms 'environment' and 'pollution' assumed their current meaning and importance, what we now see as environmental or pollution matters were covered by other mechanisms of law. In particular, a doctrinal basis for environmental law can be founded upon the law of nuisance under the common law. The importance of the common law for the purpose of environmental protection has lately been given much attention in the Anglo-American common law jurisdictions.[1]

One can see that public nuisance as a crime under English common law includes such diverse matters as carrying on an offensive trade, obstructing the highway by rendering it dangerous and inconvenient to pass, exposing to the public street a person suffering from infectious disease, or selling food unfit for human consumption.[2] Although most instances of environmental harm can be brought within the conceptual fold of public nuisance under the common law, this appears to have become inadequate in actions against perpetrators of environmental harm.[3]

Under common law, public nuisance is covered both under the law of crime and the law of tort. The law on nuisance, a rather unique area of law, is of two kinds: public and private nuisance. A private nuisance is a civil wrong and a public or a common nuisance is generally considered as a

criminal offence. The element which all public nuisance has in common with private nuisance is that of annoyance or inconvenience. The maxim *'Sic utere tuo ut alienum non laedas'* which, in essence, means the use of one's property so as not to injure another's, shows the ideological pith and substance of nuisance law as evolved under the common law. It indicates a condition or activity which unduly interferes with the use or enjoyment of land. It has been shown that although this maxim was a favourite citation in the early cases on nuisance, like most maxims, it was held to be lacking in definition and inaccurate.[4]

Historically, the law of nuisance under the common law developed for the protection of proprietorial rights through what was known as "*the assize of nuisance*".[5] The common law recognised rights to protection against environmentally offensive activities but generally tied these rights to property interests. The common law courts, particularly during the Industrial Revolution, adopted a policy of non-interference. This position, it would appear, became more established as the common law passed over into the colonies, as in American law.[6] Salmond, the well-known English jurist, has however noted that public and private nuisances are not in reality two species of the same genus.[7]

It has been shown by the authors of an English criminal law textbook that the Blackstonian definition of public nuisance as "an annoyance to all the King's subjects" is

clearly too wide and if it was so, no public nuisance could ever be established.[8] One also frequently finds reference to the definition of Lord Denning, which is often cited in English nuisance cases, that:

> "A public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effects that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large."[9]

One can therefore agree with a more modern definition that public nuisance as a criminal offence is an unlawful act or ommission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public or by which the public are obstructed in the exercise or enjoyment of any right common to all.[10] Over the years in England, virtually the entire area of traditional public nuisance prosecutions has been comprehensively covered by statutes.[11] With the advent of statutory law, the use of common law principles in this area has been stultified.[12] Where a statute expressly or by necessary implication authorises an activity, then liability under the common law principle is excluded. This appears to have been the case in the use of public nuisance in England for the development of environmental jurisprudence.[13] Thus the law on public nuisance in common law jurisdictions remains markedly underutilised, confused and dormant and has

even defied precise definition, particularly for the purpose of environmental protection.[14]

Therefore there is a strong case in the Anglo-American common law jurisdictions, that in order to meet modern environmental problems, public nuisance should not unnecessarily constrict itself with archaic property law notions, nor should it refuse an individual to prosecute the perpetrator of a crime against the community at large. In the context of the Exxon Valdez litigation, which arose out of an oil tanker disaster in North America, it was brought out that liberal standing rules could have solved much of the dilemma involved in public nuisance and federal citizen suits in the United States.[15] The inadequacy of the common law for protecting the environment clearly indicates the need for radical change in the ideology of the legal system and the non-adherence to adversarial proceedings which operate by pitching the interests and rights of one person against those of another. In this respect, one could say that a revitalised public nuisance could be of much utility in environmental cases.[16]

The new public law regime in India has been able to bring about important modifications to remould and revitalise the principles of public nuisance and utilise them effectively. First, the public interest to protect the environment was brought within the fold of the new public law regime by incorporating specific provisions in

the Indian constitution, as shown in chapter 2 above. Secondly, the judicial processes of adversarial proceedings were modified through liberalised standing provisions and through explicit judicial activism to foster public interest and to meet the ends of environmental justice.

We begin our investigation into the Indian situation by showing how the foundations of the Anglo-Indian common law allowed modification and variation necessary for the development of modern India's environmental jurisprudence. Therefore, it is relevant to consider here briefly the peculiar way by which India came under the influence of the common law.

The origins of the import of common law into India have been traced to the early Charter Acts from 1661 onwards.[17] The early Charters, which established English courts in India, while the Moghul rulers were still officially the supreme authority over the Hindu and Muslim kingdoms in most parts of India, required the judges to act according to "*Justice, equity and good conscience*" in deciding civil disputes if no source of law was identifiable.[18] The origin of this formula has been traced to the Romano-Canonical juridical philosophy of the sixteenth-century English jurists.[19] The formula was then adopted in India to smooth out discrepancies between different systems of law which were in operation and to introduce concepts which strongly resemble the character of the English law. Professor Derrett

has argued that not only English law was applied, but also it gave room for the application of all kinds of laws.[20] This concept, therefore, has not only brought Indian legal development in line with English common law but has offered ample scope for modificaton and variation.[21] The judicial need to act according to justice, equity and good conscience under the early enactments and the Charter Acts has been held to be the main reason for the Indian courts to follow English common law.[22]

Many aspects of the law of torts remained vague in India because the application of the English law of torts to the Indian conditions was completely unsuitable in many fields.[23] Only some aspects of the law of torts were codified in special statutes,[24] while much of the substantive law on torts has remained uncodified.[25] Consequently, it could be said that the formula of justice, equity and good conscience, sown in India by the British, gave more flexibility and adaptability to meet the ends of justice by allowing the case-law to develop in challenging situations in its own way.

The Constitution of India has not brought about any change to this particular situation. According to Article 372 of the Indian Constitution, all the laws in force immediately before the commencement of the Constitution continue to be in force. However, in some areas such vestigial links have led to quagmire situations. This has

been shown with reference to the vicarious liability of the government for the torts committed by its servants:[26]

Article 300 of the Constitution of India, which deals with the extent of liability, refers back to Section 176 of the Government of India Act, 1935. This, in turn, refers back to Section 32 of the Government of India Act, 1915 and that, in turn, refers back to Section 65 of the Government of India Act, 1858. Section 65 of the Government of India Act, 1858 had laid down that on the assumption of the Government of India by the British Crown, the Secretary of State for India in Council would be liable to the extent as the East India Company was previously liable. The decisions of the courts in India in this area have also not been of any great help.[27]

The above situation, like in many other areas of law in India, indicates that where the legal rationale has not been modified and is left to continue, then the result is confusion, involving strange historical exegesis.

Under common law a civil action for public nuisance is permitted only when the litigant establishes particular damage to himself. In cases of public nuisance which affect a large portion of the community, a civil action for abatement has to be brought by the Advocate General, who represents the community at large. To evoke the substantive law of public nuisance in such matters would require getting

across the procedural hurdle of *locus standi*. As shown in the previous chapter, these hurdles have been gradually lowered through judicial processes based on the constitutional rationale. The *Ratlam*[28] and *M.C. Mehta* cases,[29] discussed in detail in Chapter 6.1 and 6.2, show the distinct break from the English law tradition towards the evolution of a new jurisprudence. They give a strong indication that these efforts are also designed to develop a public law of torts. In this respect, it has been pointed out in India that blueprints for this development could be found in civil law jurisprudence, especially the French jurisprudence.[30] Such an outcome is implicit in the statement of the former Chief Justice Bhagwati in *M.C. Mehta* that "we cannot allow our juridical thinking to be constricted by reference to the law as it prevails in England."[31]

3.2 Public Nuisance under the Indian Penal Code

This section focuses here on the operation of the principles of the law of nuisance through specific statutory provisions in the Civil and Criminal Codes of India.[32] The Indian Penal Code of 1860 contains elaborate provisions defining the crime of public nuisance in its various aspects and instances and prescribes punishments. Chapter XIV of the Indian Penal Code deals with offences affecting public health, safety, convenience, decency and morals.[33]

Section 268 of the Indian Penal Code provides the definition of public nuisance. It follows the general scheme adopted in the Code of not defining a term in the abstract but by defining it in relation to the doer.[34] The section reads as follows:

> "268. Public nuisance. - A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage."

This definition of public nuisance is capable of bringing within its fold all instances of public nuisance. It has been pointed out that the definition was in fact borrowed for the purpose of the Code from a definition attempted by the authors of the Digest of Criminal Law in England.[35] This definition contained in Section 268 is interlinked with Section 290 of the Indian Penal Code which prescribes punishment for public nuisance in cases not otherwise specifically provided for in the Code. This definition is also relevant with reference to the procedural provisions under the Criminal Procedure Code of 1973. Section 290 of the Indian Penal Code reads as follows:

> "290. Punishment for public nuisance in cases not

otherwise provided for - Whoever commits a public nuisance in any case not otherwise punishable by the Code, shall be punished with fine which may extend to two hundred Rupees."

Section 290 is worded as a residual provision because in the several sections of the chapter punishments are provided for the various specific nuisances. It could be seen that the generality of the definition of public nuisance in Section 268 provides greater scope for effective application than the specific provisions. One can see from the cases discussed later in this sub-chapter that Section 290 read with Section 268 has more often been resorted to than other specific provisions related to public nuisance.

There are two specific sections dealing with the fouling of water (Section 277) and making the atmosphere noxious to health (Section 278) which could be used against perpetrators of water and air pollution. Sections 277 and 278 of the Indian Penal Code read as follows:

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

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

The above two provisions have direct relevance to environmental protection as they seek to prevent water and air pollution through a penal strategy. However, their effective application towards achieving this objective is doubtful, because the technicalities of Indian criminal law require a complete satisfaction of the ingredients of the offence as stipulated in the penal provisions. Take for instance the provisions relating to fouling of water. The wording requires proof of the voluntary corruption or fouling of water, that the water must be of a public spring or a reservoir and that the water must have been rendered less fit for the purpose for which it was ordinarily used. Such wordings not only create a burden for the prosecution to prove, but also provide the accused enough grounds to argue his way out. The above provisions did not liberate the criminal justice process from the difficulties of the common law demanding elaborate evidence for sundry matters as well as technical interpretations of obvious things and events.

The above position is well illustrated by some of the early recorded cases. In one of the earliest cases recorded

in 1882, Queen v Vitti Chokkan,[36] it was held in a one sentence judgment that the words 'public spring' or 'reservoir' under Section 277 of the Indian Penal Code did not include a river. Thus the Madras High Court, in 1881, quashed the conviction of one Vitti Chokkan for having "dirtied the drinking waters of the Varaga River, the only drinking water available in the locality, by washing bullocks therein" and also four other persons for having "rendered the spring water of the Varaga River unfit for the purpose of bathing and drinking by putting up a dam across the river and catching fish".[37]

In 1904, the Bombay High Court avoided the specific provision in the Indian Penal Code relating to fouling water, but sought refuge in the general residual provision of Section 290 in the Code for penalising the fouling of river waters in Emperor v Nama Rama.[38] Here the accused and nine others had been convicted by the trial court under the specific provision of Section 277 for the offence of fouling the waters of a river and rendering it unfit for drinking purposes. However the High Court of Bombay had a different view on appeal. The court relied upon earlier cases under the Indian Penal Code[39] and held:

> "Though the fouling of the waters of a river running in a continuous stream may not be an offence under s. 277, Indian Penal Code, it may well be an nuisance under s. 290, Indian Penal Code, if the evidence shows that the act was such as to cause common injury or danger to the

public."[40]

In 1887 the Calcutta High Court also expressed doubts about the application of the specific provision of fouling water in Re: Umesh Chandra Kar,[41] where the accused had placed bamboo stockades across tidal waters and held that the offence was one of public nuisance under Section 268, punishable under Section 290.

Thus quite specific provisions have to a great extent been downgraded by judicial adherence to the letter of the law and attention to technical requirements. One could argue this point further with similar cases, where nuisance related to the fouling of water or vitiating the atmosphere were punished by resort to the general penal provisions for public nuisance. In Berkefield v Emperor,[42] it was held that the Manager of a bone mill was guilty of committing a public nuisance because he allowed stacks of bones to remain uncovered in the open for a long time. They became rotten and emitted a smell noxious to people living in or passing by the vicinity. The Calcutta High Court held:

> "It is clear that for the provison of Section 268, it is not necessary that the smells produced by it should be injurious to health but that it is sufficient if they be offensive to the senses."[43]

In Phiraya Mal v Emperor,[44] the working of rice husking machines throughout the whole night in a residential area

was held to be a public nuisance under Section 268. In this case, the court held it was not a *sine qua non* that such an annoyance as this should injuriously affect every member of the public within its range of operation, but was sufficient that it should affect people in general who dwell in the vicinity.[45]

The above cases show that specific statutory provisions seem to have served little good. This adverse effect can also be attributed to the then prevailing judicial attitude of determining issues by avoiding the use of specific provisions, even in clear cases of nuisance arising out of water and air pollution. An important factor to be noted here is that the residual provision in section 290 lays down less punishment than the specific provisions for fouling water and for making the atmosphere obnoxious. One could draw the inference that statutory specificity and stringent penalty had only resulted in stultifying the efficiency of the law.

A complete survey of all the reported cases on public nuisance related to environmental pollution does not appear to have been attempted and it is outside the scope of this study to undertake such a survey.[46] However, it could be said from the cases analysed above that the specific provisions under sections 277 and 278 were often avoided to deal with what we would now consider as water or air pollution. This rationale appears to have continued well

into the early period of independent India. For instance in 1953, the Madras High Court in Achammagari Venkata Reddy v State[47] appears to have avoided the specific provision in what must have been a clear case for section 277 and held that, if a person by raising the level and cross bunding a rastha causes stagnation of water leading to breeding of mosquitoes and so on, giving rise to offensive smell and causing to the persons living in the vicinity danger to their health and annoyance, he commits a public nuisance punishable under Section 290.[48]

Likewise, the application of the public nuisance provisions under the criminal law was inhibited by technical requirements. In 1959, the Supreme Court of India held in a criminal appeal that, if the chimney of a mill is of a prescribed height and if it emits smoke, this is not a public nuisance and the accused is not guilty of the offence punishable under Section 290 of the Indian Penal Code.[49]

Another important inhibiting factor noticed in the study of these early cases is the invocation of a common law presumption that the principal is not continually liable for the acts of his agent.[50] One of the early cases that highlight this point is Bibhuti Bhusan Biswas v Bhuban Ram.[51] Here the proprietor and the manager of a mill were prosecuted and convicted under Section 290 of the Indian Penal Code on complaints that the working of the mill was a nuisance. But the Calcutta High Court did not agree. It set

aside the conviction and held that the principal is not criminally answerable for acts of his agent and such convictions are bad in law. This rationale, however, does not appear to be acceptable now. The change of rationale on this particular point is depicted in the 1973 Andhra Pradesh case of Kurnool Municipality v Civic Association, Kurnool,[52] where the Court went to the extent of holding a municipality liable for an offence of public nuisance for acts of their agents. The Court held:

> "It is true that corporate bodies necessarily act by or through their agents. There is no reason to exempt them from liability for criminal acts or omissions committed by their agents or servants while purporting to act for or on behalf of the corporate bodies."[53]

The above case can be seen as a forerunner to the momentous change that was brought about in the *Ratlam* case, discussed in chapters 3.4 and 6.1 below. From the above analysis of selected old cases on public nuisance in India, one can see that the operation of law was very much based upon the legal rationale that pervaded the then judicial attitude.[54] Although the foundations of law and the doctrines are very much the same today, the rationale has perceptably changed within the last two decades, as this thesis shows. This has brought about phenomenal changes in the usefulness and understanding of the law.

3.3 Public Nuisance under the criminal and civil procedural codes in India

The Indian Criminal Procedure Code of 1973 has a significant chapter on maintenance of public order and tranquility, which falls into four parts. Part A deals with unlawful assemblies (Sections 129-132), Part B with public nuisance (Sections 133-143), Part C with urgent cases of nuisance or apprehended danger (Section 144), and Part D with disputes as to immovable property (Sections 145-148). Most relevant in our present context is Section 133, which has been resorted to as an effective remedy to abate public nuisance in instances of environmental harm. This provision empowers a District Magistrate to pass conditional orders for the removal of nuisances.[55] This section is supplemented with ancillary provisions, contained in Sections 134 to 143 of the Code,[56] to constitute a comprehensive procedure for tackling public nuisance.

Section 144 of the Code has to be seen as a significant provision conferring wide powers upon the magistrate to deal with urgent cases of nuisance or apprehended danger. It constitutes a separate part of the chapter on maintenance of public order and tranquility.[57] This magisterial power has been exercised only for the purpose of preventing public disorder arising out of public unrest or riot situations. The potential of this provision is vast, but it does not appear to have been utilised effectively in cases of

environmental harm.

All these provisions of the Criminal Procedure Code were made at a time when the concern to protect the environment was not a matter of much interest. Therefore *prima facie* it may appear as if they are not relevant to environmental protection strategies. However, they confer wide and ample powers on the Magistrates, potent enough to curb or abate any public nuisance which may include environmental pollution or degradation. The judicial processes in India, being reoriented towards a public law rationale, have more recently developed new techniques of finding out potentialities of environmental protection in provisions hitherto unexplored. It is significant to note here that the provisions under the Criminal Procedure Code are more akin to an administrative remedy than a penal sanction strategy. Hence they have become more functionally efficacious under the public law rationale.

Under the Civil Procedure Code of 1908, civil suits against the perpetrators of public nuisance were allowed. By the amendment of the Civil Procedure Code in 1976, the procedure was made easier for the general public to seek recourse in the civil courts. Section 91 of the Code now reads as follows:

"Public nuisances and other wrongful acts affecting the public:-

(1) In the case of a public nuisance or other wrongful

act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted, -

(a) by the Advocate-General, or

(b) with the leave of the court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions."

Prior to the amendment in 1976 such suits were allowed only with the sanction of the Advocate General. Thus a modification was brought about to the standing requirement which had been an obstacle in civil actions against environmental degradation. This is an important instance of early relaxation of procedural rules in the wider context of developing Indian public interest litigation which has already been discussed in chapter 2.

Order 1 Rule 8 under the Civil Procedure Code of 1908, as amended in 1976, complements the above section and is significant for environmental litigation in India. This provision permits one person to sue or defend on behalf of all having the same interest. This provision deals with what are known as representative suits in common law

jurisdictions. The rule has been framed and adopted for the purpose of saving multiplication of suits over a single cause of action. Where the interest of the community is affected, the Court has the power to direct one person or few to represent the whole community so that inconvenience and expenses may be saved. To bring a case under this provision, all the members of a class should have a common interest in a common subject matter and a common grievance and the relief sought should be beneficial to all. This rule is an enabling provision and does not prevent an individual from pursuing the same matter on its own right to seek relief.

An important feature of the civil litigation strategy adopted in India is the resort to injunctive relief rather than damages. Although in theory damages form an important principle in a tort action, in practice injunctive relief is used more in India for abating pollution. Lawyers in India, intent on abating pollution, often seek a temporary injunction against the polluter followed by a perpetual injunction on decree. Injunctions are of two kinds temporary and perpetual. They are regulated by sections 94 and 95 as well as Order 39 of the Civil Procedure Code. The Courts have an inherent power to issue a temporary injunction in circumstances that are not covered by Order 39 when they are satisfied that the interest of justice would require so.[58] The grant or refusal of temporary injunction is governed by the three established principles of common law: (1) the

existence of a *prima facie* case, i.e. the facts showing that the plaintiff is likely to succeed in the suit, (2) the likelihood of irreparable injury, i.e. an injury that cannot be adequately compensated if the injunction is refused and (3) the balance of convenience, i.e the court must be satisfied that the damage the defendant would suffer by the grant of the injunction is outweighed by the damage the plaintiff would suffer if the injunction is refused.

In Ram Baj Singh v Babulal,[59] hazardous dust from a brick grinding machine polluted the air of a neighbouring medical practitioner's consulting room. Here, the polluter was permanently restrained from operating the machine. The court recognised a private right of action arising from a public nuisance. The court also employed a liberal test to determine the existence of a nuisance. Here one could discern that the injunction was issued apparently without examining the balance of convenience. Here the question also arises as to how far the common law standard of 'reasonableness' provides a satisfactory basis for regulating pollution. It appears that under Indian conditions, such an approach is not likely to protect the most vulnerable sections of the population who are not merely the 'average' or 'reasonable person'.[60]

In B. Venkatappa v B. Lovis,[61] the Andhra Pradesh High Court upheld the lower court's mandatory injunction directing the defendant to close the holes in a chimney

facing the plaintiff's property. The court authorised the plaintiff to seal the holes at the defendant's cost if the defendant failed to do so. The High Court stated that the smoke and fumes that materially interfered with ordinary comfort were enough to constitute an actionable nuisance and that actual injury to health need not be proved. In Mukesh Textiles Mills (P) Ltd. v H.R. Subramanya Sastri,[62] the defendants were the owners of a sugar factory which stored molasses in an earthen tank near the plaintiff's paddy and sugar cane field. The tank collapsed as a result of rodents digging into it. The molasses were discharged into the water channel and inundated and polluted the plaintiff's land, damaging his paddy and sugar cane crops. Here the Karnataka High Court applied the rule in *Rylands v Fletcher*,[63] partly confirmed the decision of the Court below and awarded damages to the plaintiff. The futile nature of relief obtained by the plaintiff in this action should be noted: the cause of action arose in April 1970 and the final decision of the High Court was made only in 1987.[64]

The above cases also reveal that Indian judicial processes tend to accord lesser importance to awarding damages or costs: thereby moving away from the common law's conventional emphasis on damages. It could be argued that to some extent the ideology of awarding damages as such is incompatible with the Indian public law rationale which encourages a legal strategy for prevention rather than cure.

3.4 From a common law to a public law rationale for public nuisance in India

Judicial activism in the use of the provisions on public nuisance in the Criminal Procedure Code was rare in the early cases because the courts had adopted several self-imposed restrictions. In Lalman v Bishambhar Nath,[65] a Magistrate made an order to stop the working of, and to remove, a lime kiln from the municipality limits. This kiln had been working for forty five years upon a licence renewed from year to year. The order of the Magistrate in interfering with its working was set aside by the High Court. According to the High Court, the discomfort was only to the complainant and his immediate neighbours who had moved into the locality much later. The Court, thereby, was trying to bring in the notion that long-standing nuisance could not be remedied under this provision. Similarly in Manipur Dey v Bindhu Bhusan Sarker,[66] the use of Section 133 of the Code was restricted as the nuisance alleged had been long-standing. In Khair Din and others v Wasan Singh,[67] this bar on the exercise of jurisdiction was also accepted. Long-standing nuisance has been pleaded as a principle of law to counter complaints of existing nuisance. This particular point of law, based on the common law tradition, has been castigated in *Ratlam* as an "ugly plea".[68] Some years ago this specific aspect of law has been analysed as an area of conflicting judicial opinion.[69]

A major element of judicial attitudes which restricted the efficacy of the law and which can be deduced from the study of early cases arose whenever the issue of public nuisance conflicted with the carrying on of trade or business of the accused. The trend was akin to the common law traditions of recognising individual rights in trade, business and property, rather than being aligned to the social justice or human rights jurisprudence with its bias towards public interest and safety of the people at large.

A typical case that highlights the earlier British judicial attitude and its juridical rationale is Deshi Sugar Mills v Tupsi Kahar and others in 1926.[70] A petition was filed with a Sub-Divisional Officer by nearly a hundred persons living in the neighbourhood of the river Daha complaining that the river had been polluted by the effluents from two sugar mills. The matter was referred for report and later, after appearance of both parties, an order was passed by the Sub-Deputy Magistrate directing the managers of the sugar mills to discontinue draining noxious water into the river and to abate the nuisance. The managers unsuccessfully moved the Sessions Court and then went to the High Court, pointing out that the removal of nuisance from a river was perhaps hardly applicable to the case of pollution by effluents from a factory. The High Court held that it was not very material whether that was so or not.[71] The court also expressed the opinion that:

"...in law it is not admissible for a tribunal to

assume the attitude that, even if a nuisance is proved but not as against any particular party complained of as causing it, an order prohibiting such nuisance can be issued against all parties against whom complaints are made."[72]

Although the court felt that it is of the utmost importance that sources of public water supply must be maintained pure and free from pollution by industrial factories, it was held:

"...such pollution must be convincingly proved against a wrongdoer before any order can be passed against him."[73]

The Court further asserted that:

"But the matter is, it must be emphasized, one which calls for scientific enquiry and cannot be decided merely because a number of persons, in April or May when the river is very low and hardly flowing, think that the stagnation and impurity of the water, an outbreak of illness or the loss of some cattle may be due to the presence near of two sugar mills."[74]

Therefore the Court found it technically wrong to issue orders against both sugar mills and held that it would be necessary to prove substantially, before an order could be made against either or both mills, that the effluents from either or both, respectively, were noxious. Thus, Bucknill J., had no hesitation in coming to the conclusion that the

orders of the Magistrate to abate the pollution must be quashed in both these cases. The above case exemplifies the judicial attitude and the juridical rationale which appear to ignore the obvious public interest element involved in this case.

A complete chronological survey of relevant cases is clearly beyond the scope of this study. However, it would appear that the above judicial attitudes continued until about the last two decades. This is apparent because even in 1962, when the Supreme Court of India had the occasion to interpret section 133 of the Criminal Procedure Code in Ram Autar v State of Uttar Pradesh,[75] this juridical rationale did not show much change. In this case, the three appellants carried on the trade of auctioning vegetables. As a consequence, many carts in which vegetables were brought were parked in front of residential houses. This caused obstruction and inconvenience to the users of the road. The Magistrate intervened with a Section 133 order. The High Court of Allahabad dismissed the application for revision with the opinion that:

> "When it is clear that the business of auctioning vegetables cannot be carried on without causing obstruction to the passers-by, the conduct of the business can be prohibited, even though it is carried on in a private place."[76]

But the Supreme Court held that this proposition of the

High Court was too wide, construed the provision narrowly and allowed the appeal. Justice Das Gupta who delivered the judgment of a bench consisting of himself and Justices J.L. Kapur and Raghubar Dayal stated that:

> "It appears to us that the conduct of trade of this nature and indeed of other trades in localities of a city where such trades are usually carried on, is bound to produce some discomfort though at the same time resulting perhaps in the good of the community in other respects."[77]

It would appear that the interest of the unfortunate people affected by the inconveniences arising out of the trade carried on in the vicinity has been given less importance. According to the Supreme Court:

> "In making the provisions of Section 133 of the Code of Criminal Procedure, the Legislature cannot have intended the stoppage of such trades in such part of town, merely because of the 'discomfort' caused by the noise in carrying on the trade."[78]

The above cases reflect the judicial attitude towards environmental protection vis-a-vis industrial or trade interests in India which has prevailed until more recently.

The beginnings of change can be seen in Gobind Singh v Shanti Sarup,[79] decided in 1979 by the Supreme Court consisting of Chief Justice Chandrachud and Justices

Sarkaria and Chinnappa Reddy. In this case the Sub-divisional Magistrate had made absolute a conditional order under Section 133(1) of the Criminal Procedural Code. The order required a baker to demolish the oven and the chimney of his bakery as it was found that the construction of the bakery and the volume of smoke emitted by it would play havoc with the lives of the people living nearby. According to the order, the baker should cease trading at this particular site and should not light the oven again. On revision the High Court upheld the order of the Magistrate. The baker appealed by Special Leave to the Supreme Court. The Supreme Court held:

> "We are of the opinion that in a matter of this nature where what is involved is not merely the right of a private individual but health, safety and convenience of the public at large; the safer course would be to accept the view of the learned Magistrate who saw for himself the hazard resulting from the working of the bakery."[80]

Although the Supreme Court dismissed the appeal and upheld the Magistrate's order, it nonetheless modified the same, holding that:

> "Preventing the appellant from using the oven is certainly within the terms of the conditional order, but not so the order requiring him to desist from carrying on the trade of a baker at the site."[81]

One can discern a cautious judicial approach here when the issue apparently affects the individual's fundamental right to trade and occupation guaranteed under Article 19 of the Constitution.

The decision in Municipal Council, Ratlam v Vardhi Chand and others,[82] created a tremendous impact not only in expanding the scope of Section 133 of the Criminal Procedure Code but also in setting the trend for a new jurisprudence through judicial innovation. It is a case in which a Magistrate ordered the appellant municipality under this provision to remove the nuisance in a locality mainly caused by open drains and public refuse by nearby slum dwellers for want of lavatories. Another contributory cause for the nuisance was the malodorous effluent discharged from a nearby alcohol plant. The Magistrate ordered the municipal authorities to draft a plan for better sanitary arrangements. On appeal the Sessions Court reversed the order, but then the High Court approved the order of the Magistrate. The Municipal Council appealed to the Supreme Court. The court went ahead in laying down the wide parameters of the power of the executive first class Magistrate in taking effective action against the public nuisance of environmental violation. The judgment is not confined to the interpretations of the provision but goes to the constitutional dimensions of environmental protection which are discussed in detail in chapter 6.1 below, while the former aspect alone is discussed here.

Justice Krishna Iyer delivered the judgment of the court for himself and Justice Chinnappa Reddy, who was also a member of the bench in *Gobind Singh*. The court expounded the scope and potential of the concept of public nuisance under the Criminal Procedure Code as follows:

> "Section 133, Cr.P.C. is categoric, although [it] reads discretionary. Judicial discretion when facts for its exercise are present, has a mandatory import....Thus, his [the magistrate's] judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance, triggered the jurisdictional facts...The imperative tone of S. 133, Cr.P.C. read with the punitive temper of S. 188, I.P.C. makes the prohibitory act a mandatory duty."[83]

The judgment then proceeded to highlight the potential scope of this section when activated efficaciously. The judgement asserted that:

> "Although these two Codes are of ancient vintage, the social justice orientation imparted to them by the Constitution of India makes it a remedial weapon of versatile use."[84]

Therefore the court went on to hold that:

> "An Order to abate the nuisance by taking affirmative action on a time-bound basis is justified in the circumstances."[85]

Another important aspect of this judgment is its

categorical assertion emphasising primary concern for public health, when confronted with business or industrial interests. One must also note that the judgment supplemented the magistrate's order and sought to force the state government to take appropriate action to stop the pollution caused by the effluents from an alcohol plant, stating unequivocally that:

> "Industries cannot make profit at the expense of public health."[86]

A further point to be noted here is that the judgment reflects the judicial realisation of the inefficacy of the existing penal strategy and called forth the need for a new legal strategy:

> "The dynamics of the judicial process has a new 'enforcement' dimension not merely through some of the provisions of the Criminal Procedure Code (as here), but also through activated tort consciousness."[87]

This idea of an 'activated tort', one could argue, would be based on a public law rationale. Obviously the above case brings in radical views which have set the trend towards India's new environmental jurisprudence. A few years later, the Indian Supreme Court, in one of the *M.C. Mehta* cases, discussed in detail below in chapter 6.2, held on the question of awarding damages to victims of environmental disaster that the compensation "must be correlated to the magnitude and capacity of the enterprise because such

compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it ..."[88] One can argue that the rationale behind this observation is purely based on asserting a public law regime rather than any private law approach of the common law of torts.

The impetus created by the *Ratlam* decision towards the creation of a new jurisprudence has evoked strong reactions from several legal scholars. It has been acclaimed as a case which provoked judicial cognisance of a problem which had not attracted much attention up to that time.[89] This case was also described as setting a ball rolling which, on gaining momentum, would strike down many hurdles in the field for environmental protection.[90] This case is also acclaimed as a pace setter in environmental jurisprudence.[91] A well-known jurist of India, Justice V.S. Deshpande, stated:

> "It may therefore be said without fear of contradiction that the interest of the society in the preservation and improvement of the environment proclaimed by the constitution is a value which is to be developed by the courts. The burning example of judicial activism is the Ratlam Municipality case."[92]

Yet there are some who considered *Ratlam* as an odd decision, rather than the norm-setter, because it attempted only to break away from the general case law.[93] However more

recent cases, analysed below in chapter 6, reveal what was not obvious earlier, namely that section 133 of the Criminal Procedure Code is a very effective tool for the removal of pollution. The law of public nuisance is now being used for combating pollution to fill effectively the gaps which specific legislation has left. A public nuisance, as understood in India now, would broadly be defined as an unreasonable interference with a general right of the public. To that extent a public nuisance is not tied to interference with the enjoyment and use of property and the remedies against a public nuisance are available to every citizen. A number of recent cases illustrate this powerfully.

