
**MACQUARIE UNIVERSITY
MACQUARIE LAW SCHOOL
PHD THESIS**

**CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGE: AN
ASSESSMENT OF ENVIRONMENTAL CLAIMS UNDER PRIVATE
AND PUBLIC LAW IN INDIA**

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*This thesis is presented for the degree of Philosophy of Law to Macquarie Law School,
Faculty of Arts, Macquarie University, Sydney, Australia.*

DATE OF SUBMISSION: 2 August 2012

ABSTRACT

The role of civil liability including tort law in addressing environmental claims in India had until recently been minimal. Tort law remedies with its limited scope had not been pursued or seriously considered for environmental claims until the Bhopal gas disaster in 1984-85. It is only after 1995 that tort law remedies have been explored to overcome inadequacies of the existing environmental liability regime based predominantly on public law liability tools in India. Notwithstanding the difficulties in the use of tort law for addressing environmental claims, in recent years the Supreme Court, and most recently, the Parliament, have categorically re-engaged with tort law to utilise its functions and remedies to address environmental claims.

Although the Supreme Court of India has used the public law liability tools to address most environmental claims by recognising a constitutional environmental right, reiterating a constitutional duty and statutory liability it has simultaneously recognized an environmental constitutional tort within the same case. As research indicates, tort law remedies and functions have been increasingly adopted by the Supreme Court to vindicate environmental claims by allowing for compensatory and reparative award of damages. In addition, the National Green Tribunal Act 2010 [NGTA] recognizes civil liability for environmental damage arising from the violation of the seven specific laws enumerated under Act. It allows the victims to seek compensation for personal injury and damage to property arising from violation of the person's environmental right and/or regulatory laws listed under the Act. This new liability regime for environmental claims, therefore, includes features of public law liability and private law liability for vindication of environmental claims. The mixed liability approach adopted by the Supreme Court as discussed above indicates a reengagement with tort law. In this context, the question that this thesis addresses is the extent and ambit of civil liability and tort law to address environmental claims and interests in India. The thesis proceeds to examine the role, function and nature of tort law within environmental context. It emphasises the inadequacies and gaps within the existing legal liability instruments and processes and highlights the potential advantages, limitations and connections that tort has in dealing with certain environmental claims. It establishes that the manner in which tort functions of compensation and deterrence have become amalgamated with the objectives of environmental law, the boundaries between public and private law have blurred. It is argued that within the current environmental jurisprudence, civil liability instruments including tort can play a positive role to supplement the public law liability tools used to address environmental claims in India.

DECLARATION

This thesis is of my own composition and all sources have been duly acknowledged in the footnotes and bibliography.

This work has not been submitted for a higher degree to any other university or institution.

This thesis is within the set word limit for my degree program.

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ACKNOWLEDGEMENTS

I would like to dedicate this thesis and its completion to the memory of my mother, Santosh Sharma, her dream, support and words of encouragement.

I am grateful to Macquarie Law School, Macquarie University, for providing me with the opportunity to pursue a PhD as an international student. I am also grateful to the School of Law, City University of Hong Kong, which allowed me to pursue this research work and granted me access to the Internet and library resources.

Indebted to my principal supervisor, Dr Shawkat Alam, and my co-supervisor, Dr Carlos Bernal-Pulido, for their supervision, regular teleconversations, prompt emails, critical comments, evaluation and guidance. Not to forget Dr Alam's compassion, encouragement and support during an emotional and distressing period due to personal problems.

Lastly my deep gratitude goes to my father, Dev Kumar, who kept calling me regularly and boosted my confidence, and to my friend Kiran who commented, discussed, argued and provided me with moral support throughout the time I was working on this thesis. Also, my thanks to my husband, Gajinder Kumar,, my family in Delhi, who have waited patiently and lifted my spirits when I was feeling frustrated, anxious and overwrought. To my friends in Hong Kong who bore my hermit crab-like appearances at social events with patience and encouraged me at all times. Thanks to all of you. I hope you all can read this work and understand my passionate convictions on this subject.

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LIST OF ABBREVIATIONS

| | |
|-------|---|
| CBI | Central Bureau of Investigation |
| COI | Constitution of India |
| CPCB | Central Pollution Control Board |
| CCrP | Code of Criminal Procedure |
| CPC | Code of Civil Procedure |
| CSE | Center for Science and Environment |
| CSIR | Council for Industrial and Scientific Research |
| DP | Directive Principles |
| EIA | Environmental Impact Assessment |
| EKC | Environmental Kuznets Curve |
| EPA | Environment Protection Act |
| FD | Fundamental Duties |
| FR | Fundamental Rights |
| FRI | Forest Research Institute |
| NAAQS | National Ambient Air Quality Standards |
| NEERI | National Environmental and Engineering Research Institute |
| NET | National Environmental Tribunal |
| NETA | National Environmental Tribunal Act |
| NGO | Non-Government Organisation |
| NGTA | National Green Tribunal Act |
| PCP | Precautionary Principle |
| PIL | Public Interest Litigation |
| PPP | Polluter Pays Principle |
| RSPM | Respiratory Suspended Particulate Matter |
| SD | Sustainable Development |
| SPCB | State Pollution Control Board |
| TERI | Tata Energy Research Institute |
| UCC | Union Carbide Corporation |
| UK | United Kingdom |

| | |
|-----|-----------------------|
| US | United States |
| PTD | Public Trust Doctrine |

I CHAPTER ONE: CIVIL LIABILITY FOR ENVIRONMENTAL DAMAGE IN INDIA

A Introduction

The role of civil liability in addressing environmental problems and claims has received minimal attention in India.¹ However environmental harm² and environmental justice³ have acquired significant importance in Indian society since the Bhopal gas tragedy in 1984,⁴ and have been addressed through public law liability tools.⁵ Much attention and

¹ Although civil liability is much wider and includes statutory liability, constitutional liability and tort liability, for the purposes of this work, civil liability is being used interchangeably with tort law liability unless indicated otherwise. Civil liability for violation of statutory regulations where recognized under public law has been dealt in Chapters 2, 5 and 6. The most recent statutory enactment, in the form of National Green Tribunal Act 2010 (NGTA), recognises civil liability for environmental damage in India.

²For the purposes of this work environmental harm is assumed to include personal and property injury or damage by any activity related to environmental pollution, environmental accident or other environmental damage as defined under the National Green Tribunal Act 2010 (NGTA). The NGTA of itself does not define environmental harm or damage but refers to pollution and accidental injury as recognised under various environmental legislation, especially under the Environment (Protection) Act 1986 (EPA), Biodiversity Act 2002, Air (Prevention and Control of Pollution) Act 1981, Water (Prevention and Control of Pollution) Act 1974, Water (Prevention and Control of Pollution) Cess Act 1977, Public Liability Insurance Act 1991 and Forest (Conservation) Act 1980.

³The term is not defined under any specific legislation but has evolved through social action movements. See below Chapter 2, Section C, at 27, 31.

⁴The Bhopal gas tragedy resulted in 15,000 deaths and injured over 550,000 people. It is considered to be the worst industrial disaster leading to air pollution by the negligent escape of poisonous methyl isocyanate gas from a chemical plant situated in Bhopal, in the state of Madhya Pradesh. It led to multiple legal actions and illustrated the gaps in the existing environmental laws in the country. It also brought into question the legal liability of the defendant company (a US-based multinational corporation), state policy on environmental disaster preparedness, national policy responses in case of environmental accidents, lack of proper provisions under the existing civil procedure and evidence law in handling mass disasters, and most of all the undermining of the legal machinery and the inability of courts to determine liability and provide legal remedies. See 'Supreme Court Issues Notice on Gas Leak Compensation', *The Economic Times* (New Delhi), 12 December 1990; Madhav Gadgil, 'A Day of Reckoning', *Financial Express* (New Delhi), 7 June 1999. For further details on Bhopal and its legal history see Chapter 6, *infra* at 248. See Charan Lal Sahu v Union of India AIR 1990 SC 1480 (hereinafter Bhopal Gas case) and various orders of the Supreme Court. Following Bhopal, tort law doctrine of strict liability was applied and modified into absolute liability in MC Mehta v Union of India (1987) 1 SCC 395 (hereinafter Shriram/Oleum Gas Leak case). See below Chapter 6 at 256, 260.

⁵ Public law liability instruments include constitutional liability, administrative liability, violation of regulatory and statutory standards set by the government and even criminal liability. State controls both environmental risks and harm largely through law. There are other instruments of controlling risk and harm to the environment such as "eco-education", self regulation, voluntary actions and even social and cultural

criticism has been focused on the extent to which legal liability instruments⁶ may provide a solution to environmental problems, environmental human rights issues and vindication of the environmental claims of victims.⁷ Rapid urbanisation and development has affected the ecology and put a strain on natural resources. Economic progress and the increasing population has also created urban problems and given rise to conflicts between developmental activities and the use and protection of environmental resources. This has in turn led to the rise and evolution of environmental law as a distinct subject of study in India in the last 25 years, which is dominated by the use of public law liability, for instance, inter alia, constitutional liability for infraction of right to life (including a healthy environment) under the Constitution.⁸ There are acute environmental problems in India—not only pollution and depletion of environmental resources but also major health hazards. Data from the National Environmental Policy 2006 reveals that 20 per cent of all diseases in India are a result of environmental factors such as polluted air, water, contaminated groundwater or communities living in or near areas that are highly polluted.⁹ The communities at risk due to environmental degradation suffer from malnutrition, lack of access to clean energy and water are mostly poor.¹⁰

factors, See Lucas Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in An International Context* (Kluwer Law International, 2001) 208-209..

⁶ For instance, Constitutional liability for violation of right to a healthy environment under Article 21, Constitution of India, (COI) regulatory liability under the Environment Protection Act 1986 or a tort action under the Civil Procedure Code, (CPC) 1908, Section 16 for damage to person or one's property amongst others or judicial review.

⁷ Recent works by academics on environmental law in India illustrate the difficulty of handling environmental pollution, protection of the environment and remedying claims through various instruments of legal liability. See for example, Dharmendra S Sengar, *Environmental Law* (Prentice Hall Press, 2007) i-ii; Indrajit Dubey, *Environmental Jurisprudence: Polluter's Liability* (Lexis-Nexis Butterworths, India, 2007) Chapter I.

⁸ For instance through constitutional means by utilization of Articles 21 and 32 (Fundamental Right to life and Right to seek constitutional remedies) under the Constitution for environmental law claims. The whole of environmental law regime in India is dominated by public law and although environmental law is not a self-contained branch of law, it comprises those areas of law that deal with controlling environmentally harmful activities, management, licensing, monitoring, deterrence and planning—activities that are covered under a bundle of principles to regulate, protect, preserve and conserve the environment and people's activities. See Stuart, Ball and Bell, *Environmental Law*, 2nd edn (Blackstone Press, 1994) Chapter 1.

⁹ See *National Environmental Policy 2006* <<http://envfor.nic.in/nep.nep.pdf>> 1, 16 at 5.

¹⁰ Ibid.

Although concern for the environment and liability for violating environmental rules, principles and edicts can be traced back to the ancient Indian indigenous traditions under the Hindu concept of ‘Dharma’,¹¹ there were few laws that directly dealt with the protection of the environment per se or pollution regulations during the late nineteenth and early twentieth century in British India.¹² In pollution cases, where there was loss or damage caused to an individual, the legal machinery provided a limited solution through the use of existing environmental statutes and criminal law provisions under the Indian Penal Code or applicable principles of tort law dealing with disputes between landed neighbours based on the common law of England which applied to British India.¹³ However, such cases and solutions through the application of private law remedies proved increasingly ineffectual during the earlier part of the twentieth century and after independence due to an increase in industrialisation, the requirements of a growing and developing nation and the different ideology of the newly established Constitution.¹⁴ Litigation under tort law was extremely time-consuming and it was difficult to establish evidence due to a lack of scientific and expert institutions, and equally difficult for the courts to quantify compensation within the existing legal framework.¹⁵ Regulatory

¹¹The concept of ‘dharma’ is a complex one comprising ancient Hindu law, religious law, public duty, state law and individual duty as described in the Hindu scriptures that forms a very strong cultural tradition in India. Cultural traditions, social norms and indigenous culture find recognition in the Indian Constitution and common law on which the Indian legal system is based. Environmental considerations as reflected in the dharmic tradition and its adoption and cultural underpinnings are discussed in Chapter 4 infra at 104,111.

¹²There was no regulatory machinery in place in India to collect, analyse or assimilate data on the effects of unplanned natural resources extraction, industrialisation, the effect of environmental pollutants on affected populations, or any administrative institutions to manage and respond to pollution problems specifically. For example, the Explosives Act 1884 provided for the manufacture, storage and transport of explosives but did not provide for any measures for emergency response or environmental pollution. Air pollution from gas pipelines was addressed in the only air pollution provision existing in British India under the Orient Gas Company Act 1857. See Sengar, above n 7, 20, 68.

¹³See Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes* (Oxford University Press, 2002) 2.

¹⁴See Sengar, above n 7, 20, 68–69; CM Abraham, *Environmental Jurisprudence in India* (Kluwer Law International, 1999) Chapter 3, 34–42.

¹⁵See Ram Naik, Member of Parliament (Lower House), (1995) 41 (1) Lok Sabha Debates, 200–260, 217–218; Vinod S Mishra, ‘Environmental Justice Delivery System: An Alternative Forum’(2002) 44(1) *Journal of Indian Law Institute* 62, 84; Abraham, above n 14, 37, 39; P Leelakrishnan, ‘The Public Law of Nuisance: A Tool for Environmental Protection’ (1986) 28 *Journal of Indian Law Institute* 229, 231; R Ramamoorthy, ‘Difficulties of Tort Litigants in India’(1970) 12 *Journal of Indian Law Institute* 313, 332. For the US, See Palma J Strand, ‘The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation’ (1983) 35 *Stanford Law Review* 575; Victor E Schwartz and Phil Goldberg, ‘The Law of Public Nuisance: Maintaining Rational Boundaries On A

enactments through public law took precedence and in the environmental context the role of tort was marginalised.¹⁶

However, after the Bhopal gas tragedy and the Oleum gas leak case in 1984 and 1985 respectively, strict liability doctrine was invoked but considered ineffective largely due to the scale of the environmental damage and loss of human life. In response, the Indian Supreme Court evolved a unique environmental jurisprudence by relying on Constitutional interpretation of fundamental rights and directive principles and related constitutional remedies.¹⁷

The government policies and legislative direction also reflected the control and protection of the environment through regulatory provisions. The most recent and significant development in the environmental law area is the award of compensatory and reparative damages by the Supreme Court of India and the recognition of civil liability for environmental damage under the Nation Green Tribunal Act 2010 (NGTA) recently.¹⁸

As research in this work indicates this new trend that is overcoming the public and the private law divide in the environmental field is more characteristic of a postmodern legal

Rational Tort' (2006) 45 *Washburn Law Journal* 541–583; Kenneth Abraham, 'The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview', (2002) 41 *Washburn Law Review* 379–399; Peter Cane, 'Using Tort Law to Enforce Environmental Regulations' (2002) 41 *Washburn Law Review* 427–467; For England See David Howarth, 'Muddying the Waters: Tort Law and the Environment from an English Perspective' (2002) 41 *Washburn Law Review* 469–513.