In Nagarjuna Paper Mills Ltd v Sub-Divisional Magistrate and Divisional Officer, Sangareddy,[94] the Andhra Pradesh High Court considered a petition from a Magistrate's Order shutting down a paper mill which had failed to take adequate pollution control measures. The mill challenged the Order, claiming that the State Pollution Control Board had exclusive power to regulate air and water pollution. The High Court rejected this argument and upheld the Magistrate's power to regulate pollution by restraining a public nuisance. In K. Ramachandra Mayya v District Magistrate,[95] the Karnataka High Court approved a Magistrate's Order shutting down a stone quarry, where the Magistrate acted on complaints from neighbouring residents that the blasting of rocks at the quarry caused nuisance and

danger from flying stones.

In P.C. Cherian v State of Kerala,[96] the Kerala High Court had to consider whether carbon particles emitted from two factories amounted to an actionable public nuisance. The judgement in *P.C. Cherian* was delivered immediately after the judgement of the Supreme Court in *Ratlam* was reported. On the question as to whether there is weight in the contention that carbon has no toxic effect on the human body and dissemination of carbon is not a public nuisance, Justice Janaki Amma held:

> "It is sheer common sense that if the atmosphere gets contaminated with carbon particles, visible or unvisible there is every risk that they would get themselves deposited on the bodies and get into the respiratory organs of the people residing in the neighbourhood. The evidence is that the particles get deposited on the wearing apparel of the people and the walls of buildings not to mention the other umpteen articles which may get affected by the deposit. This is therefore an outstanding instance of air pollution which has become a menace to people in the industrial cities."[97]

She then cited the remark of Krishna Iyer J. in *Ratlam*, that:

> "Public nuisance, because of pollution being discharged by big factories to the detriment of the poorer sections, is a challenge to the social justice

component of the rule of law."[98]

The court rejected the argument based on the decision in *Ram Autar* that the stoppage of work of the factories would deprive the workers of their livelihood. The court held that the danger that the general public has to face by the inadequate treatment of the pollutants outweighs the advantage in the form of jobs for a few persons and that too under threat to their own health.[99]

Krishna Gopal v State of Madhya Pradesh,[100] illustrates how section 133 has been invoked even if the nuisance is complained of by a single person. In *Krishna Gopal*, the plea that the nuisance caused by a factory was only a private nuisance and not a public nuisance to fall within the scope of Section 133 was rejected by the Madhya Pradesh High Court. In this case a glucose saline factory was licensed to operate in a residential area. The boilers of the factory made loud noise round the clock, emitting smoke and ash dust, disturbing particularly the neighbour next door, who was a heart patient. His wife complained to the Sub-Divisional Magistrate. The Magistrate issued orders under Section 133 to remove the factory and the boiler from the area upon obtaining a police report. On appeal the Sessions Court found that the boiler alone could be removed and there was no need to close the factory. On revision the High Court endorsed the order of the Magistrate and ordered removal of both the boiler and the factory.

In this case, as in *P.C. Cherian*, the Madhya Pradesh High Court found that the emission of smoke from the boiler would undoubtedly injure the health as well as the physical comfort of the community. It was argued that the inconvenience caused affected only the residents of a neighbouring house and that it should not be considered as a public nuisance as it was essentially private in nature. But the Court found the argument inherently fallacious and held that it is not the intent of the law that the community as a whole or a large number of complainants must come forward to lodge their complaint or protest against the nuisance. According to Justice Gyani:

> "It should be remembered that environmental crimes dwarf other crimes to safety and property but the position of law as it stands in the matter of sentencing such environmental crimes is rather comfortable."[101]

This case also extended the scope of Section 133, with importance accorded to the health and physical comfort of the community, by holding that:

> "The words (of Section 133) are wide in their amplitude and undoubtedly cover the present case. Manufacturing of medicines in a residential locality with the aid of installation of a boiler resulting in the emission of smoke therefrom is undoubtedly injurious to health as well as to the physical comfort of the community and there is no scope for any interference in this revision

petition on that account."[102]

Krishna Gopal also brings out, as does *Ratlam*, the total apathy and indifference of public authorities who had given their permission for the factory without applying their minds nor considering the objections from the local residents. This again shows how the public law rationale aims to make the relevant authorities, who in this case were the Joint Director of Town and Country Planning, Municipal Corporation and the Chief Inspector of Boilers, obliged to carry out their duty. This new rationale, it is submitted, has given a major impetus for the current development of Indian environmental jurisprudence.[103]

Professor Leelakrishnan, a well-known environmental law teacher in India, has pointed out that in the absence of specific statutory law, a handy tool lies in the law of public nuisance to check and control environmental hazards.[104] He shows how the law of public nuisance has been effectively used for the purpose of environmental protection in India and how the magistrates' power could interfere whenever there is any actual nuisance.

The present trend indicates that this power could soon be used to make measures for preventing potential nuisance. Since the Magistrate's power to this effect is exercised in his administrative capacity rather than in his judicial capacity, one could say this is another form whereby the

common law principles of public nuisance have been employed to strengthen the new public law regime in India. The decision in *Krishna Gopal* shows that lethargy, corruption and carelessness of license granting agencies lead to a situation where any law relating to environmental protection could be violated with impunity. Thus, Section 133 has been developed by the judiciary as an overriding provision and as an effective tool to be used when the pollution control legislation fails.

As discussed in the beginning of this chapter, there is a current rethinking in the common law world of how to revive and revitalise the law of nuisance as a useful tool to tackle many environmental problems that specific legislation fails to control. Jurists and academics seem to perceive the usefulness of this branch of law but common law legal systems appear to be incapable of finding the means and methods of revitalisation. Spencer critically examines how, in the common law world, public nuisance has become virtually obsolete.[105] He points out that everything in this branch of law seems contrary to modern notions of certainty and precision. The offence of public nuisance has such incredible breadth and is often treated at length in tort books along with private nuisance, although the two seem to have nothing much in common.[106] There is surely a strong case for abolishing the crime of public nuisance, but Spencer advocates an alternative view as well. According to him, if there is no case for retaining a common law offence

that consists in effect of doing anything that the court dislikes, there may be a case for a general offence of "doing anything which creates a major hazard to the physical safety or health of the public",[107] in order to fill the accidental gaps that inevitably appear in the coverage provided by specific statutory offences. Spencer concludes,

> "Thus as an alternative to abolish we could keep a general offence of public nuisance, but redefine it by statute so that it is limited to behaviour which creates a threat to public safety or health. This would provide a handle against polluters and environment-destroyers who find new ways of endangering our lives, and would cause less disturbance too in civil law than would be caused by abolishing public nuisance altogether".[108]

Conor Gearty's writing on nuisance law in modern tort law also shows how the poverty of principle has deprived nuisance of what ought to have been its role in recent years.[109] One could agree with him that the law of public nuisance could have been used for getting sewage out of the rivers, reducing unwanted noise and cleaning the atmosphere of acid smuts, smoke and other pollutants. Its remedies, injunctions and damages are in effect the strongest that the courts have to offer. They respond to the extent of the harm done, not, as in negligence, to the culpability of the harmer. Yet, nuisance is both attacked and is burdened because it has lost all sense of what it stands for. It

needs to rediscover its own principles before it can turn its attention to effective protection of the environment.

Gearty has also pointed out that nuisance actions under the common law face not only the problem of definition but also structural problems such as causation, the burden of proof and the rules on *locus standi*.[110] Some of the defences raised against nuisance actions on environmental issues are (1) prescription - which is raised mainly against private nuisances of long standing duration, (2) acquiescence - which is raised when there is delay in launching actions, (3) legislative authority - which is the most common attack in large environmental cases where the right of action is often taken away by some specific statutes. These and similar hurdles are shown by a North American jurist to raise the question whether common law nuisance actions in environmental battles are well-tempered swords or broken reeds.[111] However, the new Indian approach and its techniques show how such broken reeds of the common law, when energised with the public law rationale, can emerge as well-tempered swords to protect the environment.

NOTES TO CHAPTER 3

1. See generally Spencer, J.R., "Public nuisance - a critical examination", (1989) 48 Cambridge Law Journal, 55-84; Gearty, Conor, "The place of private nuisance in a modern law of torts", (1989) 48 Cambridge Law Journal, 214-242; Silver, Larry D., "The common law of environmental risk and some recent applications", (1986) 10 Harvard Environmental Law Review, 61-98; Tolbert, Miles, "The public as plaintiff: public nuisance and federal citizen suits in Exxon Valdez litigation", (1990) 14 Harvard Environmental Law Review, 511-527.

2. Smith, J.C. and Brian Hogan, Criminal law, (7th edn.), 1992, London and Edinburgh, Butterworths, at 762-764.

3. A recent example of this is the House of Lords decision in Cambridge Water Co Ltd v Eastern Counties Leather plc, [1994] 1 All ER 53. Note Lord Goff's reference to Professor Newark's article, ibid, at 69-70. For a critical comment on this case see Wilkinson, David, "Cambridge Water Company v Eastern Counties Leather plc: diluting liability for continuing escapes", (1994) 57 The Modern Law Review, 799-811. See also, Spencer, "Public nuisance - a critical examination", at 55 and Gearty, "The place of private nuisance in a modern law of torts", at 215.

4. See Lord Wright, in Sedleigh-Denfield v O'Callaghan, [1940] A.C. 880 at 902, where he quotes Earle, C.J., in Bonomi v Backhouse, (1858) EB & E 622 at 643, that: "The maxim, Sic utere ... is mere verbiage. A party may damage the property of another where the law permits; and he may not where the law prohibits: so that the maxim can never be applied till the law is ascertained; and, when it is, the maxim is superfluous."

5. For a historical account of the law of nuisance see Holdsworth, History of English law, (2nd edn.), 1973, London, Sweet & Maxwell, vol.3, 153-157; vol.7, 342-352; vol.8, 424-425; see also Halsbury's Laws of England, (4th edn.), 1980, London, Butterworths, vol.34, 100, para 301; Newark, F H., "The boundaries of nuisance", (1949) 65 Law Quarterly Review, 480-490; Winfield, P.H., "Nuisance as a tort", (1931) 4 Cambridge Law Journal, 189-206.

6. See Prosser, William L., "Private action for public nuisance", (1966) 52 Virginia Law Review, 997-1027. See also Rodgers, William H. Jr., Handbook on environmental law, 1977, St. Paul, Minnesota, West Publishing Co., 100-116; Findley, Roger W. and Daniel A. Farber, Environmental law: cases and materials, (2nd edn.), 1985, St. Paul, Minnesota, West Publishing Co., 220-239.

7. Salmond on the law of torts, (17th edn.), 1977, London, Sweet & Maxwell, at 50.

8. Smith and Hogan, Criminal law, at 764.

9. Lord Denning, in A.G. v PYA Quarries Ltd., [1957] 2 QB 169 at 191; [1957] 1 All ER 894 CA at 908.

10. Clerk and Lindsell on tort, (14th edn.), 1975, London, Sweet & Maxwell, at 803.

11. Statutory nuisance in the UK was generally dealt with under the Public Health Act, 1936. Provisions under the Clean Air Act, 1956, Noise Abatement Act, 1960, and Public Health (Recurring Nuisance) Act, 1969, were later re-enacted with modification by the Control of Pollution Act, 1974. Today, all these statutory nuisances are covered by the new Environment Protection Act, 1990, Part 3, Sections 79-82.

12. See Grandis-Harrison, Annette de, "Environmental law - English developments", (1987) The Law Society's Gazette, 2180-2181 at 2181. See also Birtles, William, "Protecting the environment by using the criminal law", (1992) 136 Solicitors Journal, 569-574 at 569 and 574.

13. For the contribution of the common law towards the development of environmental law in England and the use of the law of torts for protecting the environment see Hughes, David, Environmental law, 1986, London, Butterworths, at 26-60.

14. See Silver, "The common law of environmental risk", at 71 and 96 and also Spencer, "Public nuisance - a critical examination", at 56-76.

15. Tolbert, Miles, "The public as plaintiff: public nuisance and federal citizen suits in Exxon Valdez litigation", (1990) 14 Harvard Environmental Law Review, 511-527.

16. It is significant to note here that in Japanese law environmental pollution is called public nuisance (ko-gai) to give it a public character even if the pollution is caused by private enterprises. See Yamane, Hiroko, "Asia and human rights", in Vasak, Karel (gen. ed.), The international dimensions of human rights, vol.2, 1982, New Haven, Connecticut, Greenwood Press, 651-670 at 658 fn.14.

17. The later Charters, in particular Charter 13th Geo. 1 and the subsequent Charters, establishing the Supreme Court have been referred to for this purpose. For details, the standard legal work is Jain, M.P., Outlines of Indian legal history, (2nd edn.), 1966, Bombay, Tripathi.

18. See Banerjee, A.C., English law in India, 1984, New Delhi; Pandey, B.N., The introduction of the English law into India, 1967, Bombay, Asia Publishing House.

19. Derrett, J.D.M., "Justice, equity and good conscience in India", (1962) 64 Bombay Law Report (Journal) 129-138 and 145-152; reproduced in Anderson, J.N.D., (ed.), Changing law in developing countries; and also in Derrett, J.D.M., Essays in classical and modern Hindu law, vol.4, 1978, Leiden, E.J. Brill.

20. Ibid, at 143 and 150.

21. Some examples where the Courts in India have based their decision on justice, equity and good conscience (JEGC) are Wagahelia Rasangi v Shekh Masludin, (1887) 14 IA 89 (PC), where it was held that JEGC meant rules of English law so far as they were applicable to India; Supt. & Legal Remembrancer v Corporation of Calcutta, (1967) 2 SCR 170, where the Supreme Court held that the principles embodied in the common law were invoked in appropriate cases on grounds of JEGC; Bar Council of Delhi v Bar Council of India, AIR 1975 Del 200, where it was held that that part of common law which had been received in India as rules of justice,equity and good conscience was suited to the genius of the country. In Rattan Lal v Vardesh Chander, AIR 1976 SC 588, it was held that the JEGC phrase had to be given a connotation consonant with changing Indian conditions.

22. A well-known case in this regard is Advocate General of Bengal v Ranee Surnomoyee Dossee, (1863) 9 MIA 387. For details see Jain, Outlines of Indian legal history, at 531.

23. Ramamoorthy, R., "Difficulties of tort litigants in India", (1970) 12 Journal of the Indian Law Institute, 313-321; see also Bhate, Kusumkant D., "The law of torts in India", (1960) 62 The Bombay Law Reporter (Journal), 84-89; Thanvi, S.C., "Law of torts" in Minattur (ed.), The Indian legal system, at 590.

24. For example there are relevant provisions under the Motor Vehicles Act, 1939, Workmen's Compensation Act, 1933, Employers' Liability Act, 1938, The Indian Railways Act, 1890, The Indian Carriage by Air Act, 1934 and The Carriage of Goods by Sea Act, 1925.

25. For details see Iyer, Ramaswamy, The law of torts, (7th edn.), 1975, Bombay, Tripathi, at 22; see also Anand and Sastri, The law of torts, (3rd edn.), 1967, Allahabad, Law Book Company, at 32.

26. On details see Massey, I.P., Administrative law, (2nd edn.), 1985, Lucknow, Eastern Book Co., at 323.

27. See for example State of Rajasthan v Vidyawati (Mst), AIR 1962 SC 933; Kasturilal v State of U.P., AIR 1965 SC 1039; Superintendent and Legal Remembrancer, State of West Bengal v Corpn. of Calcutta, AIR 1967 SC 997.

28. Municipal Council, Ratlam v Vardhichand, AIR 1980 SC 1622.

29. Especially M.C. Mehta v Union of India, (1987) 1 SCC 395; M.C. Mehta v Union of India, (1987) 4 SCC 463.

30. Massey, Administrative law, at 343.

31. (1987) 1 SCC 395 at 420.

32. The specific provisions dealing with public nuisance are contained in the Indian Penal Code, 1860, the Criminal Procedure Code, 1973 (as amended by Acts 38 and 45 of 1978 and based on the first code of 1861) and the Civil Procedure Code, 1908 (as amended in 1976).

33. The offences dealt with in chapter XIV of the Indian Penal Code cover instances of public nuisance related to public health in Sections 269 to 278; those related to public safety are found in Sections 279 to 291 and those related to morality in Sections 292 to 294(A). They provide a comprehensive code on public nuisance containing eleven major categories of cases of nuisance. They are:
    1. Spread of infectious disease (Sections 269-271)
    2. Fouling water (Section 277)
    3. Making atmosphere noxious (Section 278)
    4. Adulteration of food, drink and drugs (Sections 272-276)
    5. Rash driving (Section 279)
    6. Rash navigation (Sections 280-282)
    7. Endangering public ways (Sections 281,283)
    8. Negligent handling of poisons, combustibles and explosives (Sections 284-286)
    9. Negligence with respect to machinery, building and animals (Sections 287,288 & 289)
    10. Spread of obscenity (Sections 292-294)
    11. Public gambling (Section 294A).

34. Gour, Hari Singh, Penal law of India, (10th edn.), vol.2, 1983, Allahabad, Law Publishers, at 1984.

35. Ibid, at 1945, Gour has shown that the definition was borrowed from Stephen's Digest of Criminal Law, Art. 197.

36. (1882) ILR 4 Mad 229.

37. Id.

38. (1904) 6 Bom LR 52.

39. The cases referred to are Empress v Antony, (1884) 1 Weir 230; Reg v Patha, Cr R 1869, UN C.C. 14; Imperatrix v Nilappa Durgippa, Cr R 17 of 1898, UN C.C. 963 and Empress v Halodar Parro, ILR 2 Cal 383.

40. (1904) 6 Bom LR 52 at 53.

41. (1887) ILR 14 Cal 656.

42. (1906) ILR 34 Cal 73

43. Ibid, at 74.

44. (1904) 1 Cr LJ 512.

45. Id.

46. An attempt has been made by Michael Anderson based on the Report on the Administration of Criminal Justice in the Lower Provinces of Bengal, Annual Series, 1870-1905. See Anderson, Michael R., "Public nuisance and private purpose: policed environments in British India, 1860-1947", (1992) 1 SOAS Law Department Working Papers, 1-33 at 7-9.

47. AIR 1953 Mad 242.

48. Id.

49. Puran Chand v State of U.P., Cr. App. 166 of 1959 dt. 31-7-1962, in Prem, Daulat Ram, Referencer of unreported decisions in the Supreme Court of India 1950-1965, 1965, Bombay, Tripathi.

50. See for example, Re: Nagappa Thevan, (1915) ILR 38 Mad 602 and Kandaswamy Mudaliar v King Emperor, (1920) ILR 43 Mad 344.

51. (1918) ILR 48 Cal 515.

52. 1973 Cr LJ 1227.

53. Ibid, at 1229.

54. See Anderson, "Public nuisance and private purpose".

55. Section 133 will again be referred to later in this thesis. It reads as follows:
133. Conditional order for the removal of nuisance:-
(1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers -
(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or
(b) that the conduct of any trade or occupation or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or
(c) that the construction of any building, or the disposal of any substance, or is likely to occasion conflagration or

explosion, should be prevented or stopped; or
(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighourhood or passing by, and that in consequence the removal, repair or support to such building, tent or structure or the removal or support of such tree, is necessary; or
(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public; or
(f) that any dangerous animal should be destroyed, confined or otherwise disposed of,
such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order -

(i) to remove such obstruction or nuisance; or
(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or
(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or
(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or
(v) to fence such tank, well or excavation; or
(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order;

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order and show cause, in the manner herein after provided, why the order should not be made absolute.

(2) No order duly made by the Magistrate under this Section shall be called in question in any Civil Court.

Explanation. - A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

56. Briefly, they are as follows: Section 134 prescribes the procedure for the service or notification of the order.
Section 135 requires the person to whom the order is addressed to obey and show cause.
Section 136 is about the consequences of his failing to do so.
Section 137 deals with the procedure where the existence of public right is denied.
Section 138 is on the procedure where he appears to show

cause.
Section 139 empowers the Magistrate to direct local investigation and examination of an expert.
Section 140 empowers the Magistrate to furnish written instructions etc.
Section 141 prescribes the procedure on Order being made absolute and consequences of disobedience.
Section 142 empowers a Magistrate to issue injunctions pending inquiry.
Section 143 a Magistrate may prohibit repetition or continuance of public nuisance.

57. Section 144 reads as follows:
144. Power to issue order in urgent cases of nuisance or apprehended danger.-
(1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray.
(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte*.
(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.
(4) No order under this section shall remain in force for more than two months from the making thereof:
Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.
(5) Any Magistrate may either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section by himself or any Magistrate subordinate to him or by his predecessor-in-office.
(6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or

alter any order made by it under the proviso to sub-section (4).
(7) Where an application under sub-section (5) or sub-section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order; and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reason for so doing.

58. Manohar Lal Chopra v Rai Baja Seth Hiralal, AIR 1962 SC 527 at 532.

59. AIR 1982 All 285.

60. For a discussion on the nuisance test for excessive noise see Radhey Shiam v Gur Prasad Serma, AIR 1978 All 86.

61. AIR 1986 AP 239.

62. AIR 1987 Kant 87.

63. (1868) LR 3 HL 330.

64. On the problem of delays in Indian litigation see, Jain, M.P., Outlines of Indian legal history, (4th edn.), 1981 at 254.

65. (1931) ILR 54 All 359.

66. (1914) ILR 42 Cal 158.

67. AIR 1935 Lah 28.

68. AIR 1980 SC 1620 at 1630. The juridical rationale of *Ratlam* is analysed in chapter 6.1 below.

69. See Singh, Daljit L., "Environmental protection: a study of conflicting judicial approach" in Diwan, (ed.), Environment protection, 481-490 at 488.

70. AIR 1926 Patna 506.

71. Ibid, at 507.

72. Ibid, at 508.

73. Id.

74. Id.

75. AIR 1962 SC 1794.

76. Ibid, at 1795.

77. Id.

78. Ibid, at 1796.

79. AIR 1979 SC 143.

80. Ibid, at 145.

81. Id.

82. AIR 1980 SC 1622.

83. Ibid, at 1628.

84. Id.

85. Ibid, at 1629.

86. Ibid, at 1630-1631.

87. Ibid, at 1631.

88. M.C. Mehta v Union of India, (1987) 1 SCC 395 at 421.

89. Sharma, B.K., "Constitutional mandate for the environmental protection: dynamics of judicial activism", in Diwan, Environment protection, 103-109 at 105.

90. Malhotra, Anil, "Judicial approach towards environmental protection", in ibid, 456-464 at 464.

91. Sangal, P.S., "Water pollution control laws: a critical analysis", in ibid, 211-239 at 221 and 231.

92. Deshpande, V.S., "Environment, law and public interest litigation", in ibid, 34-48 at 45.

93. For details see Singh, Chhatrapati, "Emerging principles of environmental laws for development", in Bandyopadhyay, J., et. al. (eds.), India's environment - crisis and responses, 1985, Dehra Dun, Natraj Publishers, 247-275.

94. 1987 Cr LJ 2071.

95. 1985 (2) Kar LJ 289.

96. 1981 KLT 113.

97. Ibid, at 119.

98. Id.

99. Ibid, at 120.

100. 1986 Cr LJ 396.

101. Ibid, at 400.

102. Ibid, at 399.

103. For a more recent example of how this rationale has manifested itself for the protection of the environment, see Antony v Commissioner, Corporation of Cochin, 1994 (1) KLT 169.

104. Leelakrishan, P., "The law of public nuisance: a tool for environmental protection", (1986) 28 Journal of the Indian Law Institute, 229-231.

105. Spencer, "Public nuisance - A critical examination".

106. Ibid, at 55.

107. Id.

108. Ibid, at 84.

109. Gearty, Conor, "The place of private nuisance in a modern law of torts", (1989) 48 Cambridge Law Journal, 214-242.

110. Ibid, at 216.

111. McLaren, John P.S., "The common law nuisance actions and the environmental battle - well tempered swords or broken reeds?", (1972) 10 Osgoode Hall Law Journal, 505-561.

CHAPTER 4 THE REGULATORY FRAMEWORK OF INDIAN ENVIRONMENTAL STATUTES

In the last chapter we saw how the new public law rationale, evolved out of the Indian Constitution, has been able to modify and develop the common law on public nuisance as an effective tool to tackle environmental pollution in India. Within the last two decades, specific laws have been enacted in India to protect the environment.[1] We now examine the three important statutes for the control of environmental pollution in India, the Water (Prevention and Control of Pollution) Act of 1974 [Act No. 6 of 1974], the Air (Prevention and Control of Pollution) Act of 1981 [Act No. 14 of 1981] and the Environment (Protection) Act of 1986 [Act No. 29 of 1986].

Until the mid-1970s there were few initiatives in India to legislate for pollution control at the national level. The Orissa River Pollution Act of 1954 and the Maharashtra Prevention of Water Pollution Act of 1969 were two early State enactments in this field. Various States prompted the Central Government to initiate legislation for the purpose of water pollution control in line with the Maharashtra Act. A Bill was introduced in the Rajya Sabha as early as 1962 and was examined by the Select and Joint Committees of Parliament.[2] Although it was realised at the time of the United Nations Conference on the Human Environment of 1972

at Stockholm that environmental problems of the developed countries are quite different from those which are faced by developing countries like India,[3] no clear model of alternative legal strategy was then envisaged. It can be seen that by and large new laws were made adhering to the earlier models of legal regulation. Even today, such foundations continue to affect law enforcement and particularly inhibit the practical implementation of the new public law rationale.

By the late 1970s environmental protection had assumed political importance in India and was given more attention as part of the process of development and government planning. It was noted in 1980 by the Tiwari Committee, a high-level government committee,[4] that all major political parties in India had recognised this need by the late 1970s and specific concerns for the environment were aired by them in their political manifestos.[5]

The Tiwari Committee had for its deliberations a compilation of over 200 existing laws relating to environmental protection.[6] The major shortcoming of these laws, as brought out by the Committee,[7] was that many of them were updated versions of earlier laws which had primarily been used to promote development through resource utilisation. The Committee found that these laws, lacking statements of explicit policy objectives, were inadequate for helping the implementing machinery. Also, there were no

procedures for reviewing the efficacy of the law. The findings of the Committee, thus, emphasise the complexity of the problem of statutory environmental protection in India, as most of the laws do not clearly state the social objectives they aim to achieve.[8]

Our analysis in this chapter starts from the wider framework of environmental law regulation generally. We then focus on the general framework of the three major environmental statutes in India, referred to above, to appraise their basic approach and their regulatory rationale. It is significant that they were soon seen as dysfunctional.[9] Later sections of the present chapter, thus, focus on the post-1986 amendments to illustrate the gradual permeation of the new public law rationale, which has become the hallmark of the present Indian legal development. The chapter also analyses current views of legal scholars in India about regulatory ideologies and legislative approaches for environmental protection and development. The permeation of the new public law rationale, through modifications brought about to suit the ground realities of India, further manifests characteristic indigenous elements of Indian legal development which we discuss in detail in chapter 5 below.

4.1 The nature of environmental regulation

Before we proceed to evaluate the specific pollution control statutes in India, we assess here briefly the foundations of regulatory laws generally and the basic rationale, ideology and strategy adopted in Anglo-American environmental laws. It is generally argued that most regulatory laws for the protection of the environment fail to achieve their objectives as they are applied in a legal tradition adopting the 'command and control' strategy of Western penal laws.[10] In order to understand environmental law within the Western regulatory paradigm, one must look at the development of regulatory laws in general. Obviously, to do this in detail is beyond the scope of the present study.[11]

In the relevant literature, it has been shown that since the mid-1960s there has been a gigantic increase in the regulatory legal order in the Anglo-American common law jurisdictions, creating what could be called a regulatory legal culture.[12] Although economic regulations, as broadly conceived, initially dealt with market mismatches such as control of prices or of monopoly trade practices,[13] they have also gradually become a common feature of environmental laws, which has evoked much debate.[14] The operational strategy of these early regulatory laws remained basically unaltered, in the sense that regulation is a state-imposed limitation on the exercise of discretion by individuals and organisations which is supported by threat or sanction. No

serious efforts seem to have been made to change the 'rationale in regulation'[15] and it can be argued that the only perceptional change is the shift in techniques,[16] with greater emphasis on using 'modern' economic theories aimed at wealth maximisation.[17]

As a form of social control, regulation takes different styles and strategies. Adopting Donald Black's classification, one can distinguish two major strategies within the modern Anglo-American regulatory legal order.[18] They have been identified for the purpose of environmental protection in a socio-legal study at Oxford as the 'compliance system' with a conciliatory style of enforcement and the 'sanction system' with a penal style.[19] Hawkins's work reveals the emergence of a new regulatory paradigm in the field of environmental law in England by adopting the conciliatory style. This new regulatory paradigm is characteristically different from the traditional penal laws with a distinct aversion of sanctioning rule breaking with punishment. It also seeks to differ from the traditional penal law approach in its techniques and operational philosophy.[20]

The emphasis of the new regulatory law is not on identifying a problem or a deviant for the purpose of punishment but rather to achieve functional efficiency in terms of societal and economic results. At the functional level these new regulations give rise to wide discretion,

which constitutes an important aspect of enforcement.[21] Other recent studies in the UK also show the importance in the use of discretion, particularly as a vital component to reflect acceptable constitutional and moral values.[22]

One can also see that in the United States, the earlier 'command and control' mode of regulation now seems to be replaced by a market-oriented risk management approach and a retroactive liability-based approach.[23] These appear to have brought about in recent years some fundamental restructuring of environmental laws and the functions of the Environment Protection Agency in the US.[24] The recent legal and institutional inventions in the US have been explored by jurists in some developing Asian jurisdictions[25] and similar innovative systems to control pollution have been evolved by some of them.[26]

The above necessarily very brief discussion shows a rethinking in the Anglo-American common law jurisdictions and the continuing search there to find new approaches in specific legislation to protect the environment.[27] In the light of this brief glimpse at the current Anglo-American rethinking on the rationale and style of regulation to protect the environment, we now proceed to evaluate the major relevant Indian statutes. One can reiterate, at the outset, that a major hurdle for the appropriate development of environmental law in India has been the tendency to adhere to old Anglo-American penal law models. It took some

time to realise that statutes imposing stringent standards without proper guidance for their administration are functionally useless and would only result in inequity and injustice in the management of the environment. This often results in the laws becoming mere paper tigers and assuming the role of sheer symbolic legislation.

4.2 Evaluation of the Water Act, 1974 and the Air Act, 1981

Here we focus on the general framework of the Water Act and the Air Act prior to their amendments in 1988 and 1987 respectively.[28] The Water Act of 1974 was passed by Parliament under Article 252 of the Constitution of India,[29] pursuant to resolutions passed by various State legislatures.[30] The ambit of the Water Act is quite extensive, in the sense that pollution is widely defined in Section 2(e) of the Act:

> ""pollution" means such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of any other liquid, gaseous or solid substance into water (whether directly or indirectly) as may, or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to the life

and health of animals or plants or of aquatic organisms."

The Water Act established administrative agencies or Boards under the executive branch of the Central and State governments. The functions of these Boards include advising the government as well as to promulgate industrial effluent standards and to inspect sewage and effluent treatment plants. Prevention and control of pollution of water is achieved through a permit or 'consent administration' procedure which is analysed further below. Discharge of effluents is permitted only after the consent of the State Board has been obtained and subject to any conditions imposed by it. Failure to comply with the directives of the State Board is punishable under the Act's penal provisions.

The Air Act of 1981 was modelled on the Water Act, with elaborate provisions delineating the powers and functions of the Central and State Boards. The ambit of the Air Act is also drawn very wide as "air pollutant" is defined in Section 2(a) of the Act to mean "any solid, liquid or gaseous substance (including noise) present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment".[31] The Air Act specifically empowered State Governments to designate air pollution areas and to prescribe the type of fuel to be used in these designated areas. Initially it applied to certain

types of industries like those involving production of asbestos, cement, fertilisers and petroleum products which may not be operated without the consent of the State Boards under Section 21 of the Act, but subsequent amendments to the Act in 1987, discussed in detail later in this chapter, have extended the restriction to any industry.