¹⁶Ibid. For the Indian position on the effectiveness of tort law in environmental damage cases see Marc Galanter, 'Law's Elusive Promise: Learning from Bhopal' in Michael Likosky (ed), *Transnational Legal Process* (Butterworths LexisNexis, 2002) 172, 176; 'The Displacement of Traditional Law in Modern India' (1968) 24 *Journal of Social Issues* 65 and 'Case Congregations and Their Careers' (1990) 24(2) *Law & Society Review* 1201. For an Anglo-American perspective on the context of whether common law has a useful role to fulfil as a means of formulating responses to new problems posed, see Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1985) 163 (the author emphatically states that it is not possible that courts have the potential to play the kind of law-making role they once played in addressing new situations in response to rapid industrialisation).

¹⁷See Divan and Rosencranz, above n 13, 41–45, 49.

¹⁸See, for example, *MC Mehta v Kamal Nath* (2002) 3 SCC 653 (in the Span Resorts Case the Supreme Court awarded INR ten lakhs as damages for reparation); *Indian Council for Enviro-Legal Action v Union of India*, (2011) 8 SCC 161, Supreme Court, DOJ 11 July 2011= (2011) 8 SCC 161 (over 38 lakhs INR was awarded as compensation in the Bichri II case). In the most recent case decided in May 2012, the Himachal Pradesh High Court held the polluter liable and imposed damages of 100 crores for violation of the Environmental Impact Assessment (EIA) rules under the EPA. The defendant corporation, which had set up a thermal power plant fraudulently, was also directed to dismantle the plant and repair the damage done to the environment. See Ravinder Makhaik, 'Green Bench Slaps 100 Crores', *The Times of India* (online) 5 May 2012, <<http://timesofindia.indiatimes.com/home/environment/pollution/HC-slaps-Rs100-crore-green-fine-on-firm/articleshow/13003401.cms>>.

development, albeit with a traditional conceptualisation of law. It reflects fluidity and has a capacity to change with the changing circumstances of the legal, cultural, social, economic and political scenarios in India. This indicates the development of an environmental jurisprudence with a public law rationale mixed with private law characteristics.

B Focus of the Thesis

In the context of the above brief overview and legal development, the wider issue that this thesis addresses concerns whether tort law has the potential to play an important role in the overall system of environmental regulation in India. It examines the factors that have overshadowed the efficacy of tort as a means of environmental protection in the past and critically analyses the various legal liability tools employed under private law and public law to overcome the difficulties that a plaintiff faces in India when attempting to establish liability for environmental damage and seek justice for an environmental wrong.

C Research Questions

This work addresses the following research questions:

- i. Whether civil liability including tort law can be used as an effective tool for the vindication of environmental claims in India within the wider framework of the current environmental liability regime?
- ii. To what extent is civil liability being used as a tool to address environmental damage claims and deal with environmental justice?

D Background: Extent of Private and Public Laws for Environmental Harm

Tort law traditionally functions within narrow confines and operates to protect the private interests of an individual. It protects a person's real and personal property against exploitation from others.¹⁹ In this sense tort law is rightly a part of private law protecting private interests. Environmental law concerns itself with a multitude of interests and

¹⁹See WVH Rogers, *Winfield and Jolowicz on Tort*, 18th edn (Sweet & Maxwell, 2010) 2, 6.

objectives that are public interests. It deals with a variety of objectives, goals and the interests of society as a whole and is rightly dealt with by public law liability instruments. Hence, the objectives of tort law, dealing with civil liability, and the objectives of environmental law, dealing with public interests and public liability, apparently do not have a common ground. Yet the common law torts of nuisance, strict liability and negligence have been marshalled to provide solutions to environmental problems, illustrating that the demarcation between the boundaries of private law and public law are not rigid.²⁰ This distinction has become blurred within the context of environmental law.²¹ Bergkamp observes that in many countries an individual and the state can initiate action in both the civil courts and administrative courts for a remedy under civil liability where no action lies under public law and vice versa.²² Yet, whatever the effect both public and private law actions have had over environmental litigation, “public and civil law have not merged nor become mutually substitutable, and a private civil law action may lie, where no public law action is possible and vice versa”.²³ Increasingly, for vindication of environmental harm to people and their property and goods, environmental damage claims are being influenced by remedies available not only under public law, but also under tort law.²⁴ Within the Indian environmental jurisprudence, tort law remedies and functions are being increasingly adopted by the Supreme Court to vindicate environmental claims in allowing for compensatory and reparative award of damages as stated above.²⁵ This has opened the field for victims to pursue claims for environmental damage through tort law and civil liability and is reducing the strict public law and private law distinction.

Further, the overlap of private law and public law for environmental damage is also observed within the recent enactment of the NGTA as mentioned above. This legislation deals with providing compensation to victims of environmental damage arising from the

²⁰See Mark Wilde, *Civil Liability for Environmental Damage: A Comparative Analysis of Law and Policy in Europe and the United States* (Kluwer Law International, 2002) 4, fn 7.

²¹Lucas Bergkamp, above n 5, 1-2.

²²*Ibid*, 2.

²³ *Ibid*.

²⁴Barbara Pozzo, ‘Towards Civil Liability for Environmental Damage in Europe: The ‘White Paper’ of the Commission of the European Communities’ (2001)1(2) *Global Jurist* Article 2.

²⁵See above n 18.

violation of the seven specific laws enumerated under the NGTA. In this context, the question then becomes to what extent tort law can address public environmental interests. To determine this, it becomes important to examine the role, function and nature of tort law within the environmental context. It also becomes important to examine whether certain functions of tort can be used to augment the regulatory approach that has been recognised within the environmental law framework.

E Operation of Tort Liability for Environmental Claims in India

In India the oldest form of action to deal with environmental matters was a common law action, mostly through nuisance.²⁶ Research of the Supreme Court cases from 1905–1950 and from 1950–1980 reveals only a handful of tort cases dealing with private and public nuisance where damages were granted to the plaintiff.²⁷ Although common law was part of the ‘laws in force’ prior to the adoption of the Constitution and continued to be effective by virtue of Article 372(1) of the Constitution²⁸ it has evolved by blending the common law of torts of England and adapting these to Indian conditions.²⁹ The imposition of damages for tort claims and environmental claims has however been ‘notoriously low’.³⁰ In this respect, Divan and Rosencranz state that damages were not a deterrent to the polluter.³¹ Moreover, cases took a long time to pass through the courts and inflation of the developing economy ‘diluted the value of the damages that a

²⁶Divan and Rosencranz above n 13, 88, 89.

²⁷Significant among them is *JC Galstun v Duniya Lal Seal* (1905) 9 CWN 612, where both an injunction and exemplary damages were granted for nuisance caused by the discharge of waste liquid and refuse into a municipal drain that caused a noxious odour and affected the health of the plaintiff and interfered with his comfort and the occupation of his property.

²⁸Article 372(1) Constitution: ‘Notwithstanding the repeal by the Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India, immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislative or other competent authority.’

‘[L]aw in force’ under this provision has been held by the Indian Supreme Court to include British Common Law practices (as applied by courts in India in the pre-Constitution era), see *Builders Supply Corporation v Union of India*, AIR 1965 SC 1061; see also *Director R&D v Corp of Calcutta*, AIR 1960 SC 1355.

²⁹See M Setalvad, *The Common Law of India* (1960), 53; S Desai and K Desai, *Ramaswamy Iyer’s The Law of Torts*, 8th edn (Tripathi Publications, 1987) 20, 21.