The Water Act and the Air Act, before the 1988 and 1987 amendments, showed several defects.[32] First under Sections 24 and 25 of the Water Act, consent has to be obtained from the State Board for a new or altered drain outlet or for a new discharge of sewer effluents into a stream.[33] Similar provisions are contained in Section 21 of the Air Act. Under the two Acts, the Board may vary or alter these conditions at any time, and may also revoke its consent. It has been shown that these ostensibly broad powers have seldom been invoked, and bear little relation to the actual functioning of the Board.[34] In practical terms, the Board's only recourse was to institute a prosecution, which was often ineffective and time-consuming process, and a poor instrument for pollution control.

Secondly, the Acts have created administrative agencies and have conferred wide powers on them. Sections 3-18 of both the Water Act and the Air Act contain elaborate provisions concerning the constitution of the Central and State Boards and their powers and functions. However, a close analysis of the structure, powers and functions of

these statutory agencies has revealed that they were ill-suited to ensure the adoption of adequate pollution control measures.[35] The State Boards have never been adequately staffed, and lacked the capability or resources to perform the various functions prescribed by the Water Act and the Air Act.[36] There was excessive governmental control over these Boards as the members were nominated by governments, and served at the pleasure of such governments, and the Board often functioned only as an advisory body within the Department of Environment, where it could institute prosecutions but had no real enforcement powers.[37]

Thirdly, in the operation of these two laws there was near-total apathy towards public participation in pollution control decision-making.[38] Since the public's interests were deeply affected by pollution of air and water, one might reasonably expect that the public should be given opportunities to be heard at all stages of pollution control decisions. However, Section 25(3) of the Water Act simply empowers the State Board to "make such inquiry as it deems fit in respect of the application for consent and in making such inquiry it may follow such procedure as may be prescribed." The Air Act contained a similar provision in Section 21(3). There was, thus, no specific requirement of public involvement.

It has been shown that, in practice, the Board merely dispatched an officer to visit the premises of the permit

applicant to verify information given by the applicant and this officer had no mandate to consult with members of the general public.[39] Moreover, the permit applications made by industries were never published by the Board. Under Section 25(6) of the Water Act or Section 51(2) of the Air Act, only persons "interested in" or "affected by" a Board's permit could scrutinise the contents of any such permit. It has again been noted that such permission is normally denied to members of the general public.[40] The public has thus been left completely in the dark as to the particulars of the pollutants discharged into water or air, and the polluters discharging them.

Fourthly, the most important defect for the purpose of our analysis is that Section 49 of the Water Act and Section 43 of the Air Act initially denied the public the right to seek court enforcement of the legislative provisions by expressly barring the courts from "taking cognizance of any offence (under these Acts) except on a complaint made by, or with the previous sanction in writing of, the State Board". Both these sections under the Air Act and the Water Act were subsequently amended to remove this hurdle to judicial recourse.

Thus, although the Board's permit actions may have far-reaching pollution consequences, the public had no access to any mechanism for redress. Equity jurisdiction was also unavailable to enforce the Acts. For example, Section

58 of the Water Act specifies that "no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by the Act".[41] Further, under Section 28 of the Water Act and Section 31 of the Air Act, an appeal against the permit order of the Board is available only to the person aggrieved, i.e., the person who was denied a permit.

Fifthly, Sections 24-26 of the Water Act require varying standards for different regions. The actual standard in a particular area depends upon the number and type of industries, their location and the quantity of water in the stream. However, Sections 24-26 of the Water Act offer little guidance to the Board in setting appropriate standards. Under Section 24(1)(a) of the Water Act, "No person shall knowingly cause or permit any poisonous, noxious or polluting matter determined in accordance with such standards as may be laid down by the State Board...". The Air Act contains no comparable provisions for varying *ad hoc* standards. There is no requirement in either Act for the preparation of environmental impact assessments in connection with planned new sources of pollution. Since the application of standards is a quasi-judicial determination, one might expect the Board to give notice to affected parties and to offer them an opportunity to be heard. Yet, no such procedural refinements are offered under India's Air and Water Acts.

Thus the Water Act and the Air Act, before their respective amendments in 1988 and 1987, depicted the classic example of a regulatory paradigm which served no effective purpose to control water and air pollution. The adoption of a permit system and the imposition of penal sanctions through criminal prosecution for violators of permit conditions depicted the rationale and approach of these laws. Before we proceed to analyse the significance of the amendments that manifest the permeation of the new public law rationale into the regulatory paradigm of Indian environmental jurisprudence, we need to examine the Environment Act.

4.3 Evaluation of the Environment (Protection) Act, 1986

The Environment Act was passed by Parliament in May 1986 and came into force on 19th November 1986.[42] The object of the Act states that it was enacted to implement the decisions taken at the Stockholm Conference in 1972. However, it would obviously appear that the main impetus for its enactment was because the government came under considerable pressure, following the gas leak accident at Bhopal in December 1984, to design comprehensive legislation for controlling toxic and hazardous substances.

The Act gives a wide definition to the term

"environment" which has been defined under Section 2(a) as follows:

> ""environment" includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property."

The term "environmental pollutant" is defined under Section 2(b) of this Act as:

> ""environmental pollutant" means any solid, liquid or gaseous substance present in such concentration as may be, or tends to be, injurious to environment."

The Act, thus, relates directly to the protection and improvement of the environment and the prevention of hazards to human beings, other living creatures, plants and property from the kinds of pollution that was initially envisaged under the Water Act and the Air Act. Thus, the Act attempts to be an umbrella statute by not being specific to any one kind of pollution.

Section 3 of the Act confers much wider powers on the Central Government to enforce, in the States, policies which are not specifically mentioned under the Water Act or the Air Act. Thus, new powers were conferred on the Central Government to set standards for pollution discharged or emitted into the environment and also to regulate the handling of hazardous substances under Sections 7 and 8 of the Act. Section 7 of the Act reads as follows:

"No person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutant in excess of such standards as may be prescribed."

Section 8 states:

"No person shall handle or cause to be handled any hazardous substance except in accordance with such procedure and after complying with such safeguards as may be prescribed."

Under Section 15(1) of the Act, failure to comply with or contravention of any of its provisions was made punishable with imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees. In cases of continuing offence, the fine may extend to five thousand rupees for every day "during which such failure or contravention continues after the conviction for the first such failure or contravention". Under Section 15(2) of the Act, where the offence continues beyond the period of one year after the date of conviction, the offender shall be punished with imprisonment for a term which may extend to seven years.

The Act also provided for some radically fierce provisions to penalise offences committed by companies. Section 16(1) of the Act states that where any offence has been committed by a company, every person directly in charge of, and responsible to the company, as well as the company

itself, "shall be deemed to be guilty" and is liable to be proceeded against and punished for any offence. The proviso to that section puts the burden of proof on such person to prove that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. Section 16(2) further states that if an offence is "committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company", they shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. The Act thus substantially increased the penalties for any contravention of its provisions compared to those envisaged under the Water Act and the Air Act.

However, several commentators have expressed their doubts as to how far the environmental policies will be implemented through this legislation.[43] The Act has been criticised as being ineffective and only designed to fulfil the international obligations of the Stockholm Conference.[44] It would appear that no careful analysis of the potential short and long-term deleterious effects of pollution on the environment has been taken into consideration while enacting this Act. It could also be said that the Act, like all previous laws on environmental matters, does not clearly state the social objectives it aims to achieve. In the absence of clear policy statements on the objectives to be

accomplished, administrative machineries are set up to implement the legislation. But how can the administrators interpret their duties, from time to time, when the intent and purpose for which the enactment was made in the first place remains vague?

Although the Act appears to be an umbrella statute, it does not override earlier specific legislation for the purpose of punishment. This can be seen in Section 24 of the Act which reads as follows:

> "(1) Subject to the provisions of sub-section (2), the provisions of this Act and the rules or orders made therein shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act.
>
> (2) Where any act or omission constitutes an offence punishable under this Act and also under any other Act then the offender found guilty of such offence shall be liable to be punished under the other Act and not under this Act."

The above provisions appear blatantly contradictory and paradoxical. Such provisions, often found in Indian laws, seem to ensure that the stringent penalties prescribed by the Act remain on paper. A well-known journalist in India has castigated this Act as a cobra that is seemingly fierce but without venom in its fangs.[45] One can argue, however, that the above provisions, even if they appear as 'paper

tigers', have a role and purpose as symbolic legislation. They are not as completely useless as they may appear. They have an educative function which is difficult to assess by analysing the statute as such. They often also function as 'safety valves' till the legal mechanism picks up momentum and the various loopholes are patched up.

This strengthens the argument for the purpose of our study that Indian laws are not to be assessed on their face value, but rather to be assessed on their long-term effect. This fierce yet toothless statute raises fundamental jurisprudential questions about the role of statutory regulation in India. Indian ideology on the role and concept of law, discussed in chapter 5 below, views codes and statutes as mere signposts, in this case a bold warning sign to keep perpetrators off.

4.4 The permeation of the public law rationale in Indian environmental regulation

As seen above, in spite of the drawbacks and criticisms, the Environment Act of 1986 introduced some important new elements into India's pollution control regime. The most significant aspect of the Environment Act in the context of our present debate is its manifestation of the new public law rationale by the extension of the rule of *locus standi*

under Section 19 of the Act, which reads as follows:

> "No court shall take cognisance of any offence under this Act except on a complaint made by:-
>
> (a) the Central Government or any authority or officer authorised in this behalf by that Government; or
>
> (b) any person who has given notice of not less than 60 days, in the manner prescribed, of the alleged offence and of his intention to make a complaint, to the Central Government or the authority or officer authorised as aforesaid."

Section 19(b), thus, allows the court to take cognizance of any offence under the Act on a complaint made by <u>any person</u> who has given not less than sixty days notice of the offence to the authority. This is an innovative change from what was envisaged under the earlier laws. However, the Act's requirement of sixty days notice could render the right of a complainant to move the court ineffective and could enable the offender to escape from penal liability.

Another strategically significant innovation in the Act can be seen in the power to give directions under Section 5 of the Act. It extends not only to the closure, prohibition or regulation of any industrial operation or process but also includes the power to direct stoppage or regulation of the supply of electricity or water or other services. This power conferred on the Central Government appears as a

unique strategy. It promotes the prospects for compliance without adopting a punishment strategy.

The power under Section 5, together with the power of entry for examination, testing of equipment and other material objects under Section 10 and the power under Section 11 to take samples, to a great extent ensure compliance without confrontation. This Indian development, in a sense, appears to resemble the new developments in the UK and the USA, replacing the earlier regulatory regime based merely on the penal law strategy, as briefly discussed above in 4.1 of this chapter.

Both the Air Act and the Water Act were amended in 1987 and 1988 respectively. The amendments brought the provisions under these two Acts in line with the Environment (Protection) Act, 1986. We focus here on three particular areas that forcefully manifest the permeation of the new public law rationale into Indian regulatory laws.

First the power to prosecute had remained exclusive to the government agency and the citizens had no direct statutory remedy. But, as we saw above, Section 19 of the Environment Act brought about an important change which allows any person to prosecute a polluter by a complaint to the magistrate. Similar provisions were incorporated in Section 43 of the Air Act in 1987[46] and Section 49 of the Water Act in 1988.[47] Section 43 of the Air Act now reads as

follows:

"(1) No Court shall take cognizance of any offence under this Act except on a complaint made by -

(a) a Board or any officer authorised in this behalf by it; or

(b) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint to the Board or officer authorised as aforesaid,

and no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(2) Where a complaint has been made under clause (b) of sub-section (1), the Board shall, on demand by such person, make available the relevant reports in its possession to that person:

Provided that the Board may refuse to make any such report available to such person if the same is, in its opinion, against the public interest."

Section 49 of the Water Act is similarly worded with an additional sub-section which reiterates the power of the Magistrate to pass sentence under the Code of Criminal Procedure, 1973. Section 49 (3) of the Water Act now reads as follows:

(3) Notwithstanding anything contained in section 29 of the Code of Criminal Procedure, 1973 (2 of 1974), it

shall be lawful for any Judicial Magistrate of the first class or for any Metropolitan Magistrate to pass a sentence of imprisonment of a term exceeding two years or of fine exceeding two thousand rupees on any person convicted of an offence punishable under this Act."

The above sub-section would appear as an unnecessary clause since the power of the first class Magistrate is not restricted at all.[48] Therefore the inclusion of such a clause in 1988 must have had a definite purpose which, it is submitted, is to re-assert to the few hundred odd Magistrates around the country their powers and duties for environmental protection. It emboldens and encourages Magistrates to be tough. This is a clear indication of the permeation of the new public law rationale, which was graphically expounded in the *Ratlam* case discussed above in chapter 3.4 and below in chapter 6.1.

Section 19 of the Environment Act and the amended Section 43 of the Air Act and Section 49 of the Water Act bring out the extended concept of *locus standi* which is one of the hallmarks of the emerging Indian public law regime. Evolved under the constitution by the Indian judiciary,[49] it has now found a secure place in environmental regulation.

Secondly, the amendments under Section 43(2) of the Air Act and Section 49(2) of the Water Act require the Boards to

disclose relevant internal reports to a citizen seeking to prosecute a polluter. This freedom of information and the legal requirement for a more open functioning of public authorities again obviously manifests the new public law rationale with its emphasis on public accountability by regulating the regulator. The above changes now call forth the need for detailed environmental impact statements. This could to a great extent reduce many other conspicuous drawbacks that still prevail in the administration, according to a legal expert.[50] It is now greatly felt that environmental impact assessment can achieve in India a better environmental regime built up from the grass roots.[51] Such a requirement is forseeable in the light of the present changes and it could help make Indian bureaucrats think, according to one Indian environmental lawyer, who has also argued that lessons can be learnt from the American experience.[52]

Thirdly, the amendments introduced a new Section 33A into the Water Act, and a new Section 31A into the Air Act. Both new provisions empowered the Boards to issue directions to any person, officer or authority, including orders to close, prohibit or regulate any industry, operation or process and to stop or regulate the supply of water, electricity or any other service. Both these provisions are worded similar to Section 5 of the Environment Act and they read as follows:

"Notwithstanding anything contained in any other law,

but subject to the provisions of this Act, and to any directions that the Central Government may give in this behalf, a Board may, in the exercise of its powers and performance of its functions under this Act, issue any directions in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions.

Explanation:- For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct -

(a) the closure, prohibition or regulation of any industry, operation or process; or

(b) the stoppage or regulation of supply of electricity, water or any other service."

One can say that the new approach, extending the Boards' powers to give directions, greatly enhances administrative discretion and thereby works against administrative inertia. The Environment Act has thus given greater thrust and emphasis to the new public law rationale and the consequent amendments to the Water Act and the Air Act. The three most important changes that have been brought about in the Water Act and Air Act, pursuant to the new approach adopted in the Environment Act, clearly show the permeation of the new public law rationale.

4.5 The evolving Indian legal ideology on environmental regulation

The above brief examination of the specific laws to control pollution reveals that in their actual operation the laws are often ineffective. This, it is submitted, is because the objectives and underlying policies are not well enough matched to the inherently complex setting of India. Today, it is an area where ideals, policies and administrative realities are often at odds, creating a quagmire that raises serious doubts about many strategies adopted even by new laws. Therefore, in order to achieve an ecological balance and to promote ecologically sound economic development, the primary task will be to identify and understand the social reality and dominant social values and to bring about legal changes accordingly.

Before we proceed to Chapter 5 below to discuss aspects of dominant indigenous social values which remain eclipsed in the legal system and its processes, it is relevant to examine briefly the views expressed by contemporary Indian legal writers and environmental lawyers on the progress of environmental laws.

Books on environmental law and policy in India are mostly collection of papers presented in various university seminars.[53] Academic writing on Indian environmental laws started to appear in international law journals only from

1985 onwards.[54] Some of the specialist work on environmental law in India by Indian scholars appears to be casual, shoddy and unplanned.[55] Even the Tiwari Committee, consisting of eminent scientists and environmentalists, was able to make only a cursory evaluation of the existing laws, which remain a haphazard collection. The Committee's work has been criticised by a legal expert as a macro-level analysis without a theoretical framework.[56]

On the jurisprudence of environmental legislation, Chhatrapati Singh appears to be the only legal scholar who has questioned the wisdom of merely legislating harsher laws to solve environmental problems.[57] According to him, Indian environmental laws operate on the deterrent theory of criminal justice administration. However, the retributive values of the penalties fail to deter because there is a total disparity between retribution and the economic benefits of non-compliance.[58] Singh also finds that from the economic point of view the laws seem totally counter-productive. They either slow down industrial development or provide the industries scope for indulging in more corrupt practices, such as manoeuvering the activities of the concerned Boards through economic or political malpractices.[59] According to Singh, the basic jurisprudential problem lies in the application of a 'policing the society theory' and its corollary 'conflict model' approach.[60]

More recent analysis, following the amendments of the Water Act and Air Act, also indicates the inappropriateness of the penal approach.[61] Thus, it has been pointed out by Chandrasekharan Pillai, a criminal law professor, that:

> "The fact that the punishments have been increased in the latest amendments to the Water Act and Air Act may not have the desired effect of preventing and controlling pollution. On the contrary it might aggravate the inhibitions of the courts/prosecuting agencies in launching prosecutions."[62]

On the usefulness of the new strategy adopted to seek compliance without confrontation, Pillai notes with some pessimism that:

> "At present the effective measure to control pollution would be that provided in Section 33 and 33-A however deficient, they might be in their present form. The penal provisions, it is felt, would remain as threats for a while and fade away after five or seven years. Because the enforcement agencies, as already discussed, might not be acting on them frequently."[63]

It has also been argued that the jurisprudential approach of environmental regulation should not be confined merely to seeking a resolution to the conflict of values.[64] According to Singh, it must not polarise the regulators and the users against each other so that they are in conflict, but the law should find means which fuse the interests of

the regulator with those of the user in mutual co-operation. Ideally the interest of the user and the regulator would be the same. Thus according to him:

> "For clearly, the question concerning environmental problems is not how best to punish someone, but how to manage the society in the best way so that maximal development is attained with nil or minimal environmental under-development. In other words a complete change in our jurisprudential perspective is required if we are to protect the environment and get over the exploitative [colonial] mentality."[65]

Singh has argued that the value of protection of the environment must be seen as overriding and as being in the interest of all people and that only laws which lead to this end have the 'right' perspective. Such a perspective cannot be achieved within the 'policing the society' theory of the Western regulatory paradigm, which presupposes a certain sociology of society and perceives it on the basis of a 'conflict' model, wherein the task of the regulator is to resolve the conflict in favour of a particular interest amongst competing groups of interest by using economic sanctions.

Some years ago, Upendra Baxi, a well-known legal scholar in India, pointed out that the most striking and fundamental flaw within the institutional design of the law for environmental protection in India is its neo-colonial

character.[66] According to him, 'neo-colonial' essentially means thoughtless transplants of legislative and administrative models from the First World, inapposite borrowings of Western institutional blueprints and of the underlying ideologies, excessive reliance on alien judicial and law making forms, precedents and philosophies. It means planned uses of law and administration "as if people did not matter".[67]

One can see from such statements that the ideology voiced by leading Indian legal experts strongly resists imitation of the West. As a major Third World jurisdiction, the legal system of India, in a sense, is better positioned to evolve unique ways of development than the 'under-developed' systems or even the so-called 'developed' legal systems.[68] The new Indian conceptualisations of environmental pollution control incorporate indigenous ideology and public interest perspectives which go much beyond the level of post-colonial rhetoric.[69] The next chapter shows how the traditional understandings of law and the concept of Nature in Indian culture have to a great extent formed the basis for the current development of India's new environmental jurisprudence. Seen through the prism of such concepts, it could be argued that the modern Indian law on environmental protection has drawn important sustenance from concepts of public law and the public sphere which are not necessarily unique to Indian law, but are strongly manifested in its realm.

NOTES TO CHAPTER 4

1. For commentaries on these laws see Rosencranz, Armin, Shyam Divan and Martha L. Noble, Environmental law and policy in India: cases, materials and statutes, 1991, Bombay, Tripathi. For the texts see Appendices A-G ibid, at 411-548. There are a number of recent books on environmental laws from India which are, in essence, collection of relevant statutes. For example, see Tripathi, H.N., and S.N. Pandey, Commentaries on the environment pollution control laws, 1992, Allahabad, Hari Law Agency; Asthana, K.B., Lal's commentaries on water and air pollution laws, (2nd edn.), 1986, Allahabad, Law Publishers; Malik, Vijay, Handbook of environment and pollution control laws, 1987, Lucknow, EBC Publishing (Pvt) Ltd.

2. For details see Jariwala, C.M., "Changing dimensions of Indian Environmental law", in Leelakrishnan, P. (ed.), Law and environment, 1-25 at 8-9 and 11.

3. For details see D'Monte, Temples or tombs?, at 1-27.

4. See Report of the Committee for Recommending Legislative Measures and Administrative Machinery for Ensuring Environmental Protection, [Tiwari Committee Report], 1980, New Delhi, Department of Science and Technology, Government of India.

5. Ibid, at 2 and annexure I-1 at 51.

6. Ibid, at 27. The Tiwari Committee had before it a compilation prepared by the Department of Science and Technology. A select list of about 30 such enactments is given in annexure III-12 of the report at 73-74.

7. Ibid, at 27-28.

8. Ibid, at 27.

9. For earlier analysis of these Acts see Abraham, C.M. and Armin Rosencranz, "An evaluation of pollution control legislation in India", (1986) 11 Columbia Journal of Environmental Law, 101-118; Ramakrishna, Kilaparti, "The emergence of environmental law in the developing countries: a case study of India" (1985) 12 Ecology Law Quarterly, 907-935; Jasanoff, Sheila, "Managing India's environment" (1986) 26 Environment, 12.

10. See especially Vogel, David, National styles of regulation: environmental policy in Great Britain and the United States, 1986, Ithaca and London, Cornell

University Press. See also Dwyer, John P., "Contentiousness and cooperation in environmental regulation", (1987) 35 The American Journal of Comparative Law, 809-826.

11. On this aspect see generally Kagan, Robert A., Regulatory justice, 1978, New York, Russell Sage; Breyer, Stephen, Regulation and its reform, 1982, Cambridge/ Massachusetts, Harvard University Press; Stone, Alan, Regulations and its alternatives, 1982, Washington DC, Congressional Quarterly Press; Mashaw, Jerry L., Bureaucratic justice, 1983, New Haven, Yale University Press.

12. Meidinger, Errol, "Regulatory culture: a theoretical outline", (1987) 9 Law and Policy, 355-386; see also Kagan, Regulatory justice, at 90-95.

13. Breyer, Regulation and its reform, at 15-35; see also Posner, Richard, "Natural monopoly and its regulation", (1969) 21 Stanford Law Review, 548-643 at 625-635; Green, Mark and Ralf Nader, "Economic regulation vs. competition: Uncle Sam the monopoly man", (1973) 82 Yale Law Journal, 871-889; Winter Jr, Ralf K., "Economic regulation vs. competition: Ralf Nader and creeping capitalism", (1973) 82 Yale Law Journal, 890-902.

14. For details see Ackerman, B. and R. Stewart "Reforming environmental law: the democratic case for market incentives", (1988) 13 Columbia Journal of Environmental Law, 171-199; Stewart, Richard B., "Controlling environmental risks through economic incentives", (1988) 13 Columbia Journal of Environmental Law, 153-169. For earlier stages of the debate on the economic approach to environmental laws see Stewart, Richard "Economics, environment, and the limits of legal control" (1985) 9 Harvard Environmental Law Review, 1-22 and Latin, Howard "Ideal versus real regulatory efficiency: implementation of uniform standards and "fine-tuning" regulatory reforms" (1985) 37 Stanford Law Review, 1267-1332.

15. On this point see Breyer, Regulation and its reform, at 34-35; Stone, Regulation and its alternatives, at 10-11.

16. A typical illustration on techniques that emphasise economic benefits is the Clean Air Act of 1977, 42 USC 7401, in the United States, which has given rise to new legal concepts like the "Bubble Concept" based on the legal fixation of Ambient Air Quality Standards and tradable 'pollution rights'. See Melnick, Shep R., Regulation and the courts: the case of the Clean Air Act, 1983, Washington DC, The Brookings Institution.

17. For some leading criticisms of the economic approach see generally Sagoff, Mark, The economy of the earth, 1988 Cambridge, Cambridge University Press; see also Dworkin, Ronald, A matter of principle, 1985, Cambridge, Mass., Harvard University Press, at 237-266.

18. For details see Black, Donald, "Social control as a dependent variable", in Donald Black (ed.), Towards a general theory of social control, 1984, Orlando, Academic Press.

19. See Hawkins, Keith, Environment and enforcement: regulation and the social definition of pollution, 1984, Oxford, Clarendon Press.

20. See for example Baldwin's analysis of the strategies adopted by the factory inspectors in the UK under the Health and Safety at Work Act of 1974. Baldwin, Robert, "Why rules don't work", (1990) 53 Modern Law Review, 321-337.

21. On this point see also Baldwin, Robert and Keith Hawkins, "Discretionary justice: Davis reconsidered", (1984) Public Law, 570-599; see also, Davis, Kenneth Culp, Discretionary justice: preliminary inquiry, 1969, Illinois, Banton Rouge.

22. Hawkins, Keith (ed.), The uses of discretion, 1992, Oxford, Clarendon Press; see also Fieldman, David, "Review article: discretions, choices and values", (1994) Public Law, 279-293.

23. One could see this change in the operational philosophy beginning with the enactment of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 USC ss.9601-9675, and the Superfund Amendments and Reauthorisation Act of 1986 (SARA), (1986) Pub.L.No. 99-499, 100 US Statutes 1613.

24. See Babich, Adam, "Restructuring environmental law", (1989) 19 Environmental Law Reporter, 10057-10059. See also Du Pont, Pierre, "Environmental law for the 1990's: focus private initiative, don't stifle it", (1987) 17 Environmental Law Reporter, 10353-10355.

25. See for example Lee, Kihan, "The U.S. Comprehensive Environmental Response, Compensation and Liability Act - E.P.A's policy and implementation", (1993) 21 Korean Journal of Comparative Law, 171-228.

26. Lee, Sun-Yong, "Korea's non-compliance charge system to control pollution", (1993) 21 Korean Journal of Comparative Law, 53-99.

27. See for example, Pearce, David, Anil Markandya and Edward B. Barbier, Blueprint for a green economy, 1989, London, Earthscan Publications; Mintz, Joel A., "Economic reform of environmental protection: a brief comment on recent debate", (1991) 15 Harvard Environmental Law Review, 149-164.

28. The Water Act was amended in 1978 [Act No.44 of 1978] to bring about minor changes in the constitution and powers of the Boards and to extent the application of the Act. For analytical details of the framework of the Water Act and the Air Act see Rosencranz *et al*, Environmental law and policy in India, 64-65, 153-155, 191-192, 411-466.

29. Since water is a subject allotted to the States under the federal system of government in India, Parliament could enact laws on water only under Article 252 of the Constitution. Article 252 of the Constitution of India states inter alia: "(1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which the Parliament has no power to make laws for the States except as provided in article 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State."

30. For a brief history of its enactment, see The state of India's environment 1984-85: the second citizens' report, 1985, Centre for Science and Technology, New Delhi, at 344.

31. The words "(including noise)" were inserted by the Air (Prevention and Control of Pollution) Amendment Act, 1987, Act No. 47 of 1987.

32. See Jain, S.N., "The Water Pollution Act, 1974: the basic legal issues" in Diwan (ed.), Environment protection, at 179-196; Sangal, P.S., "Water pollution control laws: a critical analysis", in ibid, at 211-239; Walia, Harpal Kaur, "Air pollution: a study of the Indian enactments", in ibid, at 314-330. See also Abraham and Rosencranz, "An evaluation of pollution control legislation in India", 101-118.

33. Section 24 imposes a total prohibition on certain effluent discharges, while Section 25 permits certain discharges within specified limits.

34. Abraham and Rosencranz, "Pollution control in India", at 105.

35. See Chandrasekharan, N.S., "Structure and functioning of environmental protection agency: a fresh look", in Leelakrishnan, Law and environment, at 153-161.

36. Ibid, at 158-159.

37. Ibid, at 154-159; see also Abraham and Rosencranz, "Pollution control in India", at 108-110.

38. See Leelakrishnan, P., "Public participation in environmental decision-making", in Leelakrishnan, Law and environment, 162-174; Abraham and Rosencranz, "Pollution control in India", at 110-112.

39. Leelakrishnan, "Public participation in environmental decision-making", at 170-171.

40. Ibid, at 172.

41. See also Section 46 of the Air Act. The Board can also apply to a court to restrain a would-be polluter under Section 33 of the Water Act.

42. For details see generally Rosencranz *et al.*, Environmental law and policy in India, at 68-74; Baxi, Upendra (ed.), Environment Protection Act: an agenda for implementation, 1987, Bombay, Tripathi. For a more critical analysis of this Act see Chandrasekharan, N.S., "Environmental protection: two steps forward, one step back", (1988) 30 Journal of the Indian Law Institute, 184-195.

43. See generally Baxi (ed.), Environment Protection Act; Chandrasekharan, "Environmental protection"; Jayakumar, K., "Environment Act: a critical overview", in Leelakrishnan (ed.), Law and environment, at 234-240; Prasad, M.K., "Environment Act: suggestions for modification", in ibid, at 271-281; Chitnis, V.S., "The Environment (Protection) Act, 1986: a critique", in Diwan, Environment protection, 152-156.

44. Ibid, at 155.

45. D'Monte, "Environmental law has no teeth", (1986) 1 Encology, 24-25. See also, Rosencranz *et al.*, Environmental law and policy in India, at 72.

46. The Air (Prevention and Control of Pollution) Amendment Act, 1987, Act No. 47 of 1987.

47. The Water (Prevention and Control of Pollution) Amendment Act, 1988, Act No. 53 of 1988.

48. Under section 29 of the Criminal Procedure Code a First Class Magistrate can imprison a person upto 3 years and fine upto Rupees five thousand which is less than what is prescribed by the Water Act.

49. The gradual expansion of the concept of *locus standi* under the Constitution has been discussed in chapter 2.4 above. See particularly Fertilizer Corporation Kamgar Union v Union of India, AIR 1981 SC 344 and S.P. Gupta v Union of India, (1981) Supp SCC 87.

50. Leelakrishnan, P., "Environmental impact assessment: legal dimensions", (1992) 34 Journal of the Indian Law Institute, 541-562.

51. Ibid, at 562.

52. Divan, Shyam A., "Making Indian bureaucracies think: suggestions for environment impact analysis in India based on the American experience", (1988) 30 Journal of the Indian Law Institute, 263-292.

53. The major collections are: Agarwal, S.L. (ed.), Legal control of environmental pollution, 1980, Bombay, Tripathi and New Delhi, Indian Law Institute; Diwan, Paras (ed.), Environment Protection, 1987, New Delhi, Deep & Deep Publications; Leelakrishnan, P. (ed.), Law and environment, 1992, Lucknow, Eastern Book Company.

54. See Ramakrishna, Kilaparti, "The emergence of environmental law in the developing countries: a case study of India" (1985) 12 Ecology Law Quarterly, 907-935; Jasanoff, Sheila, "Managing India's environment" (1986) 26 Environment, 12.

55. See for example Desai, Bharat, Water pollution in India: law and enforcement, 1990, New Delhi, Lancers Books, which is based on a Ph.D. thesis of a prestigious Indian university and has been severely criticised. See Jariwala, C.M., "Book review", (1993) 35 The Journal of the Indian Law Institute, 202-207. See also Shastri, Satish, Pollution and the environmental law, 1990, Jaipur, Printwell Publishers.

56. Singh, Chhatrapati, "Legal policy for environmental protection", in Leelakrishnan (ed.), Law and environment, 26-50 at 27 and 33. This article is a rehash of many earlier versions. See for example Singh, Chhatrapati, "Emerging principles of environmental laws for development" in Bandyopadhyay *et al.*, India's environment, 247-275 at 255 and 260.

57. Singh, "Legal policy for environmental protection", at 31-33.

58. Ibid, at 31.

59. Id.

60. Ibid, at 32-33.

61. Pillai, K.N. Chandrasekharan, "Criminal sanctions and enforcement of environmental legislation", in Leelakrishnan (ed.), Law and environment, 175-183.

62. Ibid, at 183.

63. Id.

64. Singh, Chhatrapati, "Legal policy for environmental protection", 31-39.

65. Ibid, at 38. The word 'colonial' has been omitted here from an earlier version.

66. Baxi, Upendra, "Environmental law: limitations and potential for liberation" in Bandyopadhyay *et al.*, India's environment, at 291-309.

67. Ibid, at 292.

68. For material on environmental law and policy in developing countries generally, see the annotated bibliography in (1985) 12 Ecology Law Quarterly, 1075-1087.

69. A brief account on the ideological trends in Indian environmentalism vis-a-vis First World and Third World environmentalism is contained in a contribution to a recent research programme on sustainable development and social change sponsored by the UN Research Institute for Social Development. See Gadgil, Madhav and Ramachandra Guha, "Ecological conflicts and environmental movements in India", in Ghai, Dharam (ed.), Development and environment: sustaining people and nature, 1994, Oxford, Blackwell Publishers, 101-136 at 119-136.

CHAPTER 5 INDIAN LEGAL CULTURE AND ENVIRONMENTAL JURISPRUDENCE

The earlier chapters showed how various factors have contributed to the gradual creation of a new public law rationale under the Indian Constitution. The development of environmental jurisprudence in India as part of a legal system which continues to change as a whole to meet new challenges, has thus shown a progression through the processes of legal osmosis in all directions. As discussed in the introduction, an important aim of the present thesis is to show, by focusing on the development of Indian environmental jurisprudence, how current legal progression involves more or less conscious use, if not a revival, of Indian indigenous conceptualisations of law. This progression, in line with cherished ancient legal traditions, occurs obviously in modified forms and processes and appears today as the influence of cultural rather than *prima facie* legal factors.

This chapter refines our discussion of the emergent and uniquely Indian regulatory paradigm by analysing the elusive conceptual and cultural characteristics which underpin the current development of laws in India generally and manifest themselves particularly in Indian environmental jurisprudence. The chapter initially identifies the significant aspects of Indian legal culture which

characterise traditional legal systems and then proceeds to examine specific aspects of indigenous legal culture and their impact upon juristic concepts relevant for the construction of a new environmental jurisprudence.

It is argued here that while the present legal system in India is apparently built on colonial English models, various and diverse conceptual elements inherent in the traditional pre-British legal systems still exist[1] and have not been displaced.[2] Recent research suggests that the seeds of the new public law regime in India are firmly rooted in ancient Indian jurisprudence.[3] Also the more philosophically-oriented recent literature relevant for environmental jurisprudence emphasises that Indian traditions of thought on Nature form a conceptual resource base that inspires current environmental philosophy.[4] These underlying and more or less invisible postulates are now manifesting themselves again more clearly in the process of creating what we may call a 'postmodern' legal order in India.[5]

5.1 Legal systems and legal cultures

In their quest to understand whether India could evolve an indigenous legal system after independence, some Western legal scholars appear to have perceived the Indian legal system incorrectly. As indicated, Marc Galanter appears to

be most prominent amongst them.[6] In one of his conclusions, he indicates that:

> "Contemporary Indian law is, for the most part, palpably foreign in origin or inspiration and it is notoriously incongruent with the attitudes and concerns of much of the population which lives under it. However, the present legal system is firmly established and the likelihood of its replacement by a revised "indigenous" system is extremely small."[7]

The conclusion of Galanter was also questioned by C.J. Fuller a few years ago.[8] Fuller was able to see that at the very apex of India's modern legal system, judicial reasoning on new issues is preponderantly continuous with indigenous, pre-colonial, 'traditional' styles of reasoning.[9] He thus demonstrated to an extent that modern legal norms can issue from the more diffuse norms and values of the older culture as a whole. W.F. Menski in a recent review of Galanter's book,[10] uses a Japanese jurist's theoretical framework to show that traditional Indian law has not been displaced but has thrived, albeit hidden from the view of official legal science.[11]

Here, in order to evaluate the intricate indigenous aspects of the Indian legal system, one has to look beyond the mere sum total of all the laws that exist or operate today and focus upon the foundations or the matrix of the legal system. It would obviously involve a process of

identifying not merely the gradual changes of the legal system, but a conceptual analysis of such modifications and of the diverse legal traditions that India has acquired in her long and varied historical past. To do this in detail would go beyond the ambit of the present study, so we present an outline argument here.

Around two decades ago, David and Brierley, well-known scholars in comparative law, stated that:

> "One has a very incomplete grasp of what the law is if consideration is only given to its concrete rules at any given time. No less essential are those elements which give law its characteristic features and which assure its permanency, despite all the changes made in the legal norms. This is not to say that these other elements are removed from the general process of evolution; but their evolution is incomparably slower than are the modifications affecting the legal rules themselves and they are linked to a certain understanding of law and its social role and thus reflect the actual civilization of the country."[12]

This seems to indicate that a system of law is something more than merely the sum total of all the rules valid in a given country at any given time. The general features of the law in a region are characterised by the civilisation of the region itself, its economic structures, its language and social manners, but most of all the core of

this invisible law lies in the sense of justice of its inhabitants.

Professor Derrett seems to be the only expert on Indian law who ventured into this area. He noted a few decades ago that different observers would utilise different segments or different aspects of the evidence in order to answer this question.[13] According to him:

> "The enormous bulk of legislation which is based on western models, and the apparatus of the judicial process which is admittedly derived from western techniques, owed to western inspiration, and supported by a self-conscious desire to give the public the kind of justice which Britons and Americans expect in their own homelands, all tend to support belief that Indian law is a kind of annexe (if a special kind of annexe) to the Anglo-American "common-law" consortium of legal systems. But one who reads the law reports receives a number of impressions which tell a different tale. Whether he turns his attention to the substantive law itself, or the way in which it is being administered, or in the public's and judges' attitudes towards it, he sees traces of much that is recognizably traditional."[14]

The observations of David and Brierley about legal systems in general, and Derrett's above comments in the context of the Indian legal system indicate that, apart from

the totality of the formal laws, there is what one may call a 'legal culture', a vital requisite to understanding any particular legal system and any significant legal development in that system.

More recently, a Japanese legal scholar who examined the concept of 'legal culture' from an Asian standpoint, has advanced the analysis of this theme by writing about the 'postulates of law' or 'legal postulates', operating at different levels.[15] Chiba, urges us to look beyond what he calls Western 'model jurisprudence'.[16] He shows that a legal postulate is a value principle or value system specifically connected with a particular official or unofficial law which acts to found, justify and orient the latter.[17] He sees the whole structure of law from a formal aspect as composed of three levels of law: official law, unofficial law and legal postulates.[18] Chiba also shows that legal cultures grow out of historical experiences, upbringing, religion, prevailing ideologies, education and so forth, and they lead to and form a plural structure in most countries. According to him legal cultures have both an 'internal' as well as an 'external' form; these are deep-rooted and manifest themselves as characteristic features of any significant legal development.[19]

It would thus appear that the conceptual roots of any legal development lie deep in all levels of human interactions of the people of a particular region. Thus it

is argued here that postulates of law have to be recognised as a vital ingredient for any meaningful study of 'law and society', 'law and development' and, in the present context, of environmental law.

Before we attempt to analyse the conceptual roots of Indian legal culture in more detail, it must be pointed out that modernity of a legal system is generally attributed to a legal tradition following the Western legal culture.[20] As Wieacker shows, the roots of Western legal culture lie in the Roman law tradition which is characterised by the adherence to, and predominance of, a positive law culture.[21] The positive law culture, originating perhaps from the command culture of Mosaic Law, has become central to Western civilisation and Western 'model jurisprudence'.[22] Consequently, there is a basic assumption that laws are to be imposed as the will of a superior authority. There is also a natural inclination of Western man in general, particularly post-Reformation Western man, to think of traditional values and morals based on religion and local tradition as something less important or less significant in social and political life. One can say that all these elements have contributed to a mental framework where the positive law culture is generally seen as the hallmark of a modern legal system around the world. However, a prominent author has warned that, unless checked, this will allow grave misunderstandings to develop in the analysis of Indian laws.[23] Chiba, as indicated above, now appears to argue on

the same lines for Asian laws generally.

It might not be out of context to note here that the annals of European legal history show the defiance of the English common law to follow the mainstream of Western legal culture.[24] It would appear that the sublime uniqueness of the English common law tradition is, *inter alia*, manifested in the seminal notion of 'justice, equity and good conscience', which has been traced directly to the Romano-Canonical juridical philosophy of the sixteenth-century English jurists.[25] To an extent, it must have been a necessary outcome of their exposure to India and its natives.[26] The ideal form of Commonwealth envisioned by Sir Thomas More, the Lord Chancellor of Henry VIII was based on Indological sources.[27] Thus a subtle yet prominent distinction of the English common law culture from the European mainstream appears to have played a vital role in the acceptance of the English legal culture in the colonies, particularly in India. Recent research on the introduction of English common law in the colonies examines some aspects of the scope of recognition of indigenous customary law and Islamic law, noting difficulties that have arisen from the clash of different cultures in places as far apart as Hong Kong, Malaysia, Ghana and Nigeria.[28] Matson perceives 'justice, equity and good conscience' as a 'vague notion' which made its way to India first in Portuguese guise in Bombay, then it appeared in Madras in English.[29] However, from the Indian jurisprudential perspective this clausula is

seen as very important.[30] Thus it could be said that this formula, encapsulating the notions under traditional common law, was conceptually nearest to the indigenous legal traditions of India and thereby conducive for amalgamation.

Some years ago, different perceptions of legal cultures were brought out in the Bellagio Papers and other essays which give wide and varied perspectives of Third World jurisprudence through the folk laws in different regions.[31] It has also been shown that the amalgamation of 'law' as understood in the West with moral and religious concepts is an important aspect of indigenous traditions.[32] The dominant Western conceptual understanding of law confines the purpose of a legal system to a limited sphere of social and political life. By itself, it cannot create a long lasting sustainable system that could accommodate, adapt and modify to changing concepts and world views within a particular society. It would therefore appear that the foundations and conceptual understandings of law in Western 'model jurisprudence' are narrow, compared to the broader conceptual understanding of non-Western legal cultures. In other words, modern Western law is in danger of separating the official law from Chiba's legal postulates, divorcing state law from local culture, often by assertive claims to the universal validity of legal rules.

In contrast, the primary purpose of law under the Indian indigenous tradition is aimed at sustaining a

'universal order' in every possible way.[33] One could argue that this broader, cosmic canvas inevitably gives rise to adaptability, flexibility and accommodativeness as the general characteristic feature of the legal order. Professor Derrett was able to perceive these characteristic features of Hindu culture in his *Critique of modern Hindu law*.[34] He noted that:

> "Flexibility, diversity, adaptability, and the genius for adjustment without changing one's entity - these are the hallmarks of Hinduism, properly not less a way of life than a religion. In this book I shall proceed upon the hypothesis, which I believe to be true, that the common denominator of Hinduism is still valid in legal contexts and is equally valid in all of them; that it consists quite happily with India's being a member of the international consortium of common-law nations, and that it is not open to being abolished or otherwise interfered with, whether from above or below; and that one can safely count on its efficacy in the indefinite future."[35]

The traditional indigenous understanding of law in India has a conspicuously rich content of varied philosophical and religious overtones which, according to Derrett, made it incongruous to an unaccustomed Western mind.[36] It has also been said, again and again, that the traditional indigenous law of India was by itself a conglomeration of diverse conceptual understandings, which,

one could say, was able to accommodate many divergently alien systems within its fold.[37] Derrett indicated that:

> "Out of the coexistence of different strands, at different levels of evolution, the nation expects to thrive; and the state and its officials are given a mandatory ethos within which all their acts must be developed. In India the statutes, constitutional provisions, and the courts adopt, rather, a structure, in keeping with the spirit of Hinduism, which, as it were, holds up a mirror to all sections of the public, with every hope of drawing them severally towards a common standard devised for them thousands of years ago."[38]

The indigenous traditional law is primarily aimed at the individual, his behaviour, personality and outlook. A much wider and deeper aim is sought here to support a created, pre-existing order that is eternal. This implies that what anyone does has to be conducive to that larger order. Any aspect of individual action is placed into a conceptual framework of reference in which individualistic notions are made subservient to the needs of the system as a whole, in effect a situation where 'public interest' overrides 'private interest'.[39] Here, the positivistic content of law apparently becomes diminished or less important, as the exercise of state power must seek its validation and authority from the eternal order itself.

Thus the traditional indigenous concept of law in India is different from the 'modern' concept of law which tends to separate cultural values, morality and social beliefs from the domain of law. The problematic question here is to assess the main conceptual characteristics of this impregnable legal culture that has inculcated values into the region and the society. It is impossible to do this in a few words, but the task itself cannot be avoided. In any event, one can do much more than simply assert that the legal culture which has developed from time immemorial in India and which has permeated into the collective psyche of the inhabitants, is charting the course of development of a new indigenous jurisprudence which India is currently witnessing. It is therefore reiterated here, before we go into particular details which evidentially identify these postulates, that the conceptualisation of law in India, based on indigenous traditions, is not only different but much wider than generally understood in the Western concept of law.

Although controversies abound about the historiographies of India,[40] it is apparent that several centuries of Muslim and English governance have affected the development of traditional Indian law. Since the eighteenth century, the British colonial governors gradually imposed on India a general system of law aimed primarily to maintain law and order and secure property rights. Upon the foundations laid by the Judicial Plan of 1772 by Warren

Hastings, later colonial administrators built an Anglo-Indian judicial system.[41] The second half of the nineteenth century virtually revolutionised the legal system with a spree of over-legislation, influenced by the desire to introduce English law and to shape the legal system from the English lawyers' point of view.[42]

A few decades ago, M.C. Setalvad, then Attorney-General of India, gave his exposition of the Indian legal system in the Hamlyn Law Lecture, placing it in the mainstream of the English common law systems.[43] According to him, the structure and powers of the court, the roles of judges and lawyers, the adversarial system of trial, the reliance on judicial precedent and the shared funds of concepts and techniques, bring the Indian legal system in the mainstream of the English common law system.[44] The common law in India in the wide meaning of the expression would include not only what in England is known strictly as the common law, but also its traditions, some of the principles underlying the English statute law, the equitable principles developed in England in order to mitigate the rigours of the common law, and even the attitude and methods pervading the British system of administration of justice.[45] Even as late as 1978, David and Brierley, in the second edition of their book on the major legal systems of the world today, have placed the Indian legal system, by overall assessment and for all practical purposes, as one based on English common law.[46] They indicate, however, that the desire of the English to

respect the rules of Hindu law was hampered by their own ignorance of its nature.[47]

Some Indian legal scholars have also perceived the Indian legal system generally as a common law system blending elements of other systems along with its own traditional notions of law.[48] Little over a decade ago, a well-known contemporary Indian legal scholar found the Indian legal system a common law system that has only incompletely emerged from the heritage of colonial rule.[49] There were too many laws introducing too many changes which paid little attention to the local views and feelings. Baxi found that this necessarily affected both the quality of the law and its social communication, diffusion, acceptance and effectivity, which has led to criticism and talk of 'crisis'.[50] He pointed out that:

> "The British Indian model of law making was a 'top-down' model; it was a paradigm of Austinian type. ....Thereby law making remains more or less the prerogative of a small cross-section of elites. This necessarily affects both the quality of the law enacted and its social communication, acceptance and effectivity."[51]

Despite such elaborate argumentation exhibiting the displacement of Indian legal traditions and their replacement by common law structures, it must be noted that such views undervalue the central importance of indigenous

cultural concepts. One is therefore more persuaded by Derrett's view that the official system is basically an import, a transplant, which acclimatised in a manner that its importers would never have wished; inadequate to perform the task required of it, yet only too adequate in creating problems not expected of it.[52]

5.2 *Dharma* and its dynamics

As discussed in the previous sub-chapter, India's indigenous legal tradition based upon the Indian understanding of the interlinkages of law, philosophy and religion is fundamentally different from the positive law tradition prevalent in modern Western societies. It is also not the same as the natural law tradition based on mere morals and values derived from religious beliefs. The notion of law in India from ancient times is based on the concept of *'dharma'*,[53] which permeated Indian society in all its conceivable aspects on an ideological basis, incorporating a wide variety of specifics to the elusive general.[54] The *'dharmic'* tradition in India has inculcated a deep-rooted indigenous legal culture which is often misunderstood as mere morality based on a religious orientation.[55] Under this tradition, *dharma, artha* and *kama* are legitimate aims of life; the natural order of things requires that men take them into account. This *dharmic* tradition aimed much beyond

the domain of exercising state power or religious orientation. One can say that the emphasis is on the internal inculcation of human conduct, which is quite apparently different from modern law's emphasis on regulating human behaviour by external sanctions. In other words, the dharmic system relies much more on the power of self-control than on externally enforced control.

The dharmic tradition, consequently, accords great importance to philosophical and ethical values in the context of legal development.[56] *Dharma* as a legal concept peculiar to India was described as a social cement by Professor Derrett:

> "This concept of righteousness, *dharma*, as an educational 'suction', is peculiar to India, and is a social cement which ties permanently communities with nothing else in common but their domicile in the sub-continent and their millennia-old committal to living together in competitive co-existence in a multi-cultural super-society."[57]

From a cursory Western analysis, Robert Lingat found that the concept of *dharma* derived from a more general notion which exceeds the domain of law in many respects without actually comprehending it entirely.[58] The word *dharma* has been translated as 'duty', and Lingat has pointed out that this distinction is essential only for the Western jurist:

"The word 'dharma' which is translated here 'duty' in effect expresses conformity with what Hindus regard as the natural order of things, and this explains its association with law."[59]

However, one can say that any analysis based on a superficial understanding of 'duty' as a legal concept fails to bring out its wider ramification in jurisprudential terms. Thus it has been pointed out recently that Lingat apparently did not understand the actual operation of the central Hindu concept and, very clearly, refused to acknowledge the role of self-control.[60]

Some Indian legal philosophers have grappled with closely related issues. From an Indian viewpoint, Chhatrapati Singh, in his exposition of the logical, epistemological and ontological foundations of the idea of law was able to show *dharma* as a third alternative that could operate against the dominant legal positivism and its various opposing natural law theories.[61] According to him:

"As against the dominant legal positivism which bases law on the will of some people, philosophers have sought to discover universal principles of law by probing into nature, including human nature. They have thus come up with various natural law theories. But these are not the only two alternatives - as philosophers of law commonly seem to assume. In between these two theories lies the third alternative which

looks for the substance and justification of basic laws in the communal mode of human existence and the teleology of its development. It is this third alternative which has seemed to me the most promising direction needing critical exploration."[62]

This third alternative, expressed in the notion of *dharma* and Chiba's conceptualisation of legal postulates generally, is clearly different from the notions of both positive law and natural law. The 'duty' orientation of *dharma* differs from the 'jural opposites' or the 'jural correlatives' of 'rights' under legal conceptions applied in Western jurisprudence.[63] At the same time, the dharmic culture contains within itself the characteristics of both the positive law culture as well as the natural law culture. The dharmic culture does not consider that law emanates from any authority whether sovereign or divine. To a legal mind trained in the Western legal culture, the *dharmic* culture could almost appear as lawless. In other words, the dharmic culture aims to achieve 'justice without law'.[64]

5.3 The nature of Indian *dharmic* culture

According to Derrett, Indians find it difficult to believe that their subtle and cryptic civilisation can possibly be understood by a foreigner and that the Indian is in no

danger of losing his Indianness because the ability to adjust to a new environment or ideology is a remarkable feature of an Indian.[65] Derrett states that:

> "It is the agglutinative power (as contrasted with the de-racination which other races experience, when exposed to the attractions of another culture) which makes Indians, their culture and their contemporary predicaments especially intriguing. They are intriguing to themselves, as Indian observers with genuine academic qualifications show. And they intrigue the remainder of the world ..."[66]

The agglutinative power lies in the facility to tolerate and accommodate different cultures and values. This receptive attitude, it appears, enables a unique transformation without much obliteration. In other words, Indian culture is inclusive, not exclusive, based on the universal conceptual core of *dharma*. As a result, India has been willing to borrow what is good from elsewhere and make it her own, so that foreign transplants have become Indianised. Derrett was of the view that:

> "Indian tolerance of oddities and broadness of sympathy are proverbial. The ability to adjust to the novel environment and the novel idea, without abandoning the original stand point, is unique. Modifications in colour do not affect the substance." [67]

In our present context, one could see this as a major

factor in allowing the establishment of a new Indian public law regime, which appeared to permit the use of modified common law strategies in environmental litigation. An observation in the same vein can in fact be noted in Granville Austin's perception of the making of the Indian constitution.[68]

> "India's original contributions to constitution-making, [that is] accommodation ... the ability to reconcile, to harmonize, and to make work without changing their content, apparently incompatible concepts - at least concepts that appear conflicting to the non-Indian, and especially to the European or American observer. Indians can accommodate such apparently conflicting principles by seeing them at different levels of value, or, if you will, in compartments not watertight, but sufficiently separate so that a concept can operate freely within its own sphere and not conflict with another operating in a separate sphere ... With accommodation, concepts and viewpoints, although seemingly incompatible, stand intact. They are not whittled away by compromise but are worked simultaneously."[69]

The subtle element of 'Indianness' is such that new developments of law are brought about more or less in unique ways invisible for lawyers without Indian cultural knowledge. Ultimately, radical changes, brought about slowly through modification rather than alteration, i.e., legal

osmosis, take a long time to be understood as such. For example, Galanter's monumental and comprehensive coverage of the development of the unique positive discrimination law in India does not appear to note the gradual conceptual transformation of the Indian caste system.[70] Derrett, apparently, was able to appreciate the traditional ideology of the caste system and at the same time perceive it as unsuitable to the demands of the day. He observed:

> "Quite the most interesting of India's struggles with her own diversities arose out of caste and religion. The beauty of the caste system is that it prevented a class-struggle. Everyone had a right to his way of life, and this was protected better than any 'closed shop'. No one would intrude on the sacrosanct way of life of another. But this could not square with the demands of an industrialised nation, nor with the effects of mobility and earning by both men and women."[71]

As discussed in chapter 2 above, the Indian constitution aims to bring about many radical changes from the earlier political, social and economic order, as many other newly written constitutions would do. Yet the participatory processes through which this was achieved, particularly the judicial process, with which we are centrally concerned here, depict distinct elements of Indian legal culture. Many socio-legal studies focusing on the role and exercise of judicial power by the Indian Supreme Court

have shown its unique functioning.[72] Judicial review in India is seen as an explicitly assigned political role and the provisions for judicial review have sanctioned the courts' involvement in the ongoing political process.[73] While these studies reveal quite different viewpoints about the nature of the Indian legal system, it is evident that the judges of the higher courts in India have assumed a position which is quite different from the English common law tradition,[74] and have adopted a role which might not be much dissimilar to that of the sages or 'rishis' of the ancient past.[75]

Important social, economic and political questions generally not put to judges in other countries are decided by the courts in India. The role of the Indian judge is based on the internal ('systemic') requirement to sustain an all-comprehensive notion of law and justice as the central Indian postulate of law, namely *dharma*. In Indian terms, the judges' duty can be expressed by the proposition that the judge is the only person whose *samanya dharma* (common dharma) is the same as his *varna-ashrama dharma* (the dharma of the profession or station).[76] The pedagogic and persuasive nature of most judicial discourses displays this *'dharmic'* culture.[77]

The phenomenology of this new legal philosophy has been summed up by the well-known "activist" former judge of the Supreme Court of India, Justice Krishna Iyer, who stated

that if law must serve life - the life of the million masses - the crucifixion of the Indo-Anglican system and the resurrection of the Indian system is an imperative of independence.[78] Thus quests by juridical pathfinders, in search of new avenues,[79] show the genesis or rather the reincarnation of a new legal order which has been slowly but perceptibly restructuring Indian judicial discourses.[80] Significantly, such comments have been made in the context of public interest litigation debates. A few years ago, Upendra Baxi, while writing on the plight of the victims of the *Bhopal* case, was able to show to an extent the move from a jurisprudence of abstraction to a jurisprudence of human solidarity.[81] He observed that India's articulations of the Bhopal victims' claims invite such a jurisprudence and the Supreme Court of India is perhaps well endowed by experience to inaugurate it.[82]

Following Maneka Gandhi's case,[83] there have been momentous judicial innovations in the use of the judicial system to re-orient the ideology of Indian jurisprudence. It is, therefore, too simple to rely on the conjecture that the legal system in India is adhering to the common law jurisprudence and that India has simply continued the Anglo-American models of judicial processes. The legal strategies evolved under Indian judicial patronage are bringing about institutional and structural modifications to the entire legal system.[84] This is, then, not a revolutionary recent phenomenon, but looks more like a culture-specific

characteristic of current Indian law.

5.4 *Dharma* and contemporary Indian jurisprudence

It is significant that discussion on the contemporary relevance of ancient Indian law is now getting under way.[85] Some Indian scholarly legal discourse has now focused on this aspect.[86] A few years ago, Rama Jois, a High Court judge, made an exploratory search into ancient Indian jurisprudence in a public law lecture at Cochin University.[87] Rama Jois favourably compares *dharma* with modern public law, as the duty of the 'State' was not only to enforce obedience to the law against individuals but also to conform to the law in all its actions for the purpose of ensuring the welfare and happiness of all people. In showing that the ancient legal and constitutional system in India was established on a duty-based society, he stated:

> "The legal system which was the same for the whole of India, notwithstanding the existence of large number of Kingdoms, some larger in size and others smaller indicates that the concept of absolutist monarchies had always been rejected and the supremacy of *'Dharma'* (Law) over the Kings as declared in the authoritative texts was respected in letter and spirit. The doctrine of 'King can do no wrong' emanating from the concept of Divine Rights of Kings was not accepted, though the King as head of State was held in high esteem and

people were asked to respect him as God, so that he might command the respect and the obedience of the people who were by nature God fearing and thereby ensured obedience to *Dharma*. At the same time, *Dharma Sastras* impressed upon the Kings to look upon the people as God *(Praja Vishnu)* and serve them with love and reverence."[88]

Dharma as the duty of every individual towards society was, thus, matched by the duty of the ruler towards his subjects and the society of his realm. Here lie the seeds of modern public law in India.[89] Rama Jois then describes various aspects of *Rajadharma*, a significant facet of *Dharma* according to which all the kings exercised their sovereignty, and how it applies with equal force to all persons who come to exercise political and administrative power under any system of the government.[90] Following Jois's line of arguments, the Constitution of India, particularly the Directive Principles of State Policy, can be seen to form the *rajadharma* of India today.

Rama Jois found support for his view in the statement of Dr. S. Radhakrishnan in the Constituent Assembly in favour of the Objectives Resolution moved by Jawaharlal Nehru. Dr. Radhakrishnan, later a president of India, had stated,

"*Dharmam Kshatrasya Kshatram Dharma*, righteousness is the king of kings. It is the ruler of both the people

and the rulers themselves. It is the sovereignty of the law we have asserted."[91]

Thus according to Jois, supremacy of *Rajadharma* has re-emerged in modern India in the form of constitutional supremacy which forms the foundation of the new democractic and secular State.[92] The significance accorded to the aims and ideals of the Constitution to establish a public law regime, analysed above in Chapter 2, is the manifestation of this legal culture. As this thesis shows, the most important and unique characteristic of Indian environmental jurisprudence is its development as part of a new public law regime within the legal order established by the Indian constitution.

It is significant to note here that a former Attorney-General of India sees the recent developments in Indian administrative law as reminding government of the need for self-control.[93] Although Sorabjee's article, based on a lecture to the Administrative Law Bar Association in London, does not explicitly mention *dharmic* culture, it nevertheless reflects the new legal culture of India. Other legal scholars appear confused when grappling with the present debate. Chhatrapati Singh, in analysing *dharmasastra* and contemporary jurisprudence in India, appears to hold the view that,

"In modern jurisprudential terms one may say; the *grundnorm* which established the *dharmasastra* as law is

different from the *grundnorm* that legitimises the modern Indian law; that is, the reasons for which the normative framework of *dharmasastra* was accepted by people as law is not the same as the reasons for which the modern normative framework is accepted by people as law. Any question of the relevance of the *sastras* to modern law would be out of place."[94]

Singh finds that the rise and dominance of the Western legal culture and legal positivism in this century speak against legal science as a separate science i.e., *dharmasastra* - a science of righteousness.[95] He thus states,

> "In the light of this positivistic understanding of modern law teaching and practice, even to assert that there is or can be *dharmasastra*, a self-contained body of knowledge qualifying to be a science, in the strict sense, goes contrary to the general belief."[96]

Here and in his earlier book, Singh has shown the basic shortcomings of Western legal theories with their positivistic attitudes which have their roots in the post-enlightenment colonial expansionism of Europe, where it became important to use law as an instrument of social control and hence to define it as the will of the sovereign (the state) and not as a systematic science to attain justice in society.[97]

Rajeev Dhavan' book on the juristic techniques of the

Indian Supreme Court, based on his doctoral dissertation at SOAS some two decades ago, showed that a distinct Indian jurisprudential approach does in fact exist, particularly on Indian concepts of property, and based on premises different from those of the Western concept of property.[98] But Dhavan was not able to show the manifestations of *dharmic* concepts as they remained eclipsed within the then dominant jurisprudence. In 1960, Julius Stone the well-known common law jurist, challenged the jurists of India at that time to explain what precisely other countries can learn from India's cultural heritage. Although the results were on the whole negative, Professor Derrett, was able to bring out, to some extent, the usefulness of *dharma* concepts for world peace.[99]

In his conclusion, Dhavan showed that the Indian courts of the 1960s and early 1970s had taken up the theoretical assumption of a 'cosmopolitan jurisprudence' and stated that:

> "The Court appears to have assumed a theoretical approach with regard to the nature of the individual and the State, and then arbitrated mechanically between their conflicting claims on the basis of cosmopolitan jurisprudence."[100]

At the same time, Dhavan, a student of Professor Derrett, was able to perceive then that in many less controversial areas, other than on property rights and

preventive detention, this theoretical assumption breaks down. He stated:

> "In all these cases the Court seems to have relied on native instincts and needs even though it had tried to preserve its tone of cosmopolitan objectivity. Thus we can see that although traditional factors have operated through an undeclared but clearly identifiable instinct for traditional matters, in the main the Court has thought of its function as not lagging behind the principles of cosmopolitan jurisprudence."[101]

However, Dhavan quoted Krishna Iyer J's observation in the then sensational Indian case of Smt. Indira Gandhi v Shri. Raj Narain,[102]

> "Legality is within the Court's province to pronounce upon, but canons of political propriety and democratic *dharma* are polemical issues on which judicial silence is the golden rule."[103]

That was nearly two decades ago. There is less judicial silence now, particularly for rendering environmental justice. In a more recent article on Dharmasastra and modern Indian society,[104] Dhavan notes that:

> "There are a large number of areas in which the *sastric* order survives as part of a living social order. This is inevitable given India's geographic and demographic size and the fact that many facets of social life in many parts of the country have been left relatively

undisturbed. But the force of the modern state - no less its British predecessor as its contemporary manifestation - has been to fundamentally question the basis of the *sastric* system. The end result has been precipitous. *Sastric* learning - once a powerful source of inspiration, influence and respect - has become otiose and irrelevant."[105]

However, he then goes on to say,

"Even if the civil order ordained by the *sastra* has been seriously undermined, the beliefs from which this order eventually derived inspiration remained unscathed."[106]

In other words, the value system as such is perpetuated, even if its original proponents are no longer identifiable or active. This appears to indicate that indigenous Indian legal postulates are continuing to exercise some influence. Significantly, Dhavan notes this with reference to public law:

"Although the public system of governance has intruded into people's lives, it has not been accepted as an act of faith. The system is there to be used and abused to advantage."[107]

He therefore concludes that the real problem of modern Indian society stems from the relationship between civil society and the public system of governance. Unless the latter is accepted as an act of civil faith it would remain highly vulnerable to extreme dysfunctionality.[108] Although

this appears to be a negative assessment, it nevertheless reiterates the need for the growth of the public law rationale in India. Dhavan's analysis appears to be incomplete and writers seem to be unable to link ancient concepts and modern legal developments. This problem, however, is hardly new.