³⁰ See Divan and Rosencranz, above n 13, 89.

³¹*Ibid.*

successful plaintiff received.³² As a result, most actions were filed for grant of both temporary and perpetual injunctions in a case of environmental pollution.³³ The two remedies provided by tort law, in the form of monetary damages and injunctions, have been justified based on the theories of corrective justice and deterrence in other common law jurisdictions and provide a fertile ground for serious discussion and doctrinal change in the context of environmental torts.³⁴ Technical difficulties in bringing a private law action in India, along with other factors such as differing ideology and amendment of the right to property, have contributed further to a limited role of tort in India. Additionally, tort actions require fault of an identifiable defendant and a causal link to be established between the harmful activity and environmental damage, which requires scientific skills and technical knowledge along with environmental legal training and education. In the cases of several unidentified defendants, an individual tort action does not necessarily work, as was reflected in the *Bichri* judgment.³⁵

F Difficulties with the Operation and Evolution of Tort Liability in India

Moreover, a significant factor that needs attention is that tort focuses on an individual's interest rather than the interest of the environment. This is not the case in India due to a variety of social and cultural beliefs and constitutional ideology and developments. In this sense, as some academics argue, the Indian approach to environmental protection and jurisprudence has led away from protecting private law interests that have been significant in any Anglo-American common law jurisdiction.³⁶ Because the Indian Constitution clearly provides for a 'social justice' criterion,³⁷ among others, the proprietary interests so well protected and argued for within other common law jurisdictions were not accorded importance, to such an extent that what was once a fundamental right—the right to property provision under the Constitution—was amended

³²Ibid.

³³Ibid, 89,90.

³⁴See Kenneth Abraham, 'The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview' (2002) 41 *Washburn Law Journal* 379–399, 388.

³⁵See Indian Council for Enviro-Legal Action v Union of India (2011) 8 SCC 161(Bichri II)..

³⁶See CM Abraham, above n 14, 2, 3.

³⁷Preamble to the Constitution of India.

and accorded a restrictive meaning to provide precedence to public law concerns.³⁸ As the discussion in the later chapters will show, these developments also characterise factors that have enabled the growth of the public law rationale.³⁹ In contrast, even within India the remedies that were provided by the courts had earlier focused on the loss that the individual had incurred and did not take into consideration the damage to the environment.⁴⁰ Attention therefore needs to be directed at how liability tools, whether public or private, can be best used for not only an individual or a class of people, but also for the ‘environment’ per se.

However, if the boundaries of tort are limited in this manner it stands to reason that rules with respect to civil liability need to be clarified and made certain so that tort actions prove useful in specific situations to supplement public liability law. Secondly, one may also consider the specific role of tort in environmental protection by considering the philosophy on which tort law considerations are justified. Thirdly, in addressing environmental claims, tort law becomes a viable option in certain situations which are not addressed adequately under the regulatory environmental regime, say for example, private injury and damage to property or ‘environment per se’ and historic pollution. Even the NGTA only recognises environmental damage arising out of seven enactments listed in Schedule 1 and bars claims in civil courts for any action arising out of environment.⁴¹ Further, it will be argued that enhanced utilization of tort law functions provides a better option to individual victims for personal injury and property damage at two levels –(i) in context of the inefficient implementation of the regulatory provisions under various environmental statutes evincing legislative gaps to force statutory authorities for action and (ii) for claiming higher compensation in serious fundamental rights invasion cases in private actions in contrast to damages and remedies available

³⁸ Article 300A provides an abrogated right to property. It was added after the 44th Amendment by taking away fundamental right to property.

³⁹ Ibid.

⁴⁰ See *JC Galatun v Duniya Lal Seal* (1905) 9 CWN 612, above n 27 (nuisance caused by discharge of waste liquid and refuse into a municipal drain causing a noxious odour, affecting both health and property of the plaintiff).

⁴¹ These include the Water (prevention and Control of Pollution) Act 1974, the Water (prevention and Control of Pollution) Cess Act 1977, the Air (prevention and Control of Pollution) Act 1981, the Environment (Protection) Act 1986, the Public Liability (Insurance) Act 1991, the Forest (Conservation) Act 1980 and the Biological Diversity Act 2002.

through class actions under public law. Tort law has certain defined characteristic objectives, which includes inter alia, the objective of providing corrective justice.⁴² Tort functions to restore the wronged party to its original position before the harm was caused. The wrong or the fault is corrected and compensation is therefore a remedy for vindicating the tort victim's right.⁴³ The fact that compensation is to be given by the defendant also promotes the deterrence feature of tort.⁴⁴ The objective of 'righting a wrong' therefore can help in the refinement of tort law for environmental harm within India. The latter tort objective is also capable of defining what precise environmental harms, tort law can should address.⁴⁵

However, the fact that the courts in India are looking towards a public interest model of tort and that the NGTA also recognises civil liability actions for environmental damage in specific situations does not mean that this can solve all environmental problems or augment a better-designed regulatory regime.⁴⁶ Thus, there is also a need to identify gaps in the enforcement of environmental law that tort may have the potential to reduce.⁴⁷ Citizen suit provision under the environment protection Act (EPA)⁴⁸ is only minimally used and individual actions to enforce regulatory standards are not easy to pursue due to legal technical difficulties.⁴⁹ However an affected person may be motivated to act and

⁴²See Ernest J Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44(2) *Duke Law Journal* 277–297; Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16(3) *Oxford Journal of Legal Studies* 471–488; Jules L Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 361–385.

⁴³See Nathan Issacs, 'Fault and Liability: Two Views of Legal Development' (1918) 31 *Harvard Law Review* 954, 956.

⁴⁴See William Prosser, Kathryn Kelly, David F Partlett, *Prosser, Wade and Schwartz's Torts: Cases and Materials* 12th edn (Foundation Press, 2010) 1–2.

⁴⁵See Mark Latham, Victor E Schwartz and Christopher E Appel, 'The Intersection of Tort and Environmental Law: Where the Twain Should Meet and Depart' (2011) 80 *Fordham Law Review* 737–774..

⁴⁶For similar discussion in common law jurisdictions see Wilde, above n 20. See also Kenneth Abraham, above n 34.

⁴⁷See Wilde, above n 20, 14, 15.

⁴⁸ See s 19 EPA. A person can make a complaint against a person not enforcing environmental standards by giving notice to the State Pollution Control Board (SPCB) or authority concerned. However, there is no provision to proceed individually if damage or harm has resulted as a result of the polluting activity; the recourse then lies in constituting a civil action. However, such actions are rarely taken due to technical difficulties and the role of the enforcement authorities, which take a lax attitude. The alternate recourse lies in a plaintiff moving the Supreme Court or the High Court against the State under a constitutional writ. See Chapter 6, *infra*, 221 .

⁴⁹See s 19 EPA and ss 41 and 43 of Water Act and Air Act respectively (for a detailed discussion see Chapter 6 *infra*, 221,212).

pursue an action to force the enforcement authorities to enforce regulatory measures by making a complaint by giving notice to the statutory authority, requesting data under the Right to Information Act 2005 from the government records to directly prosecute a polluter, or by taking recourse to constitutional writ procedure in pursuing an action against the state or as a public interest litigation (PIL) or social action litigation⁵⁰.

Hence, one can observe that even within regulatory liability tort liability can have an increased role. In term of incentives and risk management, tort may make it more expensive for a polluter not to take effective abatement measures. Further, the role of tort as stated above is also relevant in enforcing 'environmental rights' not only of the people, but where a public-spirited body or individual brings an action to protect the ecology against activity harmful to the environment or for the protection of an endangered species. This can be translated in the form of recognition of the public's equitable proprietary interest in the environment rather than an individual's limited property interest in his or her own property where tort action could be used to enforce an action for the environment.