S.K. Purohit has to a great extent attempted to unravel the multifarious and intricate facets of ancient Indian legal philosophy in a very recent work.[109] Although it is beyond the scope of this thesis to evaluate all those aspects, one could hardly fail to notice Purohit's analysis of law within the Indian jurisprudential concept of *rita*[110] and law as culture within the concept of *dharma*.[111] He states:

> "To Indians who have been traditionally cherishing Dharma and whose genius and culture have imbibed its tenets, Dharma contains in itself jus positivism as well as jus naturale and is a principle of division as well as unity, and a coherent scheme of life as well as a ideal of perfection. In one word it is the epitome of Indian civilisation and culture."[112]

It appears beyond dispute that Purohit's work is remarkable in its attempt to take up the challenge to re-present the old concepts in a clear and lucid modern style. However, it is submitted that Purohit, like many others before, seems to succumb to the temptation to carry out a

comparative analysis with Western jurisprudence and in the process muddles much of his venerated discourse, which is useful for contemporary Indian jurisprudence.

The re-creation of the *dharmic* order, as W.F. Menski has shown in a recent piece of writing on Hinduism and democracy, is centred on the concepts of *rita* (macrocosmic order) and, more prominently, *dharma* (microcosmic order), ultimately every individual's duty to act appropriately at any given time.[113] I would submit, in the light of the work of Purohit and Menski,[114] that such concepts remain central to Indian legal culture as such. I would disagree to the extent that this conceptual understanding involves not merely 'Hinduism' in India's pluralistic culture.

The present thesis can certainly not probe into the conceptual details of the links between *dharma* and modern Indian public law.[115] However, when one applies one's awareness of these underlying conceptual links to a specific area of legal development, such as environmental law, it becomes easier to draw the relevant links, at least in outline. The final sub-section of this chapter attempts to do just this by showing that Indian culture conceptualises the environment within its holistic universal framework of reference, thus prompting the creation of a neo-*dharmic* jurisprudence in India.

5.5 Indian tradition and environmentalism

As indicated at the beginning of this chapter, nature in Asian traditions of thought has become a field of rediscovery to recent environmental philosophy.[116] As editors of a recent volume of essays on environmental philosophy, Callicott and Ames were persuaded by the fact that Asian traditions of thought can help the West reconstruct its worldview. They are of the opinion that Eastern traditions of thought represent nature, and the relationship of people to nature, in ways that cognitively resonate with contemporary ecological ideas and environmental ideals.[117] They hold the view that contemporary environmental misdeeds perpetrated by Asian peoples today can in large measure be attributed to the intellectual colonisation of the East by the West.[118]

Callicott and Ames also show that comparative environmental philosophy faces the most obvious problem: that ideas of Eastern cultures must be made intelligible to non-specialists in the West through the syntax and semantic discrimination of Western languages (and vice versa).[119] At present there is much confusion and, as we saw with reference to the legal debates in chapter 5.4 above, a marked inability to articulate the linkages between culture and law in India. In consequence, Asian philosophies often appear to be confused as inferior variations of Western themes. In other words, by Western paradigms, either there

is no Eastern philosophy worthy of the name, or, if there is one, it is of an inferior grade.[120] Either argument tends to declare this philosophy irrelevant for modern legal analysis.

Callicott and Ames are of the view that Western cognitive culture today appears to be in the midst of a millennial upheaval which undoubtedly appears more disjunctive from the current internal perspective than it may in retrospect. Nonetheless, ideas inherited from an amalgamated Greco-Roman and Judeo-Christian heritage - about the world, about who we are as human beings in the world, and about what in the world is valuable to have and hold - seem to have played themselves out, both theoretically and pragmatically.[121]

In this context, the same authors point out that from the mid-fifteenth to the mid-twentieth century, many Western nations openly pursued a policy of naked imperialism - imposing, by force of arms, their common economic, political, administrative, and religious culture on Asian (and African, Australian and American) peoples.[122] While most Asian nations are no longer Western colonies, few former victims of Western imperialism have 'returned to pre-colonial ways'. That would imply, in the common perception, a return to the past. Yet, from the recent studies on Indian law which have been examined in the preceding sub-chapters, it can be deduced that tradition was in fact never fully

displaced. If traditional concepts could not be dislodged by colonialism it may not be possible to abandon the past when the vices of colonialism and industrialism are being condemned by those concerned about the environment.

India's religious and cultural heritage has been shown to reveal a knowledge of nature and rules of utilisation of natural resources that respect the integrity of nature.[123] It has even been seen as a resource for a global eco-theology.[124] A cardinal feature of the traditional culture within the collective psyche of Indian society is the notion of *'ahimsa'* which creates a strong sense of non-violence that reflects not only elements of nature conservation but also anathematises notions of law favouring any rampant or violent development.[125]

Using illustrative examples, Dwivedi has been able to bring out the practical impact of Hinduism on conservation and sustainable development.[126] Dwivedi's work shows how *Satyagraha* (the insistence or persistence in search of truth) provides a flexible, adjustable system of moral and ethical guidelines towards environmental preservation and conservation. According to him the early Sanskrit texts, the *Vedas* and *Upanishads*, teach the non-dualism of the supreme power that existed before creation.[127] God as the efficient cause, and nature, *Prakrti*, as the material cause of the universe, are unconditionally accepted, as is their harmonious relationship.[128] Thus God and *Prakrti* are one and

the same.

Conceptualisations like *Prajapati,* the creator of sky, earth, oceans, and all species, who is also their protector and eventual destroyer and the only Lord of creation, show that human beings have no special privilege or authority over other creatures. On the other hand, they have more obligations and duties. Dwivedi shows that the Hindu belief in the cycle of births and rebirths provides a solid foundation for the doctrine of *ahimsa* (non-violence against animals and human beings).[129] Recent works by O.P. Dwivedi bring out the increasing need for a universal code of conduct for environmental protection based on the concept of *dharma*.[130] He examines the concept of *dharma* and distinguishes it from the internalised, individualised and liberty-centred Western concept of duty.[131]

The ecological crisis of today is not a Western phenomenon alone. The East today has no more lived to its highest ideals than has the West.[132] It could be said that one cannot have an ecological movement against violence in nature unless the value of non-violence is made central to the ethos of a culture.

It is certainly beyond the scope of this thesis to show the many and very diverse traditions of thought in India on various aspects of the nature of nature. Callicott and Ames have to some extent undertaken that task. In terms of

environmental and ethical discussion the philosophical views of *Samkhya, Yoga, Vedanta and Mahayana* Buddhist thought could be employed fruitfully. It could be shown that the notion of *Prakrti* as *Triguna (Sattva, Rajas, Tamas)* is clearly "systemic and (internally) relational" and environmental ethicists could possibly find in them powerful conceptual resources.[133] Callicott and Ames have arrived at the conclusion that,

> "We are persuaded that Asian traditions of thought can help the West reconstruct its world view. Firstly they can help along the process of western self-criticism by providing an alternative place to stand, an outsider's point of view, from which the West can more clearly discern the deeper substrata of its inherited intellectual biases and assumptions. And secondly, if, as some scholars have suggested, the historical dialectic of Western thought is being impelled in what has until now been a predominantly Oriental direction, Eastern traditions, rich in metaphor, simile, and symbol, can help the West articulate in ways that are culturally assimilable, the very untraditional abstract ideas forthcoming from contemporary theoretical studies of the nature of nature.[134]

These ideas are not as new as they may sound. An often-cited quotation of M.K. Gandhi[135] reflects the Indian approach towards sustainable environment and development:

> "God forbid that India should ever take to

industrialism after the manner of the West. The economic imperialism of a single tiny island kingdom is today keeping the world in chains. If an entire nation of 300 million took to similar economic exploitation, it would strip the world bare like locusts."[136]

Contemporary Indian writings on industrialisation and development are beginning to re-discover this deep and overall inner relatedness of things.[137] Newly emerging Indian views show that a new ecological order cannot be built on the old colonial order as the two are ethically, economically and epistemologically incongruent.[138] Other recent literature clearly bring out the attitudes of the common people of India on the environment.[139] In acknowledging the inspiration which he was able to draw from the participation of indigenous people, Maurice Strong, the Secretary-General of the Earth Summit, stated:

"Traditional peoples are the primary custodians of most of the evolutionary experience of mankind. They still hold vital and rare wisdom based on their success at managing a sustainable environment, as their ability to exist in harmony with ecosystems such as the forest, that more "developed" cultures are decimating, testifies. .... The belief of Indian tribal peoples, for example, that their culture was born and nourished in the forest, and their dependence for survival upon its continued existence, has imbued in them a respectful attitude to nature, and given rise to the

development of the most basic principles of forest management."[140]

Vandana Shiva, a well-known ecologist in India, has argued that forests have always been central to Indian civilisation.[141] They have been worshipped as *Aranyani*, the Goddess of the forest, the primary source of life and fertility and the forest as a community has been viewed as a model for societal and civilisational evolution. The diversity, harmony and self-sustaining nature of the forest form the organisational principles guiding Indian civilisation. According to Shiva, the *aranya samskriti* (the culture of the forest or the forest culture) was not a condition of primitiveness, but of conscious choice.[142] Shiva has also viewed the *Chipko Andolan* (the movement to hug trees), based on the injunctions of *ahimsa*, as a feminist movement to protect nature from the greed of men.[143]

One could say from the point of view of equality that the natural world is not, as represented in classical Western science, an aggregate of essentially independent entities. It is a relationally unified, differentiated and integrated system. Human beings, moreover, are both emergent from and immersed in the ecosystem. To that extent, this world view of ecology is "holistic", and the man-world relationship "integrated" and "organic".[144]

Again, these are not entirely new revelations. Rabindranath Tagore, the national poet and philosopher of India, once wrote:

> "Contemporary western civilization is built of brick and wood. It is rooted in the city. But Indian civilization has been distinctive in locating its source of regeneration material and intellectual, in the forest, not the city. India's best ideas have come from where man was in communion with trees and rivers and lakes, away from the crowds. The peace of the forests has helped the intellectual evolution of man."[145]

One could argue from what Tagore has said that the distinctiveness of Indian culture lies in having defined the principles of life in nature as the highest form of cultural evolution:

> "The culture of the forest has fuelled the culture of Indian society. The culture that has arisen from the forest has been influenced by the diverse processes of renewal of life which are always at play in the forest, varying from species to species, from season to season, in sight and sound and smell. The unifying principle of life in diversity, of democratic pluralism, thus became the principle of Indian civilization."[146]

The impact of the current rediscovery of Indian culture is evident in most areas of scientific policy making

processes. For instance a well-known Indian ecologist, while calling for a change in the land use pattern which had arisen due to earlier faulty governmental policies, has pointed out that:

> "To restore and husband the potential of our land must be our foremost concern. And to implement this simple deed we do not need huge amounts of money or sophisticated enterprise or a massive governmental machinery. All we need is a most commonsensical approach to observe, feel for and understand land as a living dynamic system of which we are but a part. Our cultural and religious ethics must compel us to take care of it. This land ethics must permeate and influence every deed of ours which would potentially have an impact on the living landscape."[147]

Recently, for forging a new common purpose around the world, the American Vice President Al Gore proposed a global Marshall Plan.[148] It might surprise many to note that Al Gore has sought inspiration from Gandhi for the change that is currently required to keep Earth in the balance. He states:

> "But I believe deeply that true change is possible only when it begins inside the person who is advocating it. Mahatma Gandhi said it well : "We must be the change we wish to see in the world"."[149]

This reflects growing awareness of the importance of

self-control mechanisms rather than legal strategies based on 'command and control'.

Al Gore has also discovered that for giving effect to his global Marshall Plan, the world's strategy for inducing a global demographic transition to lower growth rate should be based on the strategy used in the least 'modernised' yet highly traditional societies of Kerala and elsewhere.[150] He finds:

> "But there are some stunning success stories that show what can happen with a strategic approach. One of the most interesting case studies of demographic transition in the Third World comes from the Kerala province of southwestern India, where the population growth has stabilized at zero eventhough per capita incomes are still extremely low. The provincial leaders with assistance from international population funding, developed a plan that is keyed to Kerala's unique cultural, social, religious, and political characteristics and focuses on a few crucial factors. .... The consequences are little short of remarkable; in an area of the world characterized by uncontrollable population growth, Kerala's rate more nearly resembles that of Sweden than nearby Bombay."[151]

Legal scholars in India are searching for solutions, too. Chhatrapati Singh, in analysing *dharmasastra* and contemporary jurisprudence in India, has stressed the need

to make a detailed study of the *dharmasastras, nibandhas, vyavaharas* and customary laws which are particularly relevant for environmental protection.[152] Singh showed how the close relationship that existed between the communal way of life all over rural and tribal India governed by customary laws was able to manage traditional community resources like forests, grazing lands, irrigation etc. According to him:

> "Statutory laws, like the Panchayat Acts, Forests Acts and the Irrigation laws have been super-imposed on these customary laws. Such statutes were often aimed at massive exploitation of the common property resources, thereby impoverishing the tribal and rural people as well as breaking down the traditional community resources management systems. All this is a part of our colonial legal history."[153]

At the same time he proceed to sate that:

> "We are grossly ignorant of the laws and rules governing such matters, both in the *dharmasastra* as well as in the pre-British Muslim laws. It is being now realised that some of the traditional methods of preservation of forests, such as declaring them divine (*devabanas, rakhas*) or associating village tanks with village temples, were essentially democratic methods of people participation in preservation and utilisation of common goods. We need to make a detailed study of the *dharmasastras, nibandhas, vyavaharas* and customary laws to re-learn the whole juridical areas of public

property management."[154]

Others are beginning to see actual results. Professor Leelakrishnan, writing on the new forest law in India, showed the remarkable shift from the old revenue-obsessed attitude to a new environment-oriented approach towards forests.[155] He noted that:

> "Recognition of the symbiotic relationship between the tribal people and forests is the most significant feature of the new forest policy. While the laws and administrative measures hitherto followed had miserably failed in this respect the new policy makes an attempt to restore old rights and concessions to the tribal people and recognises their effective role and association in the protection, regeneration and development of the forests."[156]

The development of laws in a postmodern society shows the need for a new regulatory order emphasising the power of self-control. Elsewhere, Richard Brooks has explored how far the state could and should mandate environmentally sensitive life styles.[157] Brooks questions whether direct or indirect coercion is legally supportable and identifies as more suitable the pluralism principle, wherein law fosters either in a neutral or equal fashion differing ways of life and differing groups.[158] Harold Berman's theory of an integrative jurisprudence appears to point in the same direction as a key to understanding the development of World

Laws.[159] According to him integrative jurisprudence is based on a legal philosophy that combines the three classical schools: legal positivism, natural law theory, and the historical school. In Berman's analysis of both positivism and natural law with historical integration, one could see a revival of historical jurisprudence.

According to Berman, the Western legal positivist tradition, which has given the political and moral aspect of that tradition their dynamic impulse for the last several centuries, has diminished substantially. At the same time, he sees a new global legal tradition emerging, which in some way threatens the Western legal tradition while also building upon it.[160] The crisis of the Western legal tradition is that it is at the end of an era in which world history was centred in Western history and the beginning of an era in which Western history is centred in world history.[161]

Therefore the socio-legal aspects of environmentalism pose a central question, which is no longer whether law is a significant vehicle for social change but rather how it so functions, how the inherent sociological obligations in our legal system can be fulfilled to win a battle for qualitative existence.[162] It is a case of creating a new post-modern legal order. The current Indian experience shows how this can be based on indigenous cultural traditions which encompass law within a 'holistic' framework of

regulation and, significantly, self-regulation.

The next chapter shows the manifestation of this approach in recent Indian judicial discourse and analyses the current development of environmental jurisprudence by Indian courts. Chapter 6 below focuses on specific articulations in important Indian environmental cases which bring out the inarticulated premises of legal conceptualisation in Indian environmental jurisprudence.

NOTES TO CHAPTER 5

1. On the place of Indian legal traditions see generally Derrett, J.D.M., "Indian cultural traditions and the law of India", in Sharma, Ram Avtar (ed.), Justice and social order in India, 1984, New Delhi, Intellectual Publishing House, 1-21; Derrett, J.D.M., "Tradition in modern India: the evidence of Indian law", in Park, Richard L. (ed.), Change and the persistence of tradition in India, 1971, Ann Arbor, University of Michigan, 17-34. For the most recent authoritative confirmation of this approach see Lariviere, Richard W., "A persistent disjunction: parallel realms of law in India", in Baird, Robert D. (ed.), Religion and law in independent India, 1993, New Delhi, Manohar, 351-360.

2. Galanter, in particular, has asserted this displacement. See Galanter, Marc, Law and society in modern India, 1989, Delhi, Oxford University Press, chapter 2, "The displacement of traditional law in modern India", 15-36; chapter 3, "The aborted restoration of 'indigenous' law in India", 37-53; and chapter 5, "Indian law as an indigenous conceptual system", 92-99.

3. See in particular Jois, Rama, Seeds of modern public law in ancient Indian jurisprudence, 1990, Lucknow, Eastern Book Company; Purohit, S.K., Ancient Indian legal philosophy: its relevance to contemporary jurisprudential thought, 1994, New Delhi, Deep and Deep Publications. Rajeev Dhavan has shown that there has always been a quest for a renaissance in Indian jurisprudence which would link the past and the future in one coherent whole. See Dhavan, R., "Introduction", in Galanter, Law and society in modern India, xiii-c at xxv. See also his reference to Dhavan S.S., Indian jurisprudence and the theory of state in ancient India, 1962, Mussorie, National Academy of Administration, ibid, at lxxxiii footnote 65. Other earlier relevant studies on this aspect include: Supakar, Shraddhakar, Law of procedure and justice in ancient India, 1986, New Delhi, Deep & Deep Publications; Singh, Nagendra, Juristic concepts of ancient Indian polity, 1980; Sharan, Mahesh Kumar, Court procedure in ancient India, 1978, New Delhi, Abhinav Publications; Sen-Gupta, Nares Chandra, Evolution of ancient Indian law, 1953, London and Calcutta, Arthur Probsthain and Eastern Law House.

4. See generally Sen, Geeti (ed.), Indigenous vision: peoples of India attitudes to the environment, 1992, New Delhi/London, Sage Publications and New Delhi, India International Centre; Vannucci, Marta, "Tradition

and change", ibid, at 25-33; Chaitanya, Krishna, "The earth as sacred environs", ibid, at 35-48; Strong, Maurice F., "Only one earth", ibid, at 49-52; Callicott, Baird J. and Roger T. Ames (eds.), Nature in Asian traditions of thought: essays in environmental philosophy, 1991, Delhi, Indian Books Centre; Ghosh, G.K., Environment: a spiritual dimension, 1991, New Delhi, Ashish Publishing House; Engel, J. Ronald and Joan Gibb Engel (eds.), Ethics of environment and development: global challenge, international response, 1990, Tucson, University of Arizona Press; Dwivedi, O.P., "Satyagraha for conservation: awakening the spirit of Hinduism", in ibid, at 201-211; Bandyopadhyay, J., N.D. Jayal, U. Schoettli and Chhatrapati Singh (eds.), India's environment: crises and responses, 1985, Dehra Dun, Natraj Publishers; Krishnamurti, B.V. and Urs Schoettli, "Environment in India's religious and cultural heritage", ibid, at 159-171; Lott, Eric J., "India's religious resources for a global eco-theology", ibid, at 172-187.

5. As indicated in chapter 1, the term 'postmodern' is used here to describe the change in the Indian legal system within the current socio-political setting in India which is a progression drawing from both capitalist and socialist ideologies. To reiterate, the two characteristic features of postmodernism in the socio-cultural setting are (a) the rejection of many theories and practices which are considered as 'modern' and (b) the reversion to more traditional approaches. See generally Docherty, Thomas (ed.) Postmodernism: a reader, 1993, New York, London, Harvester Wheatsheaf, 1-31; Connor, Steven, Postmodernist culture: an introduction to theories of the contemporary, 1989, Oxford, Basil Blackwell. Connor shows that postmodernity and post-coloniality are closely connected, ibid, at 231 and 237. See also Jameson, Fredric, Postmodernism, or, the cultural logic of late capitalism, 1991, London, Verso. Jameson salutes the arrival of postmodernism from an essentially antimodernist standpoint. See ibid, chapter 10, "The cultural reification and the 'relief' of postmodernism", 297-418 at 313-318.

6. Derrett has criticised Galanter for his obscure vision. See, Derrett, "Indian cultural traditions and the law of India", at 1.

7. Galanter, "The displacement of traditional law in modern India", at 15.

8. Fuller, C.J., "Hinduism and scriptural authority in modern Indian law", (1988) 30 Comparative Studies in Society and History, 225-248.

9. Ibid, at 226.

10. Menski, Werner F., "Review of Galanter, Law and society in modern India", 1995 Law Quarterly Review, (forthcoming).

11. On Chiba see below, notes 15 and 16.

12. David, Rene and John E.C. Brierley, Major legal systems in the world today, 1968, London, Stevens & Sons, at 10-12.

13. Derrett, J.D.M., "Tradition in modern India: the evidence of Indian law", in Park, Richard L. (ed.), Change and the persistence of tradition in India, 1971, Ann Arbor, University of Michigan, 17-34.

14. Ibid, at 17.

15. See in detail Chiba, Masaji, Legal pluralism, 1989, Tokyo, Tokai Press.

16. Chiba, Masaji (ed.), Asian indigenous law: in interaction with received law, 1986, London, KPI; see chapter 1, "Introduction", ibid, at 1-12.

17. Ibid, 351-358.

18. For details see Chiba, Legal pluralism, at 28-38.

19. Ibid, at 35-37.

20. See ibid, at 49-56; see also Friedman, Lawrence M., "Is there a modern legal culture?", (1994) 7 Ratio Juris, 117-131; Wieacker, F., "Foundations of European legal culture", (1990) 38 The American Journal of Comparative Law, 1-29.

21. Ibid, at 18-19.

22. See again Chiba, Legal pluralism, at 49-56; Chiba (ed.), Asian indigenous law, at 1-12.

23. Derrett, J.D.M., Religion, law and the state in India, 1968, London, Faber & Faber, at 44.

24. See in detail Zweigert, Konrad and Hein Koetz, Introduction to comparative law, Vol.1, 1987, Oxford, Clarendon Press, 187-211. For a more recent study tracing the historical background of English legal philosophy see Berman, Harold J., "Origins of historical jurisprudence: Coke, Selden, Hale", (1994) 103 The Yale Law Journal, 1651-1738.

25. Derrett, J.D.M., "Justice, equity and good conscience in India" (1962) 64 Bombay Law Report (Journal) 129-138 and 145-152; reproduced in J.N.D.Anderson (ed.), Changing law in developing countries, 1963, London,

Allen & Unwin, at 114-153; also in Derrett, J.D.M., Essays in Classical and modern Hindu law, vol.4, 1978, Leiden, E.J. Brill, 8-27.

26. It is interesting to note here the story narrated by Derrett about the early English settlers in India. They were considered by the natives as the *Hunas* who did not even purify themselves or observe the lavatory and other taboos of their neighbours around seventeenth century Madras, but were able to administer justice without fear or favour. See Derrett, Religion, law and the state in India, 226-228. Derrett notes that, "As to the latter the strangers were never converted: as to the former they mended their ways." Ibid, at 228.

27. See Derrett, J. D. M., "Thomas More and Joseph the Indian", (1962) Journal of the Royal Asiatic Society, 18-34.

28. Matson, J.N., "The common law abroad: English and indigenous laws in the British Commonwealth", (1993) 42 International and Comparative Law Quarterly, 753-779 at 761.

29. Id.

30. See chapter 3.1 above on the historical import of this formula. Some examples where the Indian courts have interpreted the clausula are cited there in note 21.

31. See generally, Allott, Antony and Gordon R. Woodman (eds.), People's law and state law: the Bellagio papers, 1985, Dordrecht, Foris Publications; see also Chiba (ed.), Asian indigenous law: in interaction with received law.

32. See in detail Allott, Antony, The limits of law, 1980, Butterworths, London, chapters 5 and 6. However Allott's perception of the intrinsic value of indigenous traditional law does not appear to be broad enough if one notes that recently, while recommending a new Civil Code for Zimbabwe, the Emeritus Professor, together with a scholarly barrister, sought inspiration from Napoleon who replaced the pre-existing customary laws of France within four years. For details see Guni, Vengai and Antony Allott, "E Pluribus Unum: Towards a new, truly Zimbabwean, legal system?", (1994) 10 Commonwealth Judicial Journal, 10-13. It is submitted that their conclusion that such a code could serve as a model worldwide, where a genuinely autochothonous and unified legal system is in demand, (ibid, at 13) seems to lack recognition of the complexity and intrinsic value of legal cultures.

33. On the ancient conceptual foundations of this order see Miller, Jeanine, The vision of cosmic order in the Vedas, 1985, London *et al.*, Routledge and Kegan Paul.

34. Derrett, J.D.M., A critique of modern Hindu law, 1970, Bombay, Tripathi.

35. Ibid, at 13.

36. For details see Derrett, J.D.M., "History of Indian law (Dharmashastra)", in Spuler, B. (ed.), Handbuch der Orientalistik, vol.2, 1973, Leiden, E.J. Brill, 8-17.

37. Derrett, J.D.M., "Unity in diversity: the Hindu experience", in Bharata Manisha, vol.5, No.1, 21-36. Bharata Manisha is a journal of Indological and Oriental studies published from Varanasi, India.

38. Ibid, at 33.

39. Menski, Werner F., "Hinduism and Democracy", in The encyclopedia of democracy, 1995, Washington D.C., Congressional Quarterly Books (forthcoming).

40. See Perlin, Frank, "Disarticulation of the world: writing India's economic history", (1988) 30 Comparative Studies in Society and History, 379-387. Perlin's review of The Cambridge Economic History of India, 2 Vols, 1982, 1983, Cambridge, Cambridge University Press, shows that the controversy concerns the lack of insight into the social and cultural structures of India. See also Prakash, Gyan, "Writing post orientalist histories of the Third World: perspectives from Indian historiography", (1990) 32 Comparative Studies in Society and History, 383-408; O'Hanlon, Rosalind and David Washbrook, "After orientalism: culture, criticism and politics in the Third World", (1992) 34 Comparative Studies in Society and History, 141-167; Prakash, Gyan, "Can the 'subaltern' ride? A reply to O'Hanlon and Washbrook", ibid, at 168-184.

41. For details see Jain, M.P., Outlines of Indian legal history, (4th edn.), 1981, Bombay, Tripathi.

42. Banerjee, A.C., English law In India, 1984, New Delhi, Abhinav Publications, at 189.

43. Setalvad, M.C., Common law in India, 1960, London, Stevens & Sons Ltd.

44. Ibid, at 3.

45. Id.

46. David, Rene and John E.C. Brierley, Major legal systems in the world today, (2nd edn.), 1978, London, Stevens & Sons, 447-476 at 469-71.

47. Ibid, at 453.

48. Desphande, V.S., 'Nature of Indian legal system' in Minattur J. (ed), The Indian legal system, 1978, Delhi, The Indian Law Institute, New York, Oceana Publications Inc.; See also, Minattur, Joseph., "Introduction", ibid, at xi.

49. Baxi, Upendra, The crisis of the Indian legal system, 1982, Delhi, Vikas.

50. Ibid, at 41-51.

51. Ibid, at 45.

52. Derrett, "Indian cultural tradition and the law of India", at 11.

53. For a detailed bibliography of *dharma* in Hindu ethics and in South Asian Buddhism, see Carman, John and Mark Juergensmeyer (eds.), A bibliographic guide to the comparative study of ethics, 1991, New York and Cambridge, Cambridge University Press, chapters 1 and 2. For an early select bibliography on Hindu law, see, Sternbach, L., Juridical studies in ancient Indian law, 1965, Delhi, Motilal Banarsidass, Part I, at 541. They include, Jones, Sir William, Institutes of Hindu law, 1796, Calcutta and London; Colebrooke, H.T., A digest of Hindu law, vols.1-3, 1801, Calcutta and London; Jolly, Julius, Hindu law and custom, 1928, Calcutta; Mayne, J.D., A treatise on Hindu law and usage, (9th edn.), 1922, Madras; Jha, Ganganatha, Hindu law in its sources, 1930, Allahabad; Mulla, Sir D.F., Principles of Hindu law, (9th edn.), 1940, Calcutta; Kane, P.V., History of Dharmashastra, vols.1-5, 1930-53, Poona. For a detailed bibliographical note, see also, Derrett, Religion, law and the state in India, at 561-72.

54. A concise summary treatment is found in Derrett, J.D.M., "History of Indian law (Dharmashastra)", 8-17. See also Kane, P.V., History of Dharmashastra, vol.4, 1973, Poona, Bhandarkar Oriental Research Institute.

55. See Doniger, Wendy, "Introduction", in The laws of Manu, 1991, London, Penguin Books, xv-lxxviii at xvi-xix.

56. Moore, C.A. (ed.), The Indian mind: essentials of Indian philosophy and culture, 1967, Honolulu, University Press of Hawaii; see in particular Datta, D.M., "Some philosophical aspects of Indian political, legal and economic thought", ibid, 267-298; Aiyer,

C.P.Ramaswami, "The philosophical basis of Indian legal and social systems", ibid, 248-266.

57. Derrett, A critique of modern Hindu law, at 2.

58. See generally Lingat, Robert, The classical law of India, 1973, London, University of California Press. The author's preface at xii-xiii, and his writings on the 'concept of dharma' ibid, at 3-7 are particularly pertinent.

59. Ibid, at xii-xiii, footnote 2.

60. Menski, Werner F., "Law and religion: the Hindu and Jain approach" in Bhattacharyya, N.N. (ed.), Jainism and Prakrit in ancient and medieval India: essays for Prof. Jagdish Chandra Jain, 1994, New Delhi, Manohar Publishers & Distributors, 361-374 at 368-369.

61. Singh, Chhatrapati, Law from anarchy to Utopia, 1986, Delhi, Oxford University Press.

62. Ibid, at ix.

63. See Hohfeld, W.N., "Fundamental legal conceptions as applied in judicial reasoning", in Lord Lloyd of Hampstead (ed.), Introduction to jurisprudence, (4th edn.), 1979, London, Stevens and Sons, 260-266.

64. From a comparative law perspective it will be interesting to note how Jerold Auerbach has shown the growing dissatisfaction of the role of law in America. He has challenged the very foundation of administration of justice and the operation of the rule of law and has advocated the use of alternative dispute resolution processes. See Auerbach, Jerold S., Justice without law?, 1983, Oxford, Oxford University Press. In practical terms, such a culture in India can give rise to unusual techniques of settling disputes, situations such as festivals of justice for the common man. See A report on *Malokar Neethi Mela*, held at North Parur, Kerala, India, 1985, Cochin, Kerala Productivity Council.

65. Derrett, Religion, Law and the State in India, at 25-26.

66. Ibid, at 25.

67. Id.

68. Austin, Granville, The Indian constitution: connerstone of a nation, 1966, Oxford, Clarendon Press.

69. Ibid, at 317-318.

70. See Galanter, Marc, Competing equalities: law and the backward classes in India, 1984, London, University of California Press. It is beyond the scope of this thesis to analyse this work or show in detail Galanter's perception of the traditional legal ideology of the Indian caste system.

71. Derrett, "Unity in diversity", at 29.

72. See generally Dhavan, Rajeev, The Supreme Court of India: a socio legal critique of its juristic techniques, 1977, Bombay, Tripathi; Justice on trial: the Supreme Court today, 1980, Allahabad, A H Wheeler Publishing; Baxi, Upendra, The Indian Supreme Court and politics, 1980, Lucknow, Eastern Book Company; Baxi, Upendra, Courage, craft and contention: the Indian Supreme Court in the eighties, 1985, Bombay, Tripathi; Dhavan, R., R. Sudarshan and S. Kurshid (eds.), Judges and the judicial power, 1985, Bombay, Tripathi; Singh, Bakhsish, Supreme Court of India as an instrument of social justice, 1976, New Delhi, Sterling Publishers; Dube, M P, Role of Supreme Court in Indian constitution, 1987, New Delhi, Deep & Deep Publications; Gadbois, George, "The Supreme Court of India as a political institution", in Dhavan *et al.*, Judges and judicial power.

73. Ibid, at 256.

74. A well-known English public law expert has recently reviewed, through an illuminating article, how the Law Lords in England are now using the methods of philosophy, of legal history and tradition, of the social sciences and of comparative law, as done never before. See Lester, Anthony, "English judges as law makers", (1993) Public Law, 269-290.