A review of the recent literature reveals that environmental issues have been addressed by examination of public law liability through Constitutional provisions and criminal laws and examination of traditional indigenous beliefs and practices with respect to the environment, but has not been addressed through civil liability specifically.⁵¹ Although some academics have examined the tortious aspects of environmental claims, none have examined the theoretical underpinnings of tort as a means of environmental protection within India.

⁵⁰For details see Chapter 5 infra, 186. .

⁵¹For evolution of environmental jurisprudence see Abraham, above n 14; for environmental awareness and activism much literature exists in Indian folklore, eco-lore, ancient scriptures, the cultural and social traditions of indigenous communities, and in sociological and anthropological studies. For example, see KS Sankhala and Peter Jackson, 'People, Trees and Antelopes in the Indian Desert' in *Culture and Conservation: The Human Dimension in Environmental Planning*, Jeffrey A McNeely and David Pitt(eds) (Croom Helm, 1985); RJ Fisher, *If Rain Doesn't Come: An Anthropological Study of Drought and Human Ecology in Western Rajasthan* (Manohar, 1997); Madhav Gadgil, 'The Indian Heritage of a Conservation Ethic' in *Ethical Perspectives on Environmental Issues in India*, George A James (ed) (A.P.H. Publishing Corporation, 1999).

Therefore it is through an examination of the nature, role and function of tort law as applicable and existing within the legal liability regime that one can determine the role it can play to provide successful solutions for environmental claims to victims. Further, this also necessitates an examination of the public law liability instruments that have dominated the Indian environmental law operation in order to determine the limitations of tort law and how far it can provide a supplementary role towards furthering the wider objectives with which environmental law is concerned. In this respect the thesis makes an original contribution to the existing environmental law literature by examining the role and operation of tort law and civil liability in contemporary environmental context in India. It is significant as it comprehensively traces the evolution, operation and position of tort law and civil liability with respect to environmental claims within India.

G Framework of the Research: Methodology

As stated above, this research work focuses on the key aspects that determine the role, nature and operation of tort law within the wider framework of the environmental law regime that operates in India. This question will be determined through the following method by examining these related questions:

- a. What is the role and nature of environmental torts in India? How does civil liability operate to resolve environmental claims? In determining these questions the thesis will examine the application of tort law by drawing examples on common law jurisdictions such as the United Kingdom (UK) and the United States (US) for comparison to determine the boundaries within which tort liability operates.
- b. What are the theoretical underpinnings of tort liability that are critical to designing a liability system for dealing with environmental harms? This question will be determined by analysing the justice-related arguments posited by tort scholars from the West to determine the application, conflict or parallel coexistence with the theoretical philosophy as rationalised in the Indian

- indigenous tradition and culture of 'Dharma', reflecting legal and cultural pluralism.
- c. What are the existing public liability tools used to resolve environmental problems and claims? This question will be determined in order to see whether tort liability is being used and recognised under the existing environmental regulatory regime to address design defaults or gaps that are critical to designing a liability system for dealing with environmental harms. This determination and examination may provide a solution, albeit limited, as to whether the statutory recognition of tort liability may provide supplementary support for deterrence and compensation and provide a better regulatory framework for addressing environmental claims.
 - d. How has the evolution of Indian environmental jurisprudence progressed through interpretation of the Constitution? What is the role played by the Supreme Court in the recognition of a virtual right to the environment and the recognition of constitutional torts? This evolution of constitutional environmental rights will be examined to determine and highlight the overlap and interconnectedness with tortious liability in order to conclude whether blurring of private law and public law boundaries within India furthers environmental justice.

The study is largely applied research, and in part is theoretical.⁵² The methodology in this research proceeds through the examination of the questions, case study and analyses outlined above. Thus, integration of public and private law on the governance of environmental protection laws and policy in India will be examined from a theoretical standpoint and also from the implementation aspect through case law analysis. As this study includes qualitative research it is intended to take cognisance of the relevant review of existing literature from various governmental and non-governmental sources, discussion papers, reports and academic works.⁵³

⁵²See Terry Hutchinson, *Researching and Writing in Law* (Lawbook Co Ltd, 2002) 8, 9.

⁵³Non-Government Organisations (NGOs): CEL, World Wildlife Fund India (New Delhi), Centre for Science and Environment (New Delhi), Terri (New Delhi), Tarun Bharat Sangh (Sariska, State of Rajasthan), Bombay Natural History Society (Mumbai); National Campaign for People's Right to Information (New Delhi) and the green groups. It will also examine Government of India reports, policy

The theoretical aspects of the study comprise a comprehensive literature survey on the subject of the early academic discourse on the importance of the recognition of civil, political, social and cultural rights, including environmental rights, in India and the recognition accorded to environmental considerations within the ancient cultural tradition and religious beliefs. Secondly, since the courts are often forced to deal with issues that have yet to be considered by legislation, the methodology will also include a review of relevant case law related to compensation claims for victims and vindication of their rights in India and other common law jurisdictions to understand the contemporary situation. A study of the civil liability claims in the UK and the decisions of the courts with respect to environmental claims will add to this critical evaluation of the existing situation in India in order to determine the scope and application of private law civil liability and public law liability.

The development of public law liability tools has been used and fashioned in a manner that may have subsumed application of tort liability earlier, largely through regulation, but recent development of environmental and constitutional tort remedies by the judiciary is significant. The ingenuity of the judiciary lies in the fact that to meet environmental objectives and vindicate environmental justice claims the Supreme Court has not only evolved an environmental right but has also fashioned constitutional tort remedies taking into account Indian indigenous traditions and culture by applying tort justifications to provide compensatory and reparative damages. Thus, examination of this feature is significant for the study of the evolution, operation and effectiveness of this development and the role of tort in this context. Following the above methodology, this research work highlights those aspects of civil liability that further environmental objectives.

H Significance of the Study

discussions, White Papers, as well as information available from the websites of the state agencies in India. The latter are especially relevant in an examination of the institutional administrative and statutory agencies (Ministry of Environment and Forests, Government of India, reports from the Central Pollution Control Board (CPCB) and various SPCBs.

Accordingly, as stated above the overall objective of this study is to identify the features of the current environmental law regime and highlight the effective role that tort liability can play within a clearly identified area to further environmental justice and environmental objectives. It concludes with a pragmatic analysis that determines that environmental damage and questions of imparting justice to people ought to be resolved by developing clear and recognisable foundations on which both public liability and private liability instruments ought to rest.

This work is significant, as a recent literature review of academic works in India indicates that most authors have explored and highlighted the significant development of environmental jurisprudence through use of public law instruments, especially its constitutional rationale.⁵⁴ Others have provided in-depth analysis by highlighting criminal liability under the regulatory framework⁵⁵, while yet others have provided the human rights approach,⁵⁶ called for examination of indigenous traditions and culture⁵⁷

⁵⁴See CM Abraham, above n 14; P Leelakrishnan, *Environmental Law in India* (LexisNexis, 1999); Armin Rosencranz, Shyam Divan and Martha L Noble, *Judicial Remedies and Procedures: Environmental Law and Policy-Cases, Materials and Statutes*, 2nd edn (Oxford University Press, 2001); D'Monte, 'Storm over Silent Valley' (1982) 9 *India International Centre Quarterly* as cited in Divan and Rosencranz, above n 13, 424, 426; Dan Subhankar, 'Green Law for Better Health: The Past That Was and the Future That May Be—Reflections from the Indian Experience' 2004 (16) *Georgetown International Environmental Law Review* 593, 602–04, 614; Cha Mijin 'Critical Examination of the Environmental Jurisprudence of the Courts of India' (2005) 10 *Albany Law Environmental Outlook Journal* 197, 213, 215; Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness, Sustainability' 19 *Journal of Environmental Law* 293, 315, 316 (Judicial oversight and excess).