75. A term used by Bhargava in the Constituent Assembly to symbolise the Indian judges and quoted by Dhavan, "Two concepts of law: reflecting on an Indian case study", (1986), (unpublished). See also, Singh, Chhatrapati, Law from anarchy to utopia, at 249-251.

76. Ibid, at 250. See also, Prasad, Rajendra, "The theory of Purusartha: revaluation and reconstruction", (1981) 9 Journal of Indian Philosophy, 49-76.

77. See Baxi, Upendra, "Judicial discourse: dialectics of the face and the mask", (1993) 35 Journal of the Indian Law Institute, 1-12.

78. Iyer, V.R. Krishna, Indian justice, 1984, Indore, Vedpal Law House, at 6-7. See also Justice Krishna Iyer's powerful plea for the Indianisation of Indian law in his speech before the Andhra Pradesh State lawyers' conference at Rajahmundry. (1976) 2 Supreme

Court Cases (Journal), 1-16.

79. Iyer, V.R. Krishna, "*Quo Vadis* Indian justice", in Judicial justice - a new focus towards social justice, 1985, Bombay, Tripathi.

80. See Baxi, Courage, craft and contention, 1-20; Gandhi, Sociology of legal profession, law and legal system, 130-156.

81. Baxi, Upendra and Amita Dhanda, Valiant victims and lethal litigation: the Bhopal case, 1990, Bombay, Tripathi; See "Introduction", ibid, at i-lxix.

82. Ibid, at lxix.

83. AIR 1978 SC 597.

84. A typical example is the *Lok Adalats*, or people's courts which originated as indigenous alternative dispute resolution processes patronised by some judges in the early eighties and were accorded statutory backing by the Legal Services Authorities Act of 1987. Act No. 39 of 1987. Chapter VI, ss. 19-22.

85. For example see Purohit, S.K., Ancient Indian legal philosophy: its relevance to contemporary jurisprudential thought, 1994, New Delhi, Deep and Deep Publications.

86. See in particular Singh, Chhatrapati, "Dharmasastras and contemporary jurisprudence", (1990) 32 Journal of the Indian Law Institute, 179-188; Dhavan, Rajeev, "Dharmasastra and modern Indian society: a preliminary exploration", (1992) 34 Journal of the Indian Law Institute, 515-540.

87. Jois, Rama, Seeds of modern public law in ancient Indian jurisprudence, 1990, Lucknow, Eastern Book Company. See also Garg, Ramesh D., "Book review", 35 (1993) Journal of the Indian Law Institute, 281-285.

88. Jois, Seeds of modern public law, at 2; see also Kane, History of Dharmashastra, vol.3, at 25.

89. Ibid, at 3-4 and 23-26.

90. Jois, Seeds of modern public law, at 28.

91. Ibid, at 26; see also Rao, B. Shiva *et al.*, The framing of India's constitution, vol.2, 11-18 at 15.

92. Id.

93. See Sorabjee, Soli J., "Obliging government to control itself: recent developments in Indian administrative law", (1994) Public Law, 39-50.

94. Singh, "Dharmasastras and contemporary jurisprudence", at 180.

95. Ibid, at 184.

96. Ibid, at 185.

97. Ibid, at 184-185. See also Chhatrapati Singh, Law from anarchy to utopia, 1986, Delhi, Oxford University Press, at 95-117.

98. Dhavan, Rajeev, The Supreme Court of India, 128-205 at 136. The ancient Indian concept of property has been authoritatively analysed by Derrett. See Derrett, J.D.M., "The development of the concept of property in India c.A.D.800-1800", in Derrett, J.D.M., Essays in classical and modern Hindu law, vol.2, 1977, Leiden, E.J. Brill, 8-130.

99. Derrett, Duncan J., "Indian traditions and the rule of law among nations", (1962) 11 International and Comparative Law Quarterly, 266-272. This article was written in response to Professor Stone's challenge to Indian jurists at a seminar held at Delhi University on March 9-10, 1960.

100. Dhavan, The Supreme Court of India, at 454.

101. Ibid, at 455.

102. (1975) 2 SCC 159.

103. Ibid, at 169. See Dhavan, The Supreme Court of India, at 458.

104. Dhavan, "Dharmasastra and modern Indian society: a preliminary exploration", (1992) 34 Journal of the Indian Law Institute, 515-540.

105. Ibid, at 539.

106. Id.

107. Ibid, at 540.

108. Id.

109. Purohit, Ancient Indian legal philosophy.

110. Ibid, 18-32.

111. Ibid, 33-55.

112. Ibid, at 49.

113. Menski, Werner F., "Hinduism and Democracy", in The encyclopedia of democracy, 1995, Washington D.C., Congressional Quarterly Books (forthcoming).

114. See also Menski, "Law and religion: the Hindu and Jain approach", at 368 and 370-371.

115. This would require more than a basic knowledge of Sanskrit and also indepth understanding of the pre-Aryan cultures like the Dravidian culture of the Tamils.

116. See note 4 above.

117. Callicott and Ames, "Epilogue: on the relation of idea and action", in Nature in Asian traditions of thought, at 279-289.

118. Ibid, at 280.

119. Ibid, at 12.

120. Ibid, at 50.

121. Ibid, at 287-288.

122. Ibid, at 280.

123. Krishnamurti and Schoettli, "Environment in India's religious and cultural heritage", in Bandyopadhyay *et al.*, India's environment, 159-171.

124. Lott, Eric J., "India's religious resources for a global eco-theology", in Bandyopadhyay *et al.*, India's environment, 172-187.

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150. Ibid, at 313.

151. Id.

152. Singh, "Dharmashastras and contemporary jurisprudence". See also Singh, Chhatrapati, Common Property and Common Poverty; India's forests, forest dwellers and the law, 1986, Delhi, Oxford University Press.

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154. Ibid, at 188-189.

155. Leelakrishnan, P., "Forest conservation: dawn of awareness", in Leelakrishnan, Law and environment, 51-66.

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158. Ibid, at 48.

159. Berman, Harold J., "Towards an integrative jurisprudence: politics, morality, history," (1988) 76 California Law Review, 779-801.

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161. Id.; see also Gavison, Ruth, "Natural law, positivism, and the limits of jurisprudence: a modern round", (1982) 91 Yale Law Journal, 1250-1285, a book review of Joseph Raz's Authority of law and John Finnis's Natural law and natural rights.

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CHAPTER 6 THE JURISPRUDENCE ON INDIAN ENVIRONMENTAL LAW

This chapter focuses on the Indian case-law about environmental protection. Initially, particular aspects of three well-known environmental cases or rather groups of cases are analysed in detail to show the important characteristic features of Indian environmental jurisprudence. First, *Ratlam*, as an early path breaker, has opened the way for the development of India's new environmental jurisprudence. Secondly, the *Mehta* cases show the gradual induction of new principles based on the public law rationale. Thirdly, the attempts made to resolve the famous *Bhopal* case by the Indian courts reveal the renunciation of established common law principles and notions of law. These three well-known environmental law cases exhibit the adoption of unique strategies and techniques that authenticate the operation of a new public law rationale and also reveal the use of autochthonous postulates of law and justice. They epitomise the neo-*dharmic* jurisprudence of environmental justice in India.

The early sections of this chapter analytically focus on these three well-known innovative types of cases and identify the operating principles that underpin them. In the light of our discussions in earlier chapters, we see here how the new public law rationale, building on the common law models in a fashion unique to the Indian legal culture, has

been based on autochthonous elements of juridical reasoning and understanding of law. This jurisprudential delineation can be seen as a postmodern legal development, with traditional conceptualisations of law, as discussed in the previous chapter, slowly but perceptibly establishing themselves in modified forms.

The chapter then proceeds to analyse other important environmental law cases decided by the Supreme Court and the various High Courts in India within the last decade which graphically delineate the postulates of Indian environmental jurisprudence. In short, while focusing on the development of environmental jurisprudence by the Indian judiciary, this chapter illustrates and explains the unusual nature of Indian juridical reasoning.[1] We shall see how the elements of the Indian legal culture often operate as inarticulated premises, nevertheless shaping the new jurisprudence. It must be pointed out at the outset that our present grouping of cases is not a watertight compartmentalisation of specialist concerns, but that the new rationale permeates all areas of Indian law.

6.1 The juridical rationale of *Ratlam*

Municipal Council, Ratlam v Vardhichand[2] was a criminal appeal decided by the Supreme Court of India in July 1980. It was a case wherein a magistrate had ordered the appellant

municipality under Section 133 of the Criminal Procedure Code of 1973 to abate a public nuisance caused by poor sewerage facilities in a locality by taking some time-bound action.[3] The order of the magistrate had been reversed by the Sessions Court but the High Court had approved the magistrate's order and the municipality then appealed against the High Court's decision to the Supreme Court. The Supreme Court expounded the wide parameters of the power of the executive first class magistrate in taking effective action against public nuisance for environmental violations.[4] In deciding this case, Krishna Iyer J. noted:

> "The truth is that a few profound issues of processual jurisprudence of great strategic significance to our legal system face us and we must zero-in on them as they involve problems of access to justice for the people beyond the blinkered rules of 'standing' of British Indian vintage. If the centre of gravity of justice is to shift, as the Preamble to the Constitution mandates, from the traditional individualism of *locus standi* to the community orientation of public interest litigation, these issues must be considered."[5]

The above observation of Justice Iyer in *Ratlam* clearly manifests two legal postulates. First, it emphasises the need to shift the 'centre of gravity' in the administration of justice. In other words, a re-orientation or a progressive change in the modernisation of the judicial

processes. This also indicates that the established legal structure will have to give way to a new legal order. Secondly, the shift from individualism to community orientation is seen as a necessary and mandatory requirement of the aims and ideals of the Constitution, discussed in detail in chapter 2.1 above.

Thus this judgment is not confined to the interpretation of a specific provision in the Criminal Procedure Code, as it would seem to appear, but it clearly brings out the hidden postulates of post-colonial Indian constitutional dimensions which have become particularly vital in the development of Indian environmental jurisprudence.

The judgment highlighted the scope of the new orientation of the power under the criminal codes that could then be activated efficaciously. Accordingly:

> "Although these two codes are of ancient vintage, the social justice orientation imparted to them by the Constitution of India makes it a remedial weapon of versatile use."[6]

The judgment supplemented the magistrate's order and compelled the State (in the form of the Municipality) to take appropriate action to stop the pollution caused by the effluent of an alcohol plant. The learned judge stated unequivocally that "industries cannot make profit at the

expense of public health",[7] and asked why the magistrate had not pursued this aspect. It is also significant to note the manner in which the court interpreted the power of the magistrate when it observed:

> "The imperative tone of S. 133, Cr.P.C. read with the punitive temper of S. 188, I.P.C. makes the prohibitory act a mandatory duty."[8]

The judicial observations in *Ratlam* obviously raise the question whether such seemingly innocuous and hortatory judicial rhetorics can have practical inoculative effect. Two jurisprudentially significant aspects arise for debate out of this judgment. First, there is an emphasis to shift the primary legal concern away from business or industrial interests when confronted with the public interest for a healthy environment. Secondly, the juridical rationale in *Ratlam* emphasises the 'duty' of the authority, instead of the 'rights' of the aggrieved persons, as a mandatory requirement of the new legal order.

Krishna Gopal,[9] already discussed in chapter 3.4 above, is a notable example where the *Ratlam* rationale has made this particular provision under the Criminal Procedure Code an effective tool for environmental protection.[10] P.C. Cherian v State of Kerala,[11] also discussed in chapter 3.4 above, and more recently K.C. Malhotra v State of M.P.,[12] show how the *Ratlam* rationale has found effective application.

One can therefore agree with the assertion that the *Ratlam* case has provoked the consciousness of the Indian judiciary to a problem which had not attracted much attention till then.[13] Thus *Ratlam* has been seen to prepare the path for judicial activism to rely on the constitutional mandate for environmental protection.[14] Commenting on the significance of the *Ratlam* case, Professor Leelakrishnan and others at Cochin University hold the view that by invoking Section 133 of the Criminal Procedure Code, even corporate bodies and public corporations can be made accountable for causing nuisance by way of pollution.[15]

As indicated, there are now many other similar cases where Section 133 of the Code of Criminal Procedure, 1973 was effectively used.[16] In Madhavi v Thilakan[17], it is poignant to note Justice Chettur Sankaran Nair's observations. Reflecting on the report of the Sub-Inspector of Police who recommended that the trade should not be stopped because that would deprive the respondents of their livelihood, a fundamental right in Article 19(1)(g) of the Constitution, the learned judge held:

> "To say that a workshop or factory should not be closed down, as it provides livelihood to some persons, unmindful of the consequences of others, would be to say the untenable. Constitutionally recognised values, cannot be ignored."[18]

Thus Justice Nair categorically asserted the importance

of "constitutionally recognised values". He relied upon relevant provisions of the Constitution to hold that every man has also "the right to live in peace, to sleep in peace and the right to repose and health, as part of the right to live".[19] He justified his approach by his interpretation of the relevant section in the statute and put the right to life higher than the right to work. He then proceeded to observe that:

> "This principle expressed through law and culture, consistent with nature's ground rules for existence, has been recognised in S. 133 (1)(b)."[20]

Here it can also be seen that the underlying premise of the learned judge's juridical articulation lies in the unique jurisconscience of "law and culture consistent with nature's ground rules for existence". It is submitted, in other words, that the learned judge appears to indicate that the operation of Section 133 is now no more based on the British-Indian common law rationale, but rather on the Indian constitutional law rationale, which in turn operates on "nature's ground rules for existence".

The reference to "nature's ground rules of existence", as the analysis in the previous chapter showed, links precisely to the Indian concept of *'dharma'* with its emphasis on the inevitable inter-relatedness of all human activity. Thus it can be said that the inarticulated premise of the learned judge's interpretation of Section 133 of the

Criminal Procedure Code shows the underlying postulates of Indian environmental jurisprudence. Especially in the light of later cases and, thus, with the benefit of hindsight, one can therefore say, that the *Ratlam* rationale shows an indubitable manifestation of a juridical rationale based on modified *dharmic* ideas of a legal order. In the current development of Indian environmental jurisprudence, this element of a self-controlled order and of the systemic need to check imbalances and to avoid abuses of ecological equilibria is clearly evident not only in cases where public authorities are involved.

6.2 The juristic principles in the *Mehta* cases

There are to date more than a dozen reported decisions of the Supreme Court under the name of M.C. Mehta v Union of India.[21] The petitioner in all these cases is a practising advocate of the Supreme Court. The first case,[22] decided in February 1986, was a public interest writ petition filed before the Supreme Court under Article 32 of the Constitution. Orders were sought from the court to restrain the re-opening of certain industrial plants of one Shriram Food and Fertiliser Corporation, which had been closed following a major leakage of oleum gas from one of its units in Delhi. The court after considering the reports of experts appointed by the government and by the court, permitted the plants to be re-opened but only subject to the strict

observation of conditions laid down by the court.[23]

In a separate order for compensation in the same case,[24] the court laid down new principles of absolute liability without exception. The rule laid down by the court states that:

> "Where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherent activity resulting, for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in *Rylands v Fletcher*."[25]

The decision of the Indian Supreme Court in this case, laying down the new principle of absolute liability, is a significant departure from the established common law principle of strict liability. It is important for our present study to note the way in which the court laid down the rule, again giving greater emphasis to public interest rather than private interest. In laying down this rule, the then Chief Justice Bhagwati held:

> "We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. We

cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter for that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence."[26]

The judgment very clearly indicates the need to deviate from the common law tradition of the earlier legal order and at the same time shows the willingness to accommodate and accept what is found good in the earlier legal order or in other legal systems. This attitude of the Indian judges manifests the Indian legal culture of syncretism with its openness and readiness for legal osmosis, which we have discussed in detail in chapter 5.3 above.

On the question of compensating victims of industrial accidents and on the principles of liability of industries engaged in inherently dangerous and hazardous activities, the court addressed the issues in a novel fashion. The new strategy was moulded under Article 32 of the Constitution to compensate those who were affected by violation of their fundamental rights guaranteed by the constitution.[27] The court strengthened its power to grant remedial relief on the basis that it would otherwise rob Article 32 of its efficacy and render it impotent and futile.[28] The court felt that it would be gravely unjust to the person whose fundamental

right was violated to require him to go to the civil court for claiming compensation.[29] This shows that modern Indian environmental law developments are more than verbose exercises in philosophy. More recently, it has become obvious that the focus on implementation and on meaningful remedies has become a major element of the new rationale.

In the next important *Mehta* case,[30] decided in September 1987, the Supreme Court ordered the closure of about thirty tanneries, which had failed to take minimum steps required for the primary treatment of industrial effluent, and the government was directed to enforce the standards required under law on more than one hundred other tanneries.

In this case the court explicitly emphasised the importance of, and the need for, protecting the environment by relying on Articles 48A and 51A of the Constitution.[31] Our discussion in chapter 2.2 above showed the significance of these two articles incorporated into the Constitution by the 1976 amendment for promoting the jurisprudential development in this area. The judgment also quoted *in extenso* the proclamation adopted by the United Nations conference on Human Environment at Stockholm in 1972, pointing out the stand of the Indian delegation led by the then Prime Minister of India.[32] The importance accorded to the policy of protecting the environment by reference to such materials, it is submitted, shows how the judges of the

apex court in India do not shun away from political and social realities but rather give important consideration to them and also make it a point now to exhibit their awareness of such issues.

The court ordered the closing down of the tanneries with the following observation:

> "Just like an industry which cannot pay minimum wages to its workers cannot be allowed to exist, a tannery which cannot set up a primary treatment plant cannot be permitted to continue to be in existence for the adverse effect on the public at large which is likely to ensue by the discharging of the trade effluents from the tannery to the river Ganga would be immense and it will out weigh any inconvenience that may be caused to the management and the labour employed by it on account of its closure."[33]

The unequivocal rationale of the court reiterating the importance of public concerns over individual proprietary interests is, thus, also made clear in this judgment.

The next significant *Mehta* case,[34] was decided in January 1988 after the earlier decision to close down the tanneries. In this case, Orders were passed by the Supreme Court to abate the pollution of the river Ganga by directing the Kanpur municipal corporation to take various steps for the prevention of pollution of that river. The court also

ordered that copies of the judgment be sent to all other municipalities through whose areas the river Ganga flows.

The new public law rationale and its link with Indian legal culture are very much manifest in this case, particularly in the elaborate directions given by the court. This can be seen, for instance, in the following:

> "In order to rouse among the people the consciousness of cleanliness of environment the Government of India and the government of the States and of the Union Territories may consider the desirability of organising 'Keep the city clean' week (*Nagar Nirmalikarana Saptaha*), 'Keep the town clean' week (*Pura Nirmalikarana Saptaha*) and 'Keep the village clean' week (*Garma Nirmalikarana Saptaha*) in every city, town and village throughout India at least once a year. During that week the entire city, town or village should be kept as far as possible clean, tidy and free from pollution of land, water and air."[35]

The tone and the style of the above directions originating from the apex court of law would appear to an unaccustomed legal mind as some pedagogic prescription wrapped in religious solemnity and presented with a spirit of festivity. The persuasive element and the pedagogic mode of judicial discourse in fact reflect Indian legal culture and its emphasis on self-control. In other words, it fosters the rationale of internal inculcation of normative values to

regulate human behaviour through self-participation, adopting ritualistic or festive traditional customary fashions.

What is significant for our study is the *dharmic* cultural orientation, whereby directions of law are encapsulated in ritualistic connotations in order to rouse among the people an environmental consciousness without dictating the law in a 'command and control' style.[36] Venkataramiah J. urged the authorities to act on those suggestions noting that although legislation provided for the prevention and control of pollution, 'many of those provisions have just remained on paper without any adequate action being taken pursuant thereto'.[37] It is quite obvious that from a Western jurisprudential perspective such directions are perhaps worthy of comment.[38]

This case not only depicts the permeation of the new public law regime but also the impact of autochthonous elements of the Indian legal culture on Indian environmental jurisprudence. In the first place, by entertaining this case as a public interest litigation, the court took the view that the petitioner was entitled to move the court in order to enforce the statutory provisions which imposed duties on the municipal authorities.[39] Thus the aim to regulate the regulator, which constitutes the underlying idea behind the public law approach, is sought to be achieved not only by emphasising the statutory duties but also by indicating the

desirability to carry them out in a manner acceptable to the people's consciousness.[40]

In the same *Mehta* case, further Orders were passed by the Supreme Court in December 1991.[41] Here the court ordered that a general notice be published in the national newspapers so that all industries situated along the river Ganga should file their affidavits before the court to state what steps they had taken to comply with orders of the court and the directions issued by the Ministry of Environment and Forests. It was further made clear that if any industry failed to take necessary steps for preventing pollution or following the standards, that industry should be directed to be closed. Further orders were also issued by the Supreme Court to effectively carry out its earlier orders.[42] More recent news reports show that the Supreme Court has now ordered the closure of eighty-four industries located in Uttar Pradesh[43] and thirty industries in West Bengal[44] for having failed to comply with the court's directions.

The Supreme Court also entertained several other public interest writ petitions by Mr Mehta against pollution control authorities to prompt them to take action against air pollution in and around Delhi. In November 1990, the Supreme Court issued directions to the Environment Ministry to take action to reduce the air pollution in Delhi caused by motor vehicles in one such *Mehta* case.[45] The Supreme Court also issued a series of orders in another *Mehta* case,

where the petitioner sought to challenge the continuance of stone crushing operations in the close vicinity of Delhi and consequent pollution arising from it.[46] The latter case pinpoints the style of judicial discourse that prompts administrative action. This is what the Supreme Court has to say about the regulators:

> "We are constrained to record that Delhi Development Authority, Municipal Corporation of Delhi, Central Pollution Control Board and Delhi Pollution Control Committee have been wholly remiss in the performance of their statutory duties and have failed to protect the environment and control air pollution in the Union Territory of Delhi. Utter disregard to environment has placed Delhi in an unenviable position of being the world's third grubbiest, most polluted and unhealthy city as per a study conducted by the World Health Organisation. Needless to say that every citizen has a right to fresh air and to live in pollution free environments."[47]

The above observations of the Supreme Court emphasise public accountability, which forms the apotheosis of the new public law rationale. The above strictures on the concerned public authorities indicate yet another facet in the operation of the new jurisprudence, obliging government agencies to control themselves. The power and efficacy of such judicial discourse is shown to give rise to 'a jurisprudence of rancour and strictures'.[48] According to

Baxi:

> "A stricture is the signature of disapproval and dissent. It is also a summons to constitutionally becoming behaviour. A stricture is not a sentence and yet it enjoys the fecundity of a sanction. It stigmatises without conviction. Its moral rhetoric of dismay, distress and disgust creates an aura of illegitimacy of power. Its moral force pierces even the rhinocer[o]s-layers of the political skin, in a kind of micro-surgery on body politic. ....
>
> .... The SAL discourse of strictures has assumed unimaginable potency; it poses a fertile threat to all those who would exercise power as if they were above the law and the Constitution."[49]

It is also significant to note that the court did not dispose of the writ petition but ordered to keep it pending for the purpose of monitoring the compliance of their directions.[50] This shows the adoption of a rolling review technique where there is constant monitoring and not just one dramatic court battle. This further indicates the active role that the court has taken upon itself to see that its directions are complied with in due course. Thus we see here a different style in the use of law and judicial process.

In November 1991, the Supreme Court issued directions, in yet another *Mehta* case,[51] to disseminate information and messages on environmental protection in cinema halls and for

broadcast on national radio and television. This was with a view to educating the people about their social obligation to protect the environment and making them aware of their obligation not to act as polluting agents or contributors. Here the court relied on the fundamental duty of every citizen under Article 51A(g) to protect and improve the natural environment with an interesting observation that:

> "Our ancestors had known that nature was not subduable and, therefore, had made it an obligation for man to surrender to nature and live in tune with it. Our Constitution underwent an amendment in 1976 by incorporating an Article (51-A) with the heading "Fundamental Duties". Clause (g) thereof requires ..."[52]

The court then went on to observe that:

"Law is a regulator of human conduct as the professors of jurisprudence say, but no law can indeed effectively work unless there is an element of acceptance by the people in society. No law works out smoothly unless the interaction is voluntary. In order that human conduct may be in accordance with the prescription of law it is necessary that there should be appropriate awareness about what the law requires and there is an element of acceptance that the requirement of law is grounded upon a philosophy which should be followed."[53]

The above observations of the court again indicate the

new orientation of Indian jurisprudence, emphasising the requirement of laws' awareness and acceptance grounded upon a philosophy which should be followed. The court observed further that:

> "We are in a democratic polity where dissemination of information is the foundation of the system. Keeping the citizens informed is an obligation of the government. It is equally the responsibility of society to adequately educate every component of it so that the social level is kept up. We, therefore, accept on principle the prayers made by the petitioner."[54]

The above reasoning of the court shows that in order to sustain a higher level of social order, the emphasis must be on the obligation of the government and on the responsibility of the society. This indicates the rationale of the new public law order. Although seemingly hortatory, the above observations have been relied upon in the more recent case of K.C. Malhotra v State of M.P.[55] It is also significant to note that in issuing the various directions to improve the sewerage and public health facilities the court in K.C. Malhotra emphasised that:

> "It shall be the duty of the State and its instrumentalities to educate not only the inhabitants of the locality, but the members of the society to live with appropriate awareness and to take all measures so that water and environment may not be polluted."[56]

The directions issued by the court in K.C. Malhotra, analysed above, show how the *Ratlam* rationale and the public law principles of the *Mehta* cases have now firmly been established in current Indian environmental jurisprudence. This also shows, as indicated, that our present grouping of cases is not a watertight compartmentalisation of specialist concerns, but that the new rationale permeates all areas of the law.

The above reasoning and observations of the court, it is submitted, indicate an underlying legal philosophy which prompts the creation of an obligation of the government and a responsibility of the society to maintain a higher social level. It is submitted that the regulatory rationale of law in India which emphasises the obligatory elements of human interaction, depicts the operation of a legal culture of regulating human conduct through a combination of persuasive means and voluntary acceptance. This depicts the Indian legal culture, based on the *dharmic* characteristics of Indian jurisprudence. The *dharmic* legal order, which act as the underlying legal postulate of Indian jurisprudence, envisages an ideal social order. Also in its operational philosophy one could see a juridical rationale that anathematises the 'command and control' legal ideology and brings in the conceptual understanding of law more in line with the Indian notions of *dharma* and *ahimsa*, in other words, non-violent means of achieving a self-controlled eternal order.

From all the important *Mehta* cases analysed above and in more strictly legal terms, the juristic principles, now considered in India as *Mehta* principles, can be summed up as follows: (a) The writ jurisdiction of the higher courts can be invoked to seek remedies for environmental infringements as a violation of fundamental rights and fundamental duties under the Constitution; (b) The power of the court under this jurisdiction permits the court to mould appropriate remedies, including compensation, as remedial relief for violation of fundamental rights and duties.

In other words, the above legal principles show how the Indian juridical techniques favour a flexible approach facilitating speedy remedial action and constant vigilance to support self-control mechanisms of law. The *Mehta* principles also show the emerging postulates of tortious liability in India whose principal focus is on the social limits of economic development.[57] Here there is a strong indication that the public law rationale of Indian environmental jurisprudence is antithetical to the current Anglo-American approaches to environmental law and compensation based on economic theories which we briefly discussed in chapter 4.1 above to highlight their inherent deficiencies.

However, it has to be pointed out here that the award of compensation which has been developed in India under the new rationale is different, and yet at the same time built

upon compensation as understood in the common law jurisdiction. This position, which might not have been obvious at the time of the early *Mehta* case of 1987, is now clear from a more recent case, Nilabati Behera v State of Orissa.[58] Here an award for compensation in public law proceedings under Articles 32, 226, and 300 of the Constitution, was held different from that envisaged in private tort law action of the common law tradition.

It is also significant to note the way in which Justice Verma, after discussing the opinions of the Law Lords in the UK,[59] amalgamates their views with the emerging principles found in a line of Indian decisions, particularly Rudul Sah,[60] the Bhagalpur Blinding cases[61] and the Bhopal case.[62] The Supreme Court thus held that the relief of monetary compensation as exemplary damages, in proceedings under Article 32 by the Supreme Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law. This is based on the principle of strict liability for the contravention of the guaranteed basic and indefeasible rights of the citizen.

Justice Anand's discussion about the difference in the purpose of public law proceedings and private law proceedings is also significant for our present discussion as it delineates the characteristic feature of the new

public law rationale that underpins Indian environmental jurisprudence. The juridical discussion begins with the reiteration that the court is prepared to "forge new tools and devise new remedies" in order to meet the ends of justice.[63] Anand J. then states:

> "The purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 and 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of 'monetary amends' under the public law of the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen."[64]

Thus Nilabati Behera v State of Orissa, in effect, refines the legal postulates that operate in the *Mehta* cases, representing particularly the wider ramifications of

the new public law rationale. This new rationale shows that the Indian judiciary is now well on the way to developing a jurisprudence, particularly on environmental matters, which is remarkably more 'modern' and at the same time similar to the traditional (pre-British-Muslim) legal understanding based on every individual's responsibility for the common good.

6.3 The jurisprudence of 'justice without law' in *Bhopal*

The *Bhopal* cases arose out of one of the world's worst industrial disasters. The calamity occurred on the night of 2-3 December 1984 in Bhopal in the State of Madhya Pradesh. Highly toxic gas leaked from a chemical factory of the Union Carbide Corporation, killing more than 2,500 and injuring more than 200,000. This led to the biggest ever litigation for damages before the American courts. Following a *forum non conveniens* ruling by the American courts these cases were tried by the Indian courts. Much has been written about this sensational case and its impact on the development of environmental law in India and abroad.[65]

The settlement reached in the *Bhopal* case is reported in four documents. They are the Supreme Court's order dated 14th February 1989,[66] a supplemental order dated 15th February 1989,[67] a consequential memorandum of the terms of settlement signed by Union Carbide's and the Government of

India's lawyers and tendered to the court on 15th February 1989[68] and an order dated 4th May 1989[69] setting forth the Supreme Court's reasons for urging the settlement.

The Order of the Supreme Court of 4th May 1989, wherein the court gave reasons for their earlier Settlement Order of 14th and 15th February 1989, evoked much legal debate particularly on the manner in which the court sought to resolve the case. A prominent Indian jurist has analysed these orders, taking note of the debate in this area with much criticism and counter-criticisms.[70] A significant criticism against the Supreme Court's settlement orders of 14th and 15th February came from P.N. Bhagwati, a former activist Chief Justice of India, who felt that the *Bhopal* case had come to a disturbing end in which where the multinational had won and the people of India had lost.[71] At that time many other lawyers had also felt that the settlement order was most unusual and wrong, particularly the manner in which the court had passed the order behind the backs of the victims.[72]

However, our analysis here aims to identify the inarticulated premises in the juridical rationale as evidence of the underlying postulates of India's newly evolving environmental jurisprudence. The manner in which the Indian courts sought to resolve these cases again depicts characteristic features of Indian legal culture. For the purpose of this study, we particularly focus on the non-

application of established principles of common law and the adoption of alternative dispute resolution strategies. The *Bhopal* cases in India explicitly authenticate Indian environmental jurisprudence in this respect.

It can be seen from the order of 4th May 1989 that the court "considered it a compelling duty, both judicial and humane, to secure immediate relief to the victims" rather than pursuing considerations of excellence and niceties of legal principles.[73] In conclusion, the court expressed its own limitation as a fallible human institution whose view, in the ultimate analysis, is to be judged by what it does to relieve the undeserved suffering of thousands of innocent citizens.[74] The court then quoted the words of Wallace Mendelson from a study on Supreme Court Statecraft - The Rule of Law and Men:

> "In this imperfect legal setting we expect judges to clear their endless dockets, uphold the Rule of Law, and yet not utterly disregard our need for the discretionary justice of Plato's philosopher king. Judges must be sometimes cautious and sometimes bold. Judges must respect both the tradition of the past and the convenience of present."[75]

The *Mehta* principle on absolute liability which, as Union Carbide sought to argue, had changed Indian law explicitly to favour their opponents, was referred to by the Supreme Court:

"One aspect of this matter was dealt with by this court in M C Mehta v Union of India [AIR 1987 SC 1086] which marked a significant stage in the development of the law. But at the hearing there was more than a mere hint in the submissions of the Union Carbide that in this case the law was altered with only the Union Carbide Corporation in mind, and was altered to its disadvantage even before the case had reached this court."[76]

The court then went on to refine and explain the *Mehta* principle in the following terms:

"The criticism of the Mehta principle, perhaps, ignores the emerging postulates of tortious liability whose principal focus is the social-limits of economic adventurism. There are certain things that a civilised society simply cannot permit to be done to its members, even if they are compensated for their resulting losses."[77]

Here, it is difficult to discern what the judges of the Supreme Court are able to see as the emerging postulates of Indian tort law. But in our investigation of the common law foundations of public nuisance, in chapter 3.1 above, we noted the efforts designed to develop a public law of torts in India, perhaps similar to that found in civil law jurisdictions, especially the French jurisprudence.[78] However, on a more ideological analysis, such postulates of Indian tort law seem to rest upon the values and norms that

'a civilised society can permit'.