⁵⁵Bharat Desai 'Some Strategies for Combating Water Pollution: An Indian Experience' (1987) 27 *Indian Journal of International Law* 63; Dubey, above n 4 (criminal liability for environmental pollution); Kanchi Kohli, 'Environmental Regulation and NEAA: The Delhi High Court Pulls up the NEAA' *India Together* (online), 24 February 2009, <<http://www.indiatogether.org/2009/feb/env-neaa.htm>>; Gitanjali Nain Gill, 'A Green Tribunal for India' (2010) 22(3) *Journal of Environmental Law* 461, 474 (for the operations of regulatory law—the NGTA); CM Jariwala, 'Changing Dimensions of Indian Environmental Law' in P Leelakrishnan, NS Chandrasekharan and D Rajeev (eds), *Law and Environment* (Eastern Book Company, 1992) 1, 25.

⁵⁶For the impact of developmental pressures and conflicts in the recognition of human rights under the Indian Constitution see RS Pathak, 'Human Rights and the Development of Environmental Law in India' (1988) 14 *Commonwealth Law Bulletin* 1171, 1180; Geetanjoy Sahu, 'Implications of the Indian Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4/1 *Law, Environment and Development Journal* 3, 19; Upendra Baxi, 'From Human Rights to the Right to be Human: Some Heresies' in *Rethinking Human Rights: Challenges for Theory and Action*, S Kothari and H Sethi (eds) (New Horizons Press, 1989), 151–166.

⁵⁷See Chhatrapati Singh, 'Legal Policy for Environmental Protection' in *Law and Environment*, P Leelakrishnan, NS Chandrasekharan and D Rajeev (eds), (Eastern Book Company, 1992) 26, 50; JDM

or the application of international environmental principles within domestic law.⁵⁸ Review of this academic literature did not reveal any work specifically targeting the examination of civil liability for environmental damage in India and its scope or function at length.⁵⁹ Rather, academics who have worked within the environmental law and tort law fields, such as Galanter, have succinctly stated that within the Indian environmental context tort law principles have not evolved or been explored and find only a minimal application.⁶⁰ In contrast, this research work attempts to show the increasing role and application of civil liability within the environmental context, both in environmental regulations and through judicial exposition; and highlight its usefulness in providing a supplementary, but necessary, compensatory and corrective justice role that is observed through judicial decisions. It is hoped that this study will contribute to the debate and discussion surrounding the application of the newly-enacted NGTA that recognises tort liability for environmental damage in India for furthering environmental justice objectives.

I Context in Which Legal Liability Operates: The Width of Environmental Law and the Limits of Tort Law

Derrett, 'Indian Cultural Traditions and the Law in India' in *Justice and Social Order in India*, Ram Avtaar Sharma (ed) (Intellectual Publishing, 1984) 1, 21.

⁵⁸See eg, Saptrishi Bandopadhyay, 'Before the Cart Situates the Horse: Unrecognised Movements Underlying the Indian Supreme Court's Internationalisation of International Environmental Law' from *The Selected Works of Saptrishi Bandopadhyay* (online) March 2010, <http://works.bepress.com/saptrishi_bandopadhyay/2>; Robert V Percival, 'Liability for Environmental Harm and Emerging Global Environmental Law' (2010) 25 *Maryland Journal of International Law* 37.

⁵⁹However see P Leelakrishnan, 'The Law of Public Nuisance: A Tool for Environmental Protection' (1986) 28 *Journal of Indian Law Institute* 229, 231, where the author has dealt with an examination of the operation of public nuisance in environmental pollution cases before 1985. See also Usha Ramanathan, 'Communities at Risk: Industrial Risk in Indian Law' (2004) 39 (41) *Economic and Political Weekly (Industrial Risk)*; and 'Tort Law in India' (2002) *Annual Survey of India*, 615–628.

⁶⁰Marc Galanter, 'Law's Elusive Promise: Learning from Bhopal' in Michael Likosky (ed) *Transnational Legal Process* (Butterworths LexisNexis, 2002) 172, 176; 'The Displacement of Traditional Law in Modern India' (1968) 24 *Journal of Social Issues* 65 and Marc Galanter, 'Case Congregations and Their Careers', (1990) 24 *Law & Society Review* 1201. See also Abraham, above n 14, 2, 3 and Chapter 3, 34–39 (the author stresses the interconnectedness of the constitutional rationale and increasing realisation of incorporating the Indian indigenous traditions that provide more reliance on public liability and dharmic duty rather than private liability for environmental considerations).

In view of the above brief discussion one can state that the ambit and scope of the issues that environmental law deals with and the kinds of interests it protects is much wider than the interest tort law deals with. Hence, tort law only forms a small sector of the wider circle of harms, interests, rights and the variety of administrative and anticipatory measures that environmental law is attributed to deal with. Thus tort law, which deals with harm to the person and the individual's property and proprietary interests, is confined to narrow boundaries as it is not appropriate for use for the varied environmental interests that are best suited to control by public law instruments. Yet, while dealing with environmental damage to an individual or class of people the objectives of tort law and environmental law overlap in deterrence and compensation.

J Scope and Limitations of this Thesis

This thesis is not a review of all environmental laws in India. This work explores the public and private law dimensions to examine how environmental claims are settled and whether victims of environmental damage obtain justice. Hence, it is not possible to examine at length all the provisions of the existing environmental legislation in India. A case study and examination of the nature and scope of actions being filed in Magistrate's Courts and the State High Court for vindication of environmental claims or violation of environmental standards might have provided an insight to understanding environmental claims; however, that becomes an independent subject of empirical study that goes beyond the scope of this study. This work proceeds by adopting the doctrinal method of observation, analysis and synthesis.

Further, as the area of environmental damage involves so many other branches of law and raises many public and private law issues this work mainly examines the strength and weaknesses of public law principles in dealing with environmental claims and access to environmental justice and the applicability and province of civil liability in this respect. Of course environmental issues are dealt with largely by public law in India. Thus, rethinking and reformulating a strategy for policy objectives in terms of achieving environmental justice, forces one to reorient principles and policies to obliterate the

private and public law distinction. As the work focuses on the Indian public law liability and civil liability it will not enumerate the international environmental obligations that India is party to in detail, nor will it analyse the international liability regimes for environmental damage except for a critical examination of the cases where the Supreme Court has applied principles such as the ‘precautionary principle (PCP)’, the public trust doctrine (PTD) ‘polluter pays principle (PPP)’ and ‘sustainable development (SD)’ in the context of developing the right to a healthy environment and the fashioning of constitutional tort remedies.⁶¹

K Structure of the Thesis: Chapter Outline

In accordance with the research questions highlighted above and the contextual background provided by this chapter, the following organisation is adopted for the analysis.

Chapter Two provides an overview of environmental problems, the definitions and the context in which liability tools, in both public law and private law, operate for environmental problems. Chapter Three investigates the common law environmental torts in India and in particular examines nuisance, strict liability and fault liability to explore the potential of tort law liability and its application in India. It examines the Indian civil liability provisions and those factors that have restricted the application of tort to environmental damage claims in India by comparing it with the operation of tort liability and its remedies within other common law jurisdictions, such as the UK and the US.

On the surface, as the Indian legal system is based on the common law system, the Indian legal indigenous system is mostly considered as redundant and forgotten. Chapter Four therefore explores and analyses the ancient Indian understanding of an individual’s duty towards the environment—one’s ‘dharma’—the Indian indigenous understanding of rules of law and duty. This chapter then contrasts this view with the existing theories of justice

⁶¹For a discussion on application of the international principles see Chapter 6, *infra* at 230.

that have been postulated by Western legal scholars to explain the objectives and functions of tort law and how these have been applicable within the environmental context through case law. It attempts to draw the distinction and highlight the area of coexistence of legal and cultural pluralism within these two apparently different concepts. It is argued that considerations of dharmic liability and its consequent violation also show a similar rationale of imposition of damages, thus enhancing the corrective justice function that tort liability plays. Chapter Five explores and critically analyses the doctrines that have been used by the Court to provide constitutional remedies to model and mould remedies under the public law liability regime to address environmental claims. It contextualises the role of public law and the blurring of boundaries between tort law and public law in environmental claims to posit that civil liability is providing a supplementary, but certain, support to achieve environmental justice in India within specific situations. Chapter Six examines the regulatory provisions and the NGTA critically to determine whether regulatory public law has design defects and what role, if any, has been allotted to tort liability. It highlights the role that tort liability can play in furthering regulatory enforcement and the legal gaps identified that need to be overcome within the regulatory framework, drawing examples from the operation of environmental rules and procedures in the Philippines.⁶²

The concluding chapter, Chapter Seven, critically assesses the findings of the earlier analysis to evaluate the boundaries within which tort liability operates, its potential use, overlap and interconnection with environmental rights for which remedies are being increasingly derived from tort liability justifications. It also reflects the existence of cultural and legal pluralism in this context and how the judiciary has managed to draw apparently irreconcilable concepts of dharmic liability and tort liability under public law to design remedies for environmental claims. The chapter concludes with practical suggestions to clarify rules with respect to the application of civil liability that could

⁶²See the *Rules of Procedure on Environmental Cases*, Republic of Philippines, Supreme Court of Philippines, Manila, 20 April 2010, A.M No 09-6-8-SC . These rules govern the procedure in civil, criminal and special civil actions before the Regional Trial Courts, Metropolitan Trial Courts, Municipal Trial Courts in Cities, Municipal Trial Courts and Municipal Circuit Trial Courts involving enforcement or violations of environmental and other related laws, rules and regulations.

provide certainty and a clear course of action to the administrators, victims and lawyers who will be better prepared for environmental actions and claims than they are now.

L Conclusion

This research work highlights the need to focus on the legal instruments, processes and planning required for responding to the current environmental challenges in India. The work attempts to unravel the advantages, limitations and connections that tort has with environmental laws in India and tease out the theoretical underpinnings that have informed or shaped the development of environment law and its jurisprudence. An attempt has been made to draw out the various laws together and determine how they can be integrated to provide a base for an environmental application of tort in the best possible manner. I hope the work will be a useful contribution to Indian academic rethinking of tort and to the debate on the public and private law divide over environmental protection, especially in light of the enactment of the NGTA, which provides for civil liability. In order to ensure easier access to justice for communities who are at a higher risk, both public liability instruments and civil liability tools ought to be used, along with inter- and multi-disciplinary and participatory approaches for achieving substantial environmental justice within Indian society. Moreover, all considerations of environmental justice ought to be based on the ground-level realities of the local residents, who are direct victims of destructive developmental policies. It is essential that participation in decision-making at the level of local policy formulation, as well as the right to information and easy access to justice for management of environmental policy, be ensured through this liability regime.

Environmental claims and problems within India require clear direction, design and certainty. The confusion that one observes within the law and its enforcement with respect to the environment has given rise to a crisis that needs to be resolved urgently. It requires a clear direction and stable foundation to develop an approach that takes account not only of the interconnectedness of civil liability, legal pluralism and the public law

liability regime, but also recognises cultural values and changes in social and political attitudes.

II CHAPTER TWO: BRIEF HISTORY AND CONTEXT OF ENVIRONMENTAL LAW IN INDIA

A Introduction

Environmental damage is largely recognised in two broad forms—as being harm to people and their goods and property, and therefore violative of their right to life or livelihood, and secondly, as harm to the environment per se.¹ Legal liability for environmental damage in India is recognised generally in four forms: constitutional liability (in the form of guaranteed rights enforced against the state, such as the right to life); criminal liability (penal sanctions imposed by the state for polluting activities in certain situations); statutory liability (state regulatory rules, for example limiting the extraction and use of natural resources by the state, pollution control); and lastly, civil liability (infringing an individual's right to bodily integrity or right to property). The first three kinds of liability are of course covered under public law. Harm to the public environment (e.g., polluting a public water tank with toxic waste) directly or indirectly results in harm to people or their property, and as people are vested with a public right an environmental damage claim is foreseeable. Private law rules cover civil liability wherein an individual or his or her property is harmed by another (whether a person or even a state) in a manner that constitutes an environmental harm for which the victim seeks compensation. In the contemporary Indian context environmental claims are influenced increasingly by remedies not only under public law, but also under tort law.²

Many scholars are looking towards solutions for environmental justice not only through public law, statutory law and human rights recognition, but also through private law claims.³ Others are more wary, considering private actions as 'being likely to diminish', because of the diverse outcomes of the statutory laws and human rights arguments that

¹Christopher D Stone, *Should Trees Have Standing? And Other Essays on Law, Morals and The Environment* (Oceana Publications, 1996) 20. Environmental damage is hence being used in this work as harm to people and their property resulting from activities harmful to their environment, and also in the second sense where activities have resulted in harm to the environment and ecology.

²Barbara Pozzo, 'Towards Civil Liability for Environmental Damage in Europe: The 'White Paper' of the Commission of the European Communities' (2001)1(2) *Global Jurist* Article 2.

³See Gerrit Betlem, 'Torts, A European IUS Commune and the Private Enforcement of Community Law' (2005) 64(1) *Cambridge Law Journal* 126–148 (emphasises that protection of the environment started with common law but shifted substantially from private to public law enforcement from the 1960s onwards, because tort law was not regarded as adequate for environmental protection purposes).

have ‘expanded or retrenched common law principles which have formed the basis of environmental law and its jurisprudence, that private actions may no longer prove of any utility’.⁴ Betlem states that one of the reasons for this shift from private to public law is the fact that tort law nowadays operates in a regulatory context.⁵

Some scholars of tort and environmental law ‘prefer a complementary role for tort alongside and in conjunction with public law regulatory regimes’.⁶ Additionally, one could pose the question of whether tort law has a role in furthering some social value, risk distribution, deterrence or minimisation of accident costs, or whether tort law is merely a tool to advance societal goals and thereby environmental protection. Environmental protection and environmental justice is considered to be achieved largely through the public law domain rather than private law. Accordingly, Betlem states that environmental law ‘is, and is likely to remain, clearly dominated by regulatory command and control regimes with tort or delict as at most the junior partner. However, that does not mean that there is no longer a meaningful role for old-style tort law.’⁷

Before embarking on a detailed analysis of how tort liability has been employed for establishing environmental claims within India it is necessary to provide an overview of environmental pollution problems and their detrimental effects on society to provide the context and definitions of certain terms and phrases used in this research and the manner in which legal liability tools have been used by the courts.

B Overview of Environmental Problems

- i. *Sources of environmental pollution.* Environmental problems arise from many sources, as a result of both natural disasters and human interference. Environmental

⁴See Mark Stallworthy, ‘Whither Human Rights?’ (2005) 7(1) *Environmental Law Review* 12–33; See also George Fletcher, ‘Fairness and Utility in Tort Theory’ (1972) 85 *Harvard Law Review* 537, 538. However in this thesis the argument is that as tort law operates within a narrow field it can play a supplementary role within the wider environmental liability framework. Within the Indian context the human rights approach and utilisation of tort law functions to fashion remedies for environmental victims supplements the existing and strong public law dominated environmental framework.

⁵Gerrit Betlem, above n 3, 126–148.

⁶Mark Stallworthy, ‘Environmental Liability and the Impact of Statutory Authority’ (2003) 15 *Journal of Environmental Law* 3; see also Kenneth S Abraham, ‘The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview’ (2002) 41 *Washburn Law Review* 379; Michael Anderson, ‘Transnational Corporations and Environmental Damage: Is Tort Law the Answer?’ (2002) 41 *Washburn Law Review* 399; Keith N Hylton, ‘When Should We Prefer Tort Law to Environmental Regulation?’ (2002) 41 *Washburn Law Review* 515, and Allan Kanner, ‘Toxic Tort Litigation in a Regulatory World’ (2002) 41 *Washburn Law Review* 535.

⁷Gerrit Betlem, above n 3, 126–148.

pollution may take place by the indiscriminate release of materials into the atmosphere and manifest in harm to an individual, and cumulatively, to the people of an area. Air quality may become so poor that vegetation, agriculture or forests may be affected. Water pollution results from contamination of water sources through industrial and residential processes, while overextraction of groundwater due to urban pressure or agricultural practices may result in its depletion. Air and water pollution mainly contribute to acid rain and may affect weather patterns. Emissions from hazardous substances, toxic leaks of gases or fuel cause extreme or long-term harm to human health as well as the biodiversity of an area. Odours emanating from industrial processes, waste treatment, incinerators, fertilizers, pesticides or factories also pose dangers to human health as well as to plant and animal life.

- ii. *The scale of environmental damage.* In statistics available from recent studies, the Forest Survey of India and the National Forest Commission study indicate that the forest cover in India is just 21 per cent of the total geographical area of the country, significantly short of the prescribed standard of over 33 per cent.⁸ High levels of suspended particulate matter and respiratory suspended particulate matter (RSPM), along with traces of sulphur dioxide and nitrogen have been detected in most cities in India, contributing to air pollution. According to the National Ambient Air Quality Status (NAAQS) Report 2008, the industrial and residential areas within the major metropolitan cities both suffer from high or critical level of air pollution. Analysis of the ambient air quality in residential areas of the major metropolitan cities revealed that out of the 35 cities that were monitored, 29 exceeded the NAAQS RSPM standards. The RSPM concentrations showed an increasing trend in Delhi, Mumbai, Kolkata, Bangalore, Jodhpur, Agra, Kanpur, Jharia and Patna, i.e., in most major cities including the capital.⁹ In 2006, as data on Delhi provided by the government agency indicates, 67 per cent of air pollution was attributed to

⁸According to the National Forest Commission (2006) about 41 per cent of India's forest cover has been degraded and dense forests are losing their density and productivity. Seventy per cent of the existing forest has lost the capacity to regenerate naturally and 55 per cent of forests in the country are prone to fire. See Souparna Lahiri, 'Exploring the Road to REDD India: An Equations Report' <<http://www.scribd.com/doc/49074574/REDD-Realities-in-India-Will-the-forests-and-forest-people-survive-Exploring-the-Road-to-REDD-in-India>>.

⁹See the CPCB National Ambient Air Quality Status Report 2008, <http://cpcb.nic.in/upload/NewItems/NewItem_147_report-2008.pdf>. In Delhi vehicular pollution was at levels that threatened to cause acute respiratory and health problems when the Supreme Court passed strict orders to completely ban public transport vehicles and others vehicle and switch to compressed natural gas and lead-free green fuel.

vehicular traffic; 13 per cent to thermal power plants; 12 per cent to industrial units, and 8 per cent from domestic combustion of fuel. These figures reflect the dimension and the scale of the pollution problems in just one metropolitan city with 15–17 million residents.

iii. *Unregulated growth, urban problems and their effects on the environment.*

Unregulated growth of urban areas, without adequate infrastructure or services for the proper collection, transportation and disposal of domestic waste water has added to the contamination of groundwater and surface water. Thirty-five metropolitan cities generate approximately 13,000 million litres of waste water per day, however the infrastructure for collecting this water is inadequate in most cities and sewage treatment plants can only treat up to 30 per cent of the total waste water discharged, leading to most of the waste water being diverted to surface water sources or forming cesspools.¹⁰ Similarly, water quality in most of the rivers in India, especially those with industrial towns, indicates that over 65 per cent did not meet the required biochemical oxygen demand values (i.e., less than 3 mg/l instead of over 6 mg/l).¹¹

Social factors leading to unrest due to these environmental pressures, land reclamation, displacement due to dam building, clearing of forests, poverty and the increasing population further contribute to the degraded environment and exacerbate environmental problems, imposing social and economic costs.

Development and economic progress in developing nations like India reflect poor environmental performance indicators.¹² Displacement of people from their homes, land and their manner of living impacts on their way of life and right to their livelihood.¹³ Unplanned development and extraction of natural resources by mining have a downside; they not only harm the people, but have a negative impact on the renewability of resources

¹⁰See the CPCB Status Report on Groundwater Quality 2008, <http://cpcb.nic.in/upload/NewItems/NewItem_47_foreword.pdf>.

¹¹Ibid, River Water Status.

¹²See Dan C Esty and Michael E Porter, 'National Environmental Performance: An Empirical Analysis of Policy Results and their Determinants' (2005) 10 *Environmental and Development Economics* 391.

¹³The struggles of the displaced and affected millions of people against the Tehri dam in Uttar Pradesh and the Sardar Sarovar on the river Narmada indicates the scale of environmental damage. For details see M Kishwar, 'A Himalayan Catastrophe: The Controversial Tehri Dam in the Himalayas' (1995) 95 *Manushi* 5 and P McCully, 'Silenced Rivers: The Ecology and Politics of Large Dams' (1996) 96 *Manushi* 336 as cited in Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India* (Oxford University Press, 2002) 438, 439, 439.

and in many places upset the ecological cycle, e.g., patterns of rainfall, local climate, sedimentation, vegetation, and soil nitrogen cycle in mining districts.¹⁴ Unsustainable forestry practices lead to acute thinning of the forest cover,¹⁵ which in turn is connected to displacement of animal species from their natural habitats, erosion of the cultural and traditional practices of forest communities¹⁶ and intense competition for the survival of the fittest, which may also lead to conflict between humans and animals¹⁷, the endangerment of certain species or even their extinction.

The above generalisations point to the fact that the main cause of environmental destruction lies in the lifestyle the contemporary world has adopted within individual cultures and that progress is epitomised through economic development at the cost of the environment. This oversimplification of the issues contains a rational truth that amply illustrates that environmental pollution problems are a product of this developmental/progress crisis.¹⁸ Environmental pollution and related environmental damage is reflected in scientific data that indicates that in many instances the effects of environmental pollution cause harm not only to the health and well-being of the individual, the community and the public at large, but also disrupts the natural habitats, ecology and biodiversity of a region. However one cannot not use natural resources or stop progress and the creation of better living conditions, yet the pollution and related environmental damage that is seen to be an ‘externality’ or ‘spill-over cost’ needs to be balanced. One

¹⁴See Pradeep S Mehta, ‘The Indian Mining Sector: Effects on the Environment and FDI Inflows’ (Paper presented at the Organization for Economic Cooperation and Development Global Forum on International Investment: Conference on Foreign Direct Investment and the Environment, Paris