The court then referred to the wisdom of Fritz Schumacher, for a new orientation of science and technology towards the organic, the gentle, the non-violent, the elegant and beautiful.[79] The reference to Schumacher was made in the context of the need to evolve a national policy to protect public interest and human rights from ultra-hazardous industrial activities in pursuit of economic gains. It is submitted that such reliance by the court on non-legal policy and philosophical materials gives a strong indication of the underlying ideology that governs the juridical discourse in developing Indian environmental jurisprudence.

On 22 December 1989, the Supreme Court of India, while upholding the constitutional validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, found that the victims were not given the right to be heard before the settlement and that this was wrong.[80] However, the court held that justice had been done to the victims, although justice had not appeared to have been done. The late Chief Justice Mukharji had held that "to do a great right after all, it is permissible sometimes to do a little wrong".[81] What is quite obvious here is that the issues involved are so substantial, the relief needed is so immense, that new ways have to be found to achieve 'complete justice'.

Thus one could see more or less total deviance from established canons of common law jurisprudence. It is an explicit situation where Indian judges have given less importance to rendering justice according to law but rather show the desire to render justice, if necessary without much adherence to law. In other words, the judicial process in this case, as in many other cases in India, displays the deconstruction and establishment of a new ideology of law and justice. It strikes at the very heart of English juristic technique that justice should be seen to be done. It openly challenges the conceptual understanding of what constitutes 'justice' in a particular situation such as this.

In a critical evaluation of the *Bhopal* settlement, some experts on Indian environmental law find that the net effect appears to achieve the mixed private and public goals of compensation, corrective justice and deterrence.[82] According to Divan and Rosencranz, the basic analytical question is whether the settlement efficiently achieves the traditional tort goals of compensation, corrective justice and deterrence. Norms of efficiency dictate that the goals of tort law be achieved at a minimum cost to society in terms of expense and time.[83] Thus they are of the opinion that:

> "Although the Supreme Court's orders do not ascribe liability to Carbide, the settlement implicitly establishes the multinational's accountability. Retributive or corrective justice requires that the

tortfeasor not benefit from his or her action or negligence but instead be forced to compensate the victim. The settlement clearly achieves this end. Indeed, the Bhopal settlement is the first in a mass tort case where a multinational has paid for the action of its local subsidiary. The settlement, therefore, is likely to strengthen the emergent norm of international law that transnational corporations are strictly liable for mishaps from hazardous activities conducted by their subsidiaries around the globe .... At the same time, by consenting to a settlement that will not severely deplete Carbide's assets, the Indian Government has signalled its willingness to permit new investments in hazardous industries, provided that the investors are willing to internalize the social costs resulting from their activities.

In the final analysis, the Supreme Court's statesmanship has secured more for the Bhopal victims than the Indian Government could have otherwise obtained, at least for the short term."[84]

The above insightful evaluation of Divan and Rosencranz shows that although there has been a total deviation from what might have been considered as established processual jurisprudence, the net result of the *Bhopal* case is that justice was achieved by adopting alternative methods. Here one could say that what they call 'the Supreme Court's statesmanship' is the manifestation of an important element

of the new jurisprudence. In fact, it had the practical effect of procuring the money without much delay. Consequently, as a recent news report shows, the Special Courts set up in Bhopal have been able to dispose of three-fourth of claims relating to the deaths due to the disaster.[85]

When the government of India sought to bring action against UCC in the US courts to serve the best interest of the victims, it was pointed out that the public interest in India would not tolerate a different standard than that in the US where the safety system of the plant was designed.[86] The plea of the Union of India then was that the courts in India are not up to the task, but Justice Keenan of the US District Court at New York rejected that plea and held that the Indian courts are the most appropriate forum.[87] He observed:

> "[T]o retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This Court declines to play such a role. The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and

subjugation from which India has emerged. India and its people can and must vindicate their claims before the independent and legitimate judiciary created there since the Independence of 1947."[88]

On 3rd October 1991, the Supreme Court wrote the epitaph on the *Bhopal* case by upholding the terms of the 1989 settlement with its judgment on the Review Petitions.[89] The *Bhopal* decisions were not decided by a few radical judges, but had occupied the minds of four different Constitutional Benches with five judges. Altogether the hearings on all these cases had taken up 88 days, engaging the minds of 10 different judges.[90] In upholding the settlement orders and earlier decisions, the court reiterated its earlier stand that what is required is to meet the demands of justice.

Justice in this particular situation primarily warranted the expeditious disposal of the case. To get involved deeper into legal niceties would only have enmeshed the Indian judges into a more difficult tangle within a legal system that is undergoing a great change. It was considered just in that situation to give immediate relief to the victims and avoid getting involved in any further legal exegesis. If the court had adopted any other approach, it would have been at the risk of ultimately ending up again in American courts, with their notorious 'due process' conceptual yardsticks, where the decrees of the Indian court

would have to be measured for execution. It can be seen from the judgment that the Supreme Court was well aware of this problem.[91]

More recently, an Indian lawyer has questioned the correctness of the decision of the Supreme Court in the review petition in a reputed international law journal.[92] Sen brings out the most unusual way in which the matter was dealt with by the Supreme Court. He even fears that the court's decision to dispense with the elementary requirement of natural justice in this case can operate as an incentive to administrative and judicial indiscipline.[93] However, Sen also notes that:

> "It would, of course, be pointless to label the decision of a superior court as void, not because of a conceptual bar, but because of the absence of a tribunal which can censure its lapse, however obvious it might be, from accepted norms of judicial propriety."[94]

Here, Sen appears to be lost since his perception does not seem to take account of the great changes brought about recently in the Indian legal system which seriously question what those 'accepted norms of judicial propriety' are. He certainly seems to be out of touch with the present realities when he seeks support for his proposition that the decision is void referring to Holdsworth's History of English Law and to cases on English law of contract.[95]

However, one could agree to some extent with Sen that the manner in which the review proceedings were conducted left much to be desired in that "in an area of the law where certainty once held sway, confusion now reigns".[96] But such confusion, it is submitted, is inevitable when great changes are envisaged and brought about to a legal order. The present situation is apparently chaotic and confuses many in India and abroad as to the future shape of Indian jurisprudence and the nature of the Indian legal system for the twenty first century and beyond. However, as explained above, the technique of the Indian Supreme Court in disregarding what Sen calls 'accepted norms of judicial propriety' aimed at safeguarding justice itself, which is now in Indian jurisprudence, again seen as superior to procedural law.

In the last judgment of the *Bhopal* case,[97] the Supreme Court referred to *Ratlam* and used the quote that Justice Krishna Iyer had taken from M. Cappelletti and B. Garth's Access to Justice - A World Survey, (Vol I, pp.123-124), to describe the unsuitability of a legal system based on the common law tradition.

> " Admirable though it may be, it is at once slow and costly. It is a finished product of great beauty, but entails an immense sacrifice of time, money and talent. This 'beautiful' system is frequently a luxury; it tends to give a high quality of justice only when, for one reason or another, parties can surmount the

substantial barriers which it erects to most people and to many types of claims."[98]

Thus the *Bhopal* case depicts the important facet of procedural flexibility in Indian environmental jurisprudence, which could be appropriately termed as 'justice without law'.[99] This leads to a deliberate deviation from established legal procedures as well as the purposeful adoption of alternative dispute resolution processes into the mainstream of the Indian legal system. To that extent it encourages and reaffirms the usefulness of more flexible and convenient processes for the administration of justice. This, it is submitted, is again a characteristic feature of the Indian neo-*dharmic* jurisprudence.[100]

6.4 The contours of Indian environmental jurisprudence

Apart from the above three significant groups of cases that highlighted the emphasis of Indian environmental jurisprudence, there are a number of other cases which have reinforced this new jurisprudence. The cases discussed below were selected because they comment on significant aspects. It is not the purpose of this part of our study to give a complete comprehensive coverage of all the decisions. Since judgments of the Supreme Court have more force than those of the High Courts, they are discussed first.

One of the first cases following the initiation of the jurisconscience in *Ratlam* was Rural Litigation and Entitlement Kendra v State of Uttar Pradesh[101]. In this case a letter which was treated as a writ petition under Article 32 of the Constitution was initially brought before the Supreme Court in 1983 to abate pollution caused by limestone quarries in the Dehradun Valley in the Mussoorie hills of the Himalayas. The Supreme Court played an activist role in this litigation, essentially conducting a comprehensive environmental review and analysis of the national need for mining operations located in the Dehradun Valley. In addition, the judgment provided a scheme for an administrative oversight of reforestation in the region.

It is particularly interesting to note that the court required the state to act not only as a party to the litigation but as a protector of the environment in discharge of statutory and social obligations when it held:

> "While we reiterate our conclusion that mining in this area has to be stopped as far as practicable, we also make it clear that mining activity has to be permitted to the extent necessary in the interest of the defence of the country as also for the safeguarding of the foreign exchange position. .... The court expects the Union of India to balance these two aspects and place on record its stand not as a party to the litigation but as a protector of the environment in discharge of its statutory and social obligation for the purpose of

consideration of the court by way of assisting the court in disposing of the matter in issue."[102]

The court ordered the closing down of several mines based on the reports of inspecting committees appointed by the court and in its reasoning maintained that:

"Preservation of the environment and to keep the ecological balance unaffected is a task not only governments but every citizen must undertake. It is a social obligation and let us remind every citizen that it is his fundamental duty as enshrined in Article 51A(g) of the Constitution."[103]

The strategies adopted in this case by the court characterise its role not merely as an adjudicator but as an inquisitor and as a conciliator.[104] The activist role of the judiciary in this case also reinforces the submission that the nature of modern Indian legal culture is focused on a search for justice, while awareness of limitations remains strong.

The next case that I have taken up for analysis is Shri Sachidanand Pandey and another v State of West Bengal.[105] This judgment of the Supreme Court brings out the autochthonous elements that underpin the current development of environmental jurisprudence in India. In this case the Supreme Court had to consider the environmental impact of the construction of a five star hotel near a wildlife park

in Calcutta. The court found that the construction would not interfere with the wildlife, particularly with the flights of migratory birds. However the court held:

> "Whenever a problem of ecology is brought before the Court, the Court is bound to bear in mind Art. 48-A of the Constitution, ... and Art. 51-A(g) which proclaims it to be the fundamental duty of every citizen of India "to protect and improve the natural environment ..." When the Court is called upon to give effect to the Directive Principle and the fundamental duty, the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority. The least that the Court may do is to examine whether appropriate considerations are borne in mind and irrelevancies excluded .... However the Court will not attempt to nicely balance relevant considerations. When the question involves a nice balancing of relevant considerations, the Court may feel justified in resigning itself to acceptance of the decision of the concerned authority."[106]

The judgment highlighted the risk in interfering with Nature beyond the degree of tolerance in a very interesting manner by quoting extensively at the very beginning of the judgment the famous words of the North American Indian Chief of Seattle. This quote, which has been retold and undergone several translations, was made around 1855 by the Indian Chief in reply to the then President of the U.S., Franklin

Pierce, who wished to buy the land of the Indian tribe.[107] The Indian Supreme Court quoted this extensively, apparently not to lose its full effect. Some extracts of this long quote must suffice here to indicate the cryptic ideological rationale that might have enigmatically pervaded the juridical thinking as a relevant consideration:

> "How can you buy or sell the sky, the warmth of the land? The idea is strange to us. .... We know that the white man does not understand our ways. .... His appetite will devour the earth and leave behind only a desert. .... I do not know. Our ways are different from your ways. The sight of your cities pains the eyes of the red man. But perhaps the red man is a savage and does not understand. .... This we know: the earth does not belong to man; man belongs to the earth. .... Whatever befalls the earth befalls the sons of the earth. Man did not weave the web of life: he is merely a strand in it. .... "[108]

Justice Chinnappa Reddy's use of this quote in a case which raised fundamental environmental law questions in India has been found interesting by some legal scholars in England.[109] The particular use of this long quote, it is submitted, is a strong indication of the inarticulate premises of Indian juridical reasoning. Justice Chinnappa Reddy's use of this quote clearly conveys his desire to illustrate the ideology which the Indian courts have adopted in matters concerning the protection of the environment

conflicting with private proprietary rights of individuals.

Sachidanand Pandey clearly brings out the current judicial attitude in environmental cases by highlighting the need to protect the environment, at the same time showing the need for the Indian Supreme Court to restrain itself in exercising judicial discretion. This can be seen in the observation of Justice Khalid, who stated in the same case:

> "Public interest litigation has now come to stay. But one is led to think that it poses a threat to Courts and public alike. Such cases are now filed without any rhyme or reason. It is, therefore, necessary to lay down clear guidelines and to outline the correct parameters for entertainment of such petitions. If Courts do not restrict the free flow of such cases in the name of Public Interest Litigations, the traditional litigation will suffer and the Courts of law, instead of dispensing justice, will have to take upon themselves administrative and executive functions."[110]

Justice Khalid also stated that traditional litigation has to be tackled by other effective methods like decentralising the judicial system and entrusting much of the traditional litigation to village courts and Lok Adalats through a complete restructuring of the procedural law, which he explicitly identified as "the villain in delaying disposal of cases".[111]

The above case also shows, contrary to general belief, that the Indian Supreme Court is not overzealous in its attitude towards environmental protection cases. There are several other cases where the Court has refused to interfere with the administration. In Dahanu Taluka Environment Protection Group and another v Bombay Suburban Electricity Supply Company Ltd. and others,[112] the Supreme Court refused to interfere with the construction of a thermal power plant in Dahanu, Maharashtra. The court held that it should adopt a self-imposed restriction in considering such an issue. According to the court:

> "The court's role is restricted to examine whether the government has taken into account all relevant aspects and has neither ignored nor overlooked any material considerations nor been influenced by extraneous or immaterial considerations in arriving at its final decision."[113]

Subhash Kumar v State of Bihar[114] is another important case in which the Supreme Court restrained itself when it found that a public interest litigation for preventing environmental degradation was being abused to satisfy a personal grudge. In this case the petitioner, an influential business man, sought directions against the West Bokaro Collieries and Tata Iron and Steel Company to stop their discharge of slurry/sludge into the river Bokaro in Bihar. The court found that the purpose of filing the petition was not to serve any public interest but rather the self-

interest of the petitioner to collect the slurry to use it for his business purposes. The court held that:

> "It is the duty of this Court to discourage such petitions and to ensure that the course of justice is not obstructed or polluted by unscrupulous litigants by invoking the extraordinary jurisdiction of this Court for personal matters under the garb of public interest litigation...[115]

The court held that a petition under Article 32 for the prevention of pollution is maintainable at the instance of a person or even by a group of social workers or journalists. But recourse to proceedings under Article 32 of the Constitution should be taken by a person genuinely interested in the protection of society on behalf of the community.[116]

In Bangalore Medical Trust v B. S. Muddappa and others,[117] residents of a locality challenged the action of the Bangalore Development Authority converting an open space reserved for a park into a private hospital site through a public interest litigation. The Karnataka High Court allowed the petition and the Supreme Court confirmed the judgment of the High Court in an eruditely well-written judgment by the late Justice Thommen. It was held in this case that:

> "The public interest in the reservation and the preservation of open space for parks and play grounds cannot be sacrificed by leasing or selling such sites

for private persons for conversion to some other user. Any such act would be contrary to the legislative intent and inconsistent with the statutory requirements. Furthermore, it would be in direct conflict with the constitutional mandate to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens."[118]

The late Justice Thommen relied not only upon *Ratlam* but also on a variety of human rights cases under Art.21 of the constitution for the above proposition.[119] The Supreme Court also found the Chief Minister of the State of Karnataka in breach of his public trust.

Tarun Bharat Sangh, Alwar v Union of India and others,[120] is a significant case because, while clarifying its earlier Order,[121] the Supreme Court issued directions to provide adequate protection, including police protection, to environmental activists. While placing on record that the Sangh had evinced a constructive and helpful attitude, the court observed:

"But business and commercial interests and the relentless means of achieving them, being what they are, it is not safe to rule out any possible intimidatory tactics against environmentalists. They are perhaps the most thankless and unprotected lot. We

should, therefore, direct the District Administration of Alwar to afford protection to the petitioner's members and workers. We look upon the authorities of the State Government, in particular to the Police Administration of the district, to ensure that none of the activists and workers of the petitioner are subjected to any intimidation and hinderance to their activity".[122]

It is significant to note the extent to which the Supreme Court in recent times has encouraged environmental activists. They are not only tolerated but also accorded respect and protection by the Indian judiciary. The above directions of the Indian Supreme Court tend to show what one could call the subtle nature of the Indian legal culture, which is in stark contrast to the general attitude and tendency in many highly developed jurisdictions to use the police powers of the state against environmental activists. The judgment appears to support environmentalists and local activists at the grassroots level by conferring police protection on local activists, thereby manifesting the operation of the public law regime and the dynamics of the rule of law as understood in India. It is submitted that this judicial attitude clearly reveals the subtle trait of Indian legal culture which attributes close benignity to nature, so that those who genuinely seek to protect nature at the grassroots level are themselves entitled to protection.

All the Supreme Court judgments discussed above show the vivid contours of Indian environmental jurisprudence, the scope as well as the limits of juridical rationale and judicial activism. A further search into the various High Court judgments reveals many more interesting cases and details which add to the profile of this jurisprudence.

Up to the mid-1980's the High Courts in India generally refrained from any judicial intervention for the purpose of environmental protection. This particular 'judicial hands off' aspect is best illustrated by one of the early cases decided in 1980 by the Kerala High Court. It was a case brought before the court seeking to forbid the State of Kerala from proceeding with the hydro-electric project at Silent Valley.[123] In this case, the Kerala High Court refused to interfere with the government's policy decision. It would appear that much material was placed before the court to show the national policy and the need for environmental consideration. Yet the court held:

> "We are by no means satisfied that these aspects have not been borne in mind by the government in planning and processing the project. We are also not satisfied that the assessment of these considerations made by the Government and the policy decisions taken thereafter are liable to be reviewed by this court in these proceedings."[124]

The project was, however, abandoned as a result of

political pressure and the direct intervention of the then Prime Minister, Mrs. Gandhi.[125]

A quantum leap in Indian environmental jurisprudence was made by a judge of the Andhra Pradesh High Court in 1987. Although it initially appeared as a freak judgment, T. Damodhar Rao v S.O. Municipal Corporation, Hyderabad,[126] can now be considered as a significant judgment which reinforces the unique characteristic features of Indian environmental jurisprudence. Here, the High Court of Andhra Pradesh prohibited the government from constructing houses on a piece of land previously allocated for a recreational park. Justice Choudary gave an emphatic human rights approach to his exposition of the law on ecology and environment, referring to the Stockholm Declaration of the UN as well as the African Charter on Human and People's Rights.

The court produced an elaborate discussion on the law of ecology and environment by examining it from the viewpoint of Indian legal and constitutional obligations to preserve and protect the ecology and environment.[127] The court delineated the Indian jurisprudence from the dictates of the common law doctrine of ownership which give the right to the owner to use and enjoy the thing he owns, and could extend even to consuming, destroying or alienating the thing.[128] The court showed its aversion to the thrust of this concept of individual ownership which was to deny communal enjoyment of individual property. The court was

categorical in asserting the Indian juridical approach to environmental law and stated that:

> "Under the powerful impact of the nascent but the vigorously growing law of environment, the unbridled right of the owner to enjoy his piece of land granted under the common law doctrine of ownership is substantially curtailed."[129]

The legal ideology of protecting the environment as perceived by the Indian courts can be seen in the following observation:

> "The objective of the environmental law is to preserve and protect the nature's gifts to man and woman such as air, earth and atmosphere from pollution. Environmental law is based on the realisation of mankind of the dire physical necessity to preserve these invaluable and none too easily replenishable gifts of mother nature to man and his progeny from the reckless wastage and rapacious appropriation that common law permits."[130]

Here the court relied upon Articles 48A and 51A(g) of the Constitution and adopted a human rights approach to prevail over and above the common law right of land ownership. According to the court, slow poisoning by the polluted atmosphere amounted to violation of Article 21 of the Constitution. Thus:

> "[I]t would be reasonable to hold that the enjoyment of life and its attainment and fulfilment guaranteed by

> Art. 21 of the Constitution embraces the protection and preservation of nature's gifts without [which] life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Art. 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation of Art. 21 of the Constitution. .... It, therefore, becomes the legitimate duty of the Courts as the enforcing organs of Constitutional objectives to forbid all action of the State and the citizen from upsetting the environmental balance."[131]

Thus the basic characteristic elements that underpin Indian environmental jurisprudence are explicitly brought out in the court's interpretation of environmental law in this case. There is not only a strong rejection of common law notions but also an ingestion of indigenous concepts of law in this area.

In L.K. Koolwal v State of Rajasthan and others,[132] the petitioner, representing the citizens of the city of Jaipur, moved the Rajasthan High Court under Article 226 of the Constitution to remedy the acute sanitation problem of the city which led to slow poisoning, affecting the life of the citizens. The court entertained the writ petition directing the municipality to remove dirt and filth and clean the

entire city of Jaipur, particularly the areas mentioned in the petition. The court also appointed a team of five eminent advocates of the court as commissioners to inspect the city with the petitioner and the Administrator of the municipality.[133]

What is very interesting in this case is the judge's interpretation of Article 51A of the Constitution. It is extremely difficult to accept the conclusion of Justice D.L. Mehta's discussion and discern the logic that the duties under Article 51A in effect confer rights on citizens. There is, however, a clear indication that the judge's conceptual understanding of 'rights' and 'duties' is not in line with Western conceptual understanding of law. Interestingly, the judge saw the change in the jurisprudence and stated that:

> "Prior to 1976 everyone used to talk of the rights but none cared to think that there is a duty also. The right cannot exist without a duty and it is the duty of the citizen to see that the rights which he has acquired under the Constitution as a citizen are fulfilled."[134]

Koolwal does not appear as a well-reasoned nor a well-written judgment and there is a failure to note *Ratlam* or any other case.[135] However, it strengthens current Indian judicial propensity to create innovative jurisprudence.

In Kinkri Devi and another v State of Himachal Pradesh

and others,[136] the Himachal Pradesh High Court issued directions for cancelling limestone mining leases as this industry posed dangers to the wildlife, ecology and environment. Here the court delineated more clearly the rationale of Indian environmental jurisprudence and firmly applied the Supreme Court rulings on this matter.

> "Thus 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. The neglect or failure to abide by the pointer or to perform the duty is nothing short of a betrayal of the fundamental law which the State and, indeed, every Indian high or low, is bound to uphold and maintain."[137]

The court relied upon the decisions of the Supreme Court[138] and held:

> "The judicial organ of the State having sounded a note of caution at the highest level, this Court cannot remain silent spectator if there is a complaint that the warning has fallen on deaf ears."[139]

The concern shown by the judiciary in environmental cases has, at times, resulted in prescribing remedial measures with such specificity that it would appear the courts are performing executive and administrative functions. Thus in Citizens Action Committee v Civil

Surgeon, Mayo (General) Hospital, Nagpur and others,[140] the Bombay High Court issued directions with great specificity, laid down in an Annexure to the judgment. However, the court also noted:

> "Such directions or writ by the Courts are not issued to run the Government through Court. We hasten to dispel any such impression. These are issued so as to compel the statutory bodies including the State to stand by the citizens and to do their public duty so that the purposes of public laws expressly enacted are not frustrated. While doing so, furtherance of public interest is the sole touchstone. That is equally the central point of judicial considerations. The domain of jurisdiction in this regard is occupied by the administration of public law. That should be evident from directions contained in the Annexure which are intended to meet the grievances found to be real and genuine and to afford remedial measures to the citizens incorporated in the City of Nagpur, matters of policy being left to the authority concerned."[141]

The courts have also assumed divergent roles for protecting the environment, particularly that of a conciliator. Thus in Janki v Sardar Nagar Municipality[142] the High Court of Gujarat persuaded a municipality to provide a sewerage and drainage system for the residents of a certain area who had approached the court as public interest litigants. Here the persuasive nature of the

judgment and the participatory role played by the High Court is noteworthy.

More recent cases show the process of streamlining and regulating the use of public interest litigation cases for the protection of the environment. In Smt. Satyavani and another v A.P. Pollution Control Board and others,[143] the Andhra Pradesh High Court dismissed a writ petition which sought to set aside the industrial licence granted by the Union of India to a modern meat processing project. The petitioners here sought to establish animal rights to protect buffaloes under Articles 48A and 51A(g) of the Constitution. Dismissing the case, the court found that the petitioners were merely trying to vindicate sentimental objections through a public interest litigation for the protection of the environment.[144] Here the court relied upon the Supreme Court decisions in Sachidanand Pandey[145] and Subhash Kumar.[146] It is also relevant to note here that one of the petitioners who made an erroneous statement in his affidavit was ordered by the court to be prosecuted for perjury.[147]

In People United for Better Living in Calcutta - Public and another v State of West Bengal and others,[148] the High Court of Calcutta ordered the State Government to stop reclaiming certain wetland for commercial or residential purposes. In this elaborate judgment, Justice Umesh Chandra Benerjee made a thorough survey of the impact of interfering

with natural wetland. He found no justiciable reason to disagree with the opinion expressed by environmentalists that wetland should be preserved and no that interference or reclamation should be permitted.[149]

The observations of the court while discussing the meaning of 'ecology' and 'ecological problem' seem to show a significant modification in the development of Indian environmental jurisprudence. The Court appeared to take the view that ecological problems and environmental degradation are to be seen as a special type of social problem, similar perhaps to alcoholism, crime, death on the road - which make the society better off without it.[150]

Still, many authorities continue to disregard environmnetal concerns. D.D. Vyas and others v Ghaziabad Development Authority, Ghaziabad and another,[151] is an apt example where the Allahabad High Court found how the statutory object to secure preservation of the environment and development of residential colonies is defeated by authorities who lack dynamism, aestheticism and enthusiasm for development, though assigned developmental duties.[152] Here the local authority had failed to develop a public park, Adu Park, in the place earmarked in a master plan in Raj Nagar of Ghaziabad in Uttar Pradesh.

The court emphasised the importance of public parks as a gift of modern civilisation and a significant factor for

the improvement of the quality of life.[153] The court felt that the authority, having failed to develop the Adu Park as a park for several years, had belied all the cherished hopes of the State and citizens as contemplated under Article 48A of the Constitution.[154]

The court also held that the fundamental right to life under Article 21 of the Constitution includes the right of enjoyment of pollution free water and air for full enjoyment of life.[155] The court relied upon Article 51(g) and then went on interestingly to interpret clause (j) of Article 51. It was held:

> "The last clause (j) of Article 51-A of the Constitution further mandates that it shall be the duty of every citizen of India to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement. It is lamentable that the respondents being the State instrumentality have failed to discharge both the fundamental duties."[156]

The above judicial pronouncement explicitly seeks to extend the duty concept into the very way of life of every Indian citizen. It is submitted that the above interpretation of a constitutional provision, requiring strife towards excellence in 'all spheres of individual and collective activity' in order that 'the nation constantly rises to higher levels of endeavour and achievement',

reverberates with the cosmology of *dharmic* concepts, albeit put in modified form.

All the cases discussed above have shaped the contours of Indian environmental jurisprudence. As indicated at the beginning of this chapter, it was not the purpose of this part of our study to provide complete coverage of all decided cases. The above selection of important cases decided by various High Courts and the Supreme Court in India shows the variations and modified approaches adopted by different High Courts. Taken as a whole, they clearly manifest the Indian conceptual understanding of law established on the rationale and principles of public law, as now enforceable in a court of law in India. The next chapter provides my concluding analysis, summing up the essential features of the neo-*dharmic* jurisprudence that characterises current Indian environmental justice.

NOTES TO CHAPTER 6

1. An attempt in this direction was made in my brief account of the development of environmental law by the Indian judiciary. See Abraham, C.M., "The Indian judiciary and the development of environmental law", (1991) 11 South Asia Research, 61-69. See also Leelakrishnan, P., N.S. Chandrasekharan, G. Sadasivan Nair and K.V. Ramana Murthy, "Evolving environmental jurisprudence: the role played by the judiciary", in Leelakrishnan, P. (ed.), Law and Environment, 1992, Lucknow, Eastern Book Company, 126-152; Jariwala, C.M., "Direction of environmental justice in India: critical appraisal of 1987 case law", (1993) 35 Journal of the Indian Law Institute, 92-114.

2. AIR 1980 SC 1622; (1980) 4 SCC 162.

3. The public nuisance aspect of this case was already analysed in chapter 3.4 above.

4. See in particular AIR 1980 SC 1622 at 1628.

5. Ibid, at 1623.

6. Id.

7. Ibid, at 1630-1631.

8. Ibid, at 1628. Section 188 of the Indian Penal Code, 1860 prescribes the punishment for disobedience of an order duly promulgated by a public servant.

9. Krishna Gopal v State of M.P., 1986 Cr LJ 396.

10. See also the case comment by Leelakrishnan, P., "Law of public nuisance: a tool for environmental protection", (1986) 28 Journal of the Indian Law Institute, 229-231.

11. 1981 KLT 113.

12. AIR 1994 MP 48.

13. Sharma, B.K., "Constitutional mandate for the environmental protection: dynamics of judicial activism" in Diwan, Environment protection, 103-109 at 105.

14. See Malhotra, Anil, "Judicial approach towards environmental protection", in Diwan, Paras (ed.), Environment protection, 1987, New Delhi, Deep & Deep Publications, 456-464.

15. Leelakrishnan *et al.*, "Evolving environmental jurisprudence: the role played by the judiciary", in Leelakrishnan, P. (ed.), Law and Environment, 126-152 at 128. A more recent article by two law students from India also indicates the current trend in redefining the concept of the public-private divide contemplated by the Indian Constitution in the light of the changes in the political economy. See Viswanathan, L. and R.V. Anuradha, "Liberalisation, public interest and Indian Constitution", (1994) 36 Journal of the Indian Law Institute, 378-382.

16. Relevant cases were discussed in chapter 3 above. See also Himmat Singh v Bhagwana Ram, 1988 Cr LJ 614, where the Rajasthan High Court ordered the stoppage of a trade in cutting cattle fodder which caused public nuisance. In Madhavi v Thilakan, 1989 Cr LJ 499, the Kerala High Court directed the magistrate to proceed with a complaint for the removal of an automobile workshop in a residential area. In Ajeet Mehta v State of Rajasthan, 1990 Cr LJ 1596, the Rajasthan High Court endorsed the order of the magistrate directing the removal of a business enterprise from a residential locality. More recently in K.C. Malhotra v State of M.P., AIR 1994 MP 48, the Madhya Pradesh High Court issued specific directions to a municipal corporation to ensure that public health and safety are improved. In Antony v Commissioner, Corporation of Cochin, 1994 (1) KLT 169, the Kerala High Court ordered the closure of a cement warehouse in a residential area.

17. 1989 Cr LJ 499.

18. Ibid, at 500.

19. Ibid, at 501.

20. Id. Cr.P.C. section 133 (1)(b) reads as follows: "[T]hat the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated;" For the full text of this section see note 55 in chapter 3 above.

21. Several orders were passed in some cases and they have been reported separately.

22. M.C. Mehta and another v Union of India and others, (1986) 2 SCC 176. There were three Orders passed in this case.

23. The Order of February 1986 was modified in March 1986. See M.C. Mehta and another (II) v Union of India and others, (1986) 2 SCC 325.

24. M.C. Mehta and another v Union of India, (1987) 1 SCC 395.

25. Ibid, at 421.

26. Ibid, at 420.

27. Compensation as a public law strategy was introduced for the first time in Rudul Sah v State of Bihar, (1983) 4 SCC 141; AIR 1983 SC 1086.

28. M.C. Mehta and another v Union of India, (1987) 1 SCC 395 at 405-409, paras 3-7.

29. Ibid, at 409.

30. M.C. Mehta v Union of India and others, (1987) 4 SCC 463.

31. Ibid, at 467.

32. Id.

33. Ibid, at 478.

34. M.C. Mehta (II) v Union of India and others, (1988) 1 SCC 471.

35. Ibid, at 491.

36. Ritualism, in any form, it is submitted, is of seminal importance for creating a law of action or *karma* as understood under the ancient Indian legal philosophy.

37. Ibid, at 480.

38. See "Editorial Introduction", [1989] Law Reports of the Commonwealth (Const) xiii-xiv.

39. (1988) 1 SCC 471 at 489.

40. A more recent example adopting this style of reasoning can be seen in Antony v Commissioner, Corporation of Cochin, 1994 (1) KLT 169 at 173 and 175

41. M.C. Mehta v Union of India and others, 1993 Supp (1) SCC 434. The Order was passed in December 1991, but was reported only in 1993.

42. M.C. Mehta v Union of India and others, 1992 Supp (2) SCC 633; M.C. Mehta (Kanpur Tanneries) v Union of India and others, 1992 Supp (2) SCC 637.

43. "S.C. orders closure of 84 industries in U.P." in The Hindu (International Edition), vol. 21 No. 4, January 28, 1995, Madras, India, at 13.

44. "SC orders closure of 30 industries" in The Hindu (International Edition) vol. 21 No. 6, February 11, 1995, Madras, India, at 2.

45. M.C. Mehta v Union of India and others, (1991) 2 SCC 137.

46. M.C. Mehta v Union of India and others, 1992 Supp (2) SCC 85; 1992 Supp (2) SCC 86; (1992) 3 SCC 256.

47. M.C. Mehta v Union of India and others, (1992) 3 SCC 256 at 257.

48. Baxi, Upendra, "Judicial discourse: dialectics of the face and the mask", (1993), 35 Journal of the Indian Law Institute, 1-12, at 10.

49. Ibid, at 10-11, footnote 30.

50. M.C. Mehta v Union of India and others, (1992) 3 SCC 256 at 259.

51. M.C. Mehta v Union of India and others, (1992) 1 SCC 358.

52. Ibid, at 359.

53. Id.

54. Ibid, at 359-60.

55. AIR 1994 MP 48 at 51.

56. Ibid, at 52.

57. In a very recent comparative study on mass torts, the public law approach and the dispensation of private remedies seem to be appreciated. See Fleming, John G., "Mass torts", (1994) 42 The American Journal of Comparative Law, 507-529 at 527-529.

58. (1993) 2 SCC 746.

59. Ibid, at 761-762. Verma J. refers to Lord Diplock's reasoning as well as Lord Hailsham's dissent in the Privy Council decision in Maharaj v Attorney-General of Trinidad and Tobago (No.2), (1978) 2 All ER 670.

60. Rudul Sah v State of Bihar, (1983) 4 SCC 141.

61. Khatri (II) v State of Bihar, (1981) 1 SCC 627 and Khatri (IV) v State of Bihar, (1981) 2 SCC 493

62. Union Carbide Corporation and others v Union of India and others, (1991) 4 SCC 584.

63. Nilabati Behera v State of Orissa, (1993) 2 SCC 746 at 763.

64. Id.

65. See for example Abraham, C.M., and Sushila Abraham, "The Bhopal case and the development of environmental law in India", (1991) 40 The International and Comparative Law Quarterly, 334-365. See also Baxi, Upendra (ed.), Valiant victims and lethal litigation: the Bhopal case, 1990, Tripathi; Muchlinski, P.I., "The Bhopal case: controlling ultrahazardous industrial activities undertaken by foreign investors", (1987) 50 The Modern Law Review, 545-587; Baxi, Upendra, Inconvenient forum and convenient catastrophy: the Bhopal case, 1986, New Delhi, The Indian Law Institute.

66. (1989) 1 SCC 674.

67. (1989) 1 SCC 676.

68. (1989) 1 SCC 677.

69. (1989) 3 SCC 38.

70. See Baxi, Upendra, "Introduction", in Valiant victims and lethal litigation: the Bhopal case, i-lxix. Baxi takes note of some of the important proponents of the settlement at that time, ibid, at xlix. See for example Tarkunde V.M., "Bhopal critics miss two points", in (March 15, 1989) Times of India,16; Dwivedi, D.N., "How not to conduct a debate", (March 16-17, 1989) Hindustan Times, 13. See also Srivastava, B.P., "Bhopal settlement order: social activism in conflict with judicial activism", (1989) National law School of India Journal, 217.

71. Bhagwati, P.N., "Travesty of justice", in (March 15, 1989) India Today, 45. Reproduced in Rosencranz *et al*, Environmental law and policy in India, at 388-390.

72. See Sahay, "The verdict is shocking", in Hindustan Times, New Delhi, February 20, 1989; Jaising, Indira, "Bhopal: Settlement or sellout?", The Lawyers, March 1989, at 4. Extracts of the above articles are reproduced in Rosencranz *et al*, Environmental law and policy in India, at 391-395.

73. (1989) 3 SCC 38 at 43.

74. Ibid, at 51.

75. Id.

76. Ibid, at 50.

77. Id.

78. For details see Massey, I.P., Administrative law, (2nd edn.), 1985, Lucknow, Eastern Book Co., at 343.

79. (1989) 3 SCC 38, at 50.

80. Charan Lal Sahu v Union of India, (1990) 1 SCC 613.

81. Ibid, at 705.

82. Divan, Shyam and Armin Rosencranz "The Bhopal settlement", (1989) 19 Environmental Policy and Law, 166-169, extracted in Rosencranz *et al*, Environmental law and policy in India: cases materials and statutes, at 385-388.

83. Ibid, at 386.

84. Ibid, at 387-388.

85. "Bhopal victims' claims disposed" 30 India Weekly, London, (12-18 August 1994), at 9 col.4.

86. See Baxi, Inconvenient forum and convenient catastrophy, at 30.

87. Opinion and Order of John F. Keenan, US District Judge, In Re: Union Carbide Corporation Gas Leak Disaster at Bhopal, India, December 1984, dated 12 May 1986, New York; See Comp LJ 169 (US) at 195. See Baxi, Upendra (ed.), Inconvenient forum and convenient catastrophe: the Bhopal case, 1986, Bombay, Tripathi, 35-69.

88. Ibid, at 69.

89. Union Carbide Corporation and others v Union of India and others, (1991) 4 SCC 584.

90. Ibid, at 603.

91. Ibid, at 608-609, para 17.

92. Sen, Jayaprakash, "Can defects of natural justice be cured by appeal? Union Carbide v. Union", (1993) 42 International and Comparative Law Quarterly, 369-381.

93. Ibid, at 380.

94. Ibid, at 381.

95. Ibid, at 381, footnotes 81-83.

96. Ibid, at 381.

97. (1991) 4 SCC 584; AIR 1992 SC 248.

98. (1991) 4 SCC 584 at 609.

99. Auerbach, Jerold S., Justice without law?, 1983, Oxford, Oxford University Press. Auerbach shows the growing dissatisfaction with the role of law in America. He challenges the very foundation of administration of justice and the operation of the rule of law.

100. Professor Derrett had shown much earlier this characteristic element of Indian *dharmic* justice with reference to Justice Krishna Iyer's discussion on justice, equity and good conscience in Rattan Lal v Vardesh Chander, (1976) 2 SCC 103 at 114-115. See Derrett, J.D.M., Essays in classical and modern Hindu law, vol. III, 1977, Leiden, E.J. Brill, at xxi.

101. The Supreme Court has issued several Orders in this case. They are reported as follows: AIR 1985 SC 652; AIR 1985 SC 1259; AIR 1987 SC 359; AIR 1987 SC 2426; AIR 1988 SC 2187.

102. AIR 1987 SC 2426 at 2428-2429.

103. AIR 1987 SC 359 at 364.

104. A more recent judgment of the Supreme Court reveals the continuing vigilance and the court's activist role for environmental protection. See M/s A.R.C. Cement Ltd and others v State of U.P. and others, (1993) Supp (1) SCC 57, where the Petitioner's cement factory in the Doon Valley was not permitted to operate by the Supreme Court following an earlier court order declaring the area as non-industrial.

105. AIR 1987 SC 1109.

106. Ibid, at 1114-1115.

107. The present Vice-President of United States also seems to appreciate the wisdom of the Indian chief to keep the earth in a balance. See Gore, Al, Earth in a balance, at 259.

108. Shri Sachidanand Pandey and another v State of West Bengal, AIR 1987 SC 1109 at 1112-1114.

109. See "Editorial introduction", [1988] Law Reports of the Commonwealth (Const), xi.

110. Shri Sachidanand Pandey and another v State of West Bengal, AIR 1987 SC 1109 at 1136.

111. Id.

112. (1991) 2 SCC 539.

113. Ibid, at 541.

114. (1991) 1 SCC 598.

115. Ibid, at 605. On this proposition the court relied upon Bandhua Mukti Morcha v Union of India, (1984) 3 SCC 161 and Sachidanand Pandey v State of West Bengal, AIR 1987 SC 1109.

116. Subhash Kumar v State of Bihar, (1991) 1 SCC 598 at 604.

117. (1991) 4 SCC 54.

118. Ibid, at 75-76.

119. Ibid, at 76, footnote 2.

120. (1993) Supp (1) SCC 4.

121. Tarun Bharat Sangh v Union of India, (1992) Supp (2) SCC 448.

122. (1993) Supp (1) SCC 4 at 6.

123. The judgment of Mr Justice V. P. Gopalan Nambiar dated 2nd January 1980 in Society for Protection of Silent Valley v Union of India and others, O.P. Nos. 2949 and 3025 of 1979 was not reported. For extracts of the judgment see Prasad, M. K., "Silent Valley case: An ecological assessment" in Leelakrishnan, Law and environment, 116-125 at 121-125.

124. Ibid, at 124.

125. For details on this controversial political issue see, D'Monte, Darryl, Temples or tombs?: industry versus environment: three controversies, 1985, New Delhi, Centre for Science and Environment.

126. AIR 1987 AP 171.

127. Ibid, 180-181, paras 20-25.

128. Ibid, at 180.

129. Id.

130. Id.

131. Ibid, at 181.

132. AIR 1988 Raj 2.

133. Ibid, at 6.

134. Ibid, at 4.

135. See however, the editor's note drawing attention to *Ratlam*, ibid, at 3.

136. AIR 1988 HP 4.

137. Ibid, at 8.

138. Mining operations in the Himalayan region have been extensively curtailed following the Supreme Court Orders in Rural Litigation and Entitlement Kendra v State of Uttar Pradesh, AIR 1985 SC 652; AIR 1985 SC 1259; AIR 1987 SC

359; AIR 1987 SC 2426; AIR 1988 SC 2187.

139. Kinkri Devi and another v State of Himachal Pradesh and others, AIR 1988 HP 4 at 9.

140. AIR 1986 Bom 136.

141. Ibid, at 140 para 12.

142. Janki v Sardar Nagar Municipality, AIR 1986 Guj 49.

143. AIR 1993 AP 257.

144. The subject matter of this decision appears to be a sequel to the famous cow slaughter case of the Supreme Court in M.H.Qureshi v State of Bihar, AIR 1958 SC 731.

145. AIR 1987 SC 1109.

146. AIR 1991 SC 420.

147. Smt. Satyavani and another v A.P. Pollution Control Board and others, AIR 1993 AP 257 at 277.

148. AIR 1993 Cal 215.

149. Ibid, at 231.

150. Ibid, at 228.

151. AIR 1993 All 57.

152. Ibid, at 58.

153. Ibid, at 61.

154. Ibid, at 62.

155. Id.

156. Ibid, at 62-63.

CHAPTER 7 CONCLUSION: THE NEO-*DHARMIC* INDIAN ENVIRONMENTAL JURISPRUDENCE

This chapter brings together the characteristic features of Indian environmental jurisprudence and is based on the analysis and discussions carried out in the earlier chapters. This thesis has argued that Indian environmental jurisprudence today is mainly based on three interconnected elements. First, it manifests the postmodern Indian constitutional law rationale which now clearly accords more importance to public concerns rather than to protecting private interest. Secondly, it reflects certain traditional aspects of Indian legal culture through implicit and explicit reliance on autochthonous values based on pre-colonial indigenous conceptions, which are clearly more relevant for environmental protection than much of the legal writing assumes. Thirdly, it bears testimony to the uniquely activist role of the Indian judiciary in promoting a new public law rationale which has also had many implications in fields other than environmental protection.

These jurisprudential developments were made possible, as this thesis has shown, because of the evolution and induction of a new rationale which relied upon the importance accorded to the aims and ideals of the Constitution as much as reflections of ancient Indian notions of law and justice. The incorporation of specific

provisions in the Constitution by the 42nd amendment in 1976 has explicitly bolstered this jurisprudence and there has been a clear shift in the legal ideology of India within the last two decades. This can be seen, as our analysis in chapter 2 showed, particularly in the greater emphasis accorded to the Preamble and in understanding the purpose and role of the Fundamental Rights and the Directive Principles of State Policy under the constitution in the new light of 'public interests' and 'public duties'.[1]

India's new public law regime has been gradually strengthened through the cumulative effects of judicial interpretations which have gradually changed the meaning of relevant important Articles of the Constitution. This, in turn, led to various kinds of amended legislation, both in the Constitution itself during the 1970s and in the field of environmental laws during the 1980s. Such legislation differs from earlier models in that it takes the new rationale explicitly into account. During the 1990s the emphasis has, so far, been placed on the judicial refinement of Indian environmental jurisprudence.

Chapter 2 showed how the newly evolved strategies in Indian public interest litigation, unprecedented and unique in many respects, have apparently become a key element in developing the new public law regime.[2] Environmental litigation in India today, mostly brought as public interest litigation, demonstrates that Indian environmental

jurisprudence has become an integral part of the new public law jurisprudence. The cost-effective and speedy remedial process now available under SAL has enhanced the development of environmental jurisprudence in India. Its power and efficacy has been described by a well-known Indian jurist as giving rise to 'a jurisprudence of rancour and strictures'.[3] According to Baxi:

> "The SAL discourse of strictures has assumed unimaginable potency; it poses a fertile threat to all those who would exercise power as if they were above the law and the Constitution."[4]

The development of Indian environmental jurisprudence within a public law regime has made the State accountable in all major environmental litigation. This was made possible because of three significant developments in the interpretation of the Constitution, as analysed in detail in chapter 2. First, the interpretation of Article 12 of the Constitution has brought a wide range of public entities and their activities within the fold of the significantly enlarged definition of 'the state', thus requiring many more institutions to comply with the new constitutional rationale. Secondly, the Indian judicial discourse on the concept of 'equality', exemplifying the inequity of treating unequals equally has led to the creation of the concept of 'arbitrariness' as a litigation strategy under Article 14, giving ample scope for judicial scrutiny of administrative discretion. Thirdly, the right to a clean environment is now

subsumed within the extended right to life under Article 21. This requires positive state action which is judicially recognisable as just, fair and reasonable.

The permeation of the public law rationale has gradually steered the Indian legal development away from the common law tradition. This change has been brought about through a process of modification and accommodation and is clearly seen in the new Indian understanding of the common law principle of public nuisance. I have shown in chapter 3 how this particular branch of law, originally based on common law principles, has been gradually developed in India as an effective tool to tackle environmental issues. While the common law principles on public nuisance as a crime remain ineffective and dormant when it comes to addressing environmental issues in other common law jurisdictions, they have been judicially recast in India to suit the needs of a developing nation.

As discussed in chapter 3, in the Anglo-American common law jurisdictions, legal culture tends to operate within a private law rationale, with individual and proprietary interests clearly outweighing the public interest. The Indian development of public nuisance principles reveals the processual effects of inducting the public law rationale. It has become an important aspect of the development of Indian environmental jurisprudence.

The modifications and the changes in line with the new public law regime have also been manifested in specific environmental statutes. The significant changes that have been brought about to the specific laws on pollution control were analysed in chapter 4 above. The amendments to the Air Act in 1987 and the Water Act in 1988, in line with the innovative provisions under the Environment Act of 1986, enlarged the scope of *locus standi* and expanded the scope of public participation along with greater access and freedom of information. Thus there is a clear permeation of the new public law rationale into India's regulatory framework to protect the environment.

The wider ramifications of the public law regime which has been established in India under the Constitution show that one cannot confine a study of Indian environmental law by taking into account merely the basic input of the common law tradition in India. It also requires understanding the intricacies of India's indigenous culture that have all along remained eclipsed at the ground level but now appear to constitute more visibly the underlying philosophical and ideological resource base for legal development.

Chapter 5 analysed in some detail how the ideology behind the establishment of a public law regime in India, particularly in the context of protecting nature and its resources, reflects traditional Indian legal culture in the new setting. The Indian conceptualisations of law and

justice, encapsulated in the notion of an overriding order and its individualised manifestation in such concepts like *dharma*, have among their major attributes a legal culture demanding a public law regime. Based on social obligations, the aim is to maintain a universal order in which respect for nature and the close interlinking of man with cosmology are an integral part. It has not been the major purpose of this thesis to venture into a detailed study on various aspects of the *dharmic* tradition, but to analyse the current Indian legal developments based on the constitutional rationale. It is, however, important to see the operation of *dharmic* postulates in their contemporary forms within our current context.

The analysis of significant cases on environmental law in India in chapter 6 revealed the operation of various strategies and techniques adopted by the Indian courts. This chapter also depicted the inarticulated major premises of judicial discourse on environmental issues. The juridical rationale in *Ratlam*, the *Mehta* cases and the *Bhopal* decisions, all analysed in chapter 6, delineates the contours of Indian environmental jurisprudence. *Ratlam* conveys the duty-oriented legal approach that clearly reverberates with the neo-*dharmic* rationale. The *Mehta* cases have evolved public law principles by placing public interests well above private individual interests, while the *Bhopal* decisions authenticate a juridical reasoning emphasising expediency and efficacy. The above three

important groups of cases depict the following elements: First, they manifest the deviation from established principles of law under the earlier legal order. Secondly, they reflect the urge to evolve indigenous jurisprudence. Thirdly, they adopt the most practical approach to solve the issues brought before the courts. The various other Supreme Court and High Court decisions also analysed in chapter 6 illustrate and underpin the general trend of this jurisprudential development.

While examining India's evolving new environmental jurisprudence, Professor Leelakrishnan and others at Cochin University in India have highlighted how the Indian judiciary introduced new strategies of law.[5] Similarly, Professor Jariwala of Banaras Hindu University has also shown the new direction of environmental justice in India through his critical appraisal of 1987 case law.[6] It can be deduced from their discussions that, in strictly legal terms, Indian environmental jurisprudence is significant particularly in three respects.

First, there is the new dimension given to the dormant procedural provisions on public nuisance as a crime. Secondly, there has been a rejection of traditional common law doctrines of strict liability, creating instead an absolute liability for hazardous and inherently dangerous industrial activities. Thirdly, the past few years have witnessed the creation of what amounts to a fundamental

human right to a clean environment guaranteed under the Indian Constitution. Side by side with these developments, two related legal technicalities of wider import have also been established. First, a relaxation of the rules of *locus standi* has promoted environmental justice through public interest litigation. Secondly, enlarging the scope for paying compensation under public law has enabled victims of environmental hazards to obtain a direct remedy through the writ jurisdiction of the higher courts. Thus the implantation and transplantation of many aspects of Western legal ideology has, in its operation, gradually and through legal osmosis, contributed to a regulatory framework which is more Indian in character and can therefore be called neo-*dharmic*.

The characteristic features of this postmodern Indian development can be summed up thus:

1. Within the secular context of modern Indian constitutional law, there has been a conscious move to create a new legal order, through a public law regime, focused on public rather than private interest.
2. The extended notion of the right to life under the Constitution, both in terms of procedural requirements as well as in substance, depicts a distinct cultural attitude towards the meaning and quality of life.
3. The emphasis on duty, particularly the duty of public authorities, delineates the public law rationale aimed at regulating the regulator.

4. The persuasive and pedagogic manner of Indian juridical discourse, rhetoric and strictures is directed at creating environmental consciousness through the internal inculcation of normative tenets rather than external sanctions.

5. There is a reliance upon indigenous concepts of nature and understanding nature as part of the universal order by emphasising the duty of every individual to be concerned about the environment.

6. There is a strong reaction, at times explicit aversion, against Western legal culture and dominant common law traditions.

7. At the same time, there is also a strong tendency to closely link Indian legal ideology with the current world ideology of a sustainable development, voiced around the world and in international fora, thereby placing the Indian legal development firmly within the new world order.

The above features of the Indian development cannot be seen as a retrogression aimed at the revival of an ancient legal order but as a progression from an incomplete or partially established modern legal order. In the development of this jurisprudence, many values and concepts considered as 'modern' are deliberately not being adopted. It is my argument that this does not mean a regression or a revival of pre-colonial ways but, rather, a progression towards a postmodern future. Thus this development is not aimed at

merely 'modernising' a legal system, as it is generally assumed, but rather the creation of a distinctly postmodern legal system.

Indian environmental jurisprudence, as this thesis shows, manifests the characteristic features of Indian conceptual understanding of law encapsulated in the concept of *dharma* in modified forms. In the Indian context, this new postmodern legal culture could be termed as neo-*dharmic*. This neo-*dharmic* jurisprudence has brought about the establishment of a new public law regime as the apotheosis of the new constitutional law rationale in India. It permeates and directs Indian environmental jurisprudence by bringing in indigenous and traditional understandings of nature as well as developing them in line with the ideology of the new world order on environmental issues.

I have already pointed out that a little over three decades ago, Professor Julius Stone challenged Indian scholars to explain what precisely other countries could learn from her "cultural heritage".[7] The result, then, was disappointing. This thesis shows that, in the meantime, new developments in Indian law have spoken for themselves, and that Indian judges, in particular, have taken up the challenge. It remains, however, true to say that very few scholars on Indian legal studies today appear to have taken up this challenge, nor have any substantial contributions been made to build upon the work of Professor Derrett.

As pointed out in chapter 5 above, about two decades ago, in his doctoral dissertation on the juristic techniques of the Indian Supreme Court, Rajeev Dhavan showed that a distinct Indian jurisprudential approach does in fact exist, particularly on Indian concepts of property, and based on premises different from those of the Western concept of property.[8] But there were no open manifestations of *dharmic* concepts at that time; they remained eclipsed by India's inherited legal framework and the attempts to modernise the legal system. Thus, in his conclusion, Dhavan showed that the courts of the 1960s and the 1970s had taken up theoretical assumptions of a 'cosmopolitan jurisprudence' with regard to the nature of the individual and the State, and then arbitrated mechanically between their conflicting claims.[9]

In other words, Dhavan seems to have said that Indian judges were all along aware that theory and practice were at odds and incompatible in that particular area of law. However, Dhavan was able to perceive then that in many less controversial areas, other than on property rights and preventive detention, this theoretical assumption breaks down. He stated:

> "In all these cases the Court seems to have relied on native instincts and needs even though it had tried to preserve its tone of cosmopolitan objectivity. Thus we can see that although traditional factors have operated through an undeclared but clearly identifiable instinct

for traditional matters, in the main the Court has thought of its function as not lagging behind the principles of cosmopolitan jurisprudence."[10]

That was nearly two decades ago. What was not clear then has now become more visible, particularly for rendering environmental justice, thereby manifesting what we have called neo-*dharmic* jurisprudence. It is significant that recent discussions on their relevance for current Indian legal study are now rapidly getting under way.[11]

Indian environmental jurisprudence, as any other newly evolved branch in Indian law, cannot be studied in isolation. Apart from its linkages with cultural elements, it is closely connected with social, economic and political realities. I therefore attempt a very brief examination here of the current Indian economic and political ideology towards environmental protection.

Developing countries like India are now under tremendous pressure to achieve economic growth. This would mean they could follow the same roads through which the developed countries of the West have reached their present state of economic development, with all the environmental side-effects and other implications like social, cultural and moral disintegration. At the same time, in the wake of the new thinking on environment and development, it would be quite irrational that the countries of the South should

blindly adopt the same pattern of development shown by the industrialised North. This necessarily calls forth different ideologies and legal approaches towards sustainable development as an inevitable option for them to adopt.[12]

By 1985, the Approach Paper to the Seventh Five-Year Plan of the Indian government had brought out relevant concerns at the policy making level.[13] It showed how the national plan in India appeared to have endorsed the concept of sustainable development as its ideological basis.[14] The Indian Planning Commission reiterated the fact that the problems encountered in the field of environment in India arise not only due to conditions of poverty and underdevelopment but also due to the negative effects of development programmes which have been badly planned or badly implemented.[15]

The question as to what constitutes development is most relevant in this context. Current Indian views appear to be against the ideology of the dominant pattern of development based on a linear theory of progress.[16] Two well-known Indian environmentalists have argued that this ideology derives its driving force from a vision of historical evolution created in eighteenth and nineteenth century Western Europe and universalised throughout the world, especially in the post-war decades.[17] The linearity of history, pre-supposed in the theory of progress, created an ideology of development that equated development with

economic growth, economic growth with the expansion of the market economy, modernity with consumerism, and non-market economies with backwardness.

The Eighth Five-Year Plan which has been put into operation from April 1992, shows an approach of deregulation in the context of a series of economic reforms initiated by the present Indian government opening up the Indian economy.[18] One can also see in this context the changes brought about in the politico-legal framework with the decentralisation of power through the Constitution (73rd Amendment) Act of 1993 and Constitution (74th Amendment) Act of 1993.[19] These amendments have now endowed upon the panchayats or local governments, the power and responsibility to prepare plans for economic development and social justice and the implementation of schemes entrusted to them. In the present Indian scenario, more effective decentralisation of the polity is seen as the only solution to protect the local environment of the common man.[20] The current ideological changes and the present trend towards a decentralised Indian polity, slowly establishing a panchayat raj, is a bold and welcome step. One can see that it fits in with and reinforces developments in Indian environmental jurisprudence based on the constitutional rationale and indigenous conceptual understanding of law and justice.

The concluding analysis of Indian environmental jurisprudence conveys two significant messages. First, in

the current socio-political scene in India, the need of the hour is to require that all private activities and entities are made accountable to public life.[21] The approach and rationale adopted so far in Indian environmental jurisprudence, thus, helps future development particularly to guide and direct the efficient use of judicial and administrative discretion for the protection of the environment. Secondly, Indian environmental jurisprudence, based on the public law rationale and autochthonous notions of law and nature, proceeds closely in line with the legal ideologies which are now frequently voiced in international fora.

This thesis could not include within its ambit a detailed examination of the links between the Indian development of environmental jurisprudence and international initiatives for sustainable legal principles. However, the Indian legal experience strongly favours the creation of a fundamental human right for a clean environment as a vital requirement for any sustainable legal principles to be adopted around the world.

NOTES TO CHAPTER 7

1. For a jurisprudential analysis of public duties as a vital element in the development of public law see Harding, A.J., Public duties and public law, 1989, Oxford, Clarendon Press.

2. See Sorabjee, Soli J., "Obliging government to control itself: recent developments in Indian administrative law", (1994) Public Law, 39-50. For an insight into the current development of English public law by two reputed experts in the field see Lester, Anthony, "English judges as law makers", (1993) Public Law, 269-290 and Lord Woolf of Barnes, "Droit Public - English style", (1995) Public Law, 57-71.

3. Baxi, Upendra, "Judicial discourse: dialectics of the face and the mask", (1993) 35 Journal of the Indian Law Institute, 1-12 at 10.

4. Ibid, at 10-11, Footnote 30.

5. Leelakrishnan, P., N.S. Chandrasekharan, G. Sadasivan Nair and K.V. Ramana Murthy, "Evolving environmental jurisprudence: the role played by the judiciary", in Leelakrishnan, Law and Environment, 126-152.

6. Jariwala, C.M., "Direction of environmental justice in India: critical appraisal of 1987 case law", (1993) 35 Journal of the Indian Law Institute, 92-114.

7. Derrett, J. Duncan M., "Indian traditions and the rule of law among nations", in (1962) 11 International and Comparative Law Quarterly, 266-272 at 267.

8. See Dhavan, Rajeev, The Supreme Court of India, 1977, Bombay Tripathi, 128-205 at 136. The ancient Indian concept of property has been authoritatively analysed by Derrett. See Derrett, J.D.M., "The development of the concept of property in India c.A.D.800-1800", in Derrett, J.D.M., Essays in Classical and Modern Hindu Law, vol.2, 1977, Leiden, E.J. Brill, 8-130.

9. Dhavan, The Supreme Court of India, at 454.

10. Ibid, at 455.

11. See again Singh, Chhatrapati, "Dharmasastras and contemporary jurisprudence",(1990) 32 Journal of the Indian Law Institute, 179-188; Dhavan, Rajeev, "Dharmasastra and modern Indian society: a preliminary exploration", (1992) 34 Journal of the Indian Law Institute, 515-540; Purohit, S.K., Ancient Indian legal philosophy: its relevance to

contemporary jurisprudential thought, 1994, New Delhi, Deep and Deep Publications.

12. There is a growing literature on this aspect within the last decade or so, see for example Anand, R.P., "Development and environment: the case of the developing countries", (1980) 20 Indian Journal of International Law, 1-19; Ogolla, Bondi D., "Role of environmental law in development", (1987) 29 Journal of the Indian Law Institute, 187-200.

13. Planning Commission's approach paper to the Seventh Five Year Plan, 1985, New Delhi, Government of India Publication. The Planning Commission of India is a high-level policy making body of the government.

14. Ibid, at 385.

15. Id.

16. See generally, Mukherjee, Amitava and V.K. Agnihotri (eds.), Environment and development (Views from the East and the West), 1993, New Delhi, Concept Publishing Company; see particularly Chattopadhyay, Srikumar, "Sustainable development: concept and application case of developing countries", ibid, at 39-57; Sundaram, K.V., "The emerging new development paradigm: issues, considerations and research agenda", ibid, at 69-88; Roy, Sunil K., "Sustainable development of natural resources in the Third World: the human equation", in Southgate, Douglas D. and John F. Disinger (eds.), Sustainable resource development in the Third World, 1987, Boulder and London, Westview Press.

17. Bandyopadhyay, J., and Vandana Shiva, "Ecological sciences - a response to the ecological crises", in Bandyopadhyay *et al.* (eds.), India's environment, 196-213 at 200-201.

18. The Eighth Five Year Plan, 1992, New Delhi, Government of India Publication.

19. For texts of the 73rd and 74th Amendment of the Constitution see AIR 1993 Acts 158-169.

20. See Mukherjee, Amitava, "Meaning of development: the common man's concern", in Mukherjee *et al.*, Environment and development, 387-430 at 418-419.

21. A recent legal article by two law students of the National Law School of India urges, rightly I would say, the need to redefine the concept of public-private divide contemplated by the Indian Constitution in the light of the current changes of economic liberalisation. See Viswanathan, L. and R.V. Anuradha, "Liberalisation, public interest and Indian Constitution", (1994) 36 Journal of the Indian Law Institute, 378-382.

ABBREVIATIONS

AC	Appeal Cases
AIR	All India Reporter
All	Allahabad
All ER	All England Reports
AP	Andhra Pradesh
Bom	Bombay
Bom LR	Bombay Law Reporter
Cal	Calcutta
Cr LJ	Criminal Law Journal
Del	Delhi
EB & E	Ellis, Blackburn & Ellis's Reports
Guj	Gujarat
HL	House of Lords
HP	Himachal Pradesh
IA	Law Reports, Indian Appeals series
ILR	Indian Law Reports
Kant	Karnataka
Ker	Kerala
KLT	Kerala Law Times
Lah	Lahore
LR	The Law Reports
Mad	Madras
MIA	Moore's Indian Appeals
MP	Madhya Pradesh
Ori	Orissa
PC	Privy Council
QB	Queens Bench
Raj	Rajasthan
SCC	Supreme Court Cases
SCR	Supreme Court Report
UP	Uttar Pradesh
Weir	Weir's Criminal Rulings (India)

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Note: * denotes UK Statutes
+ denotes US Statutes

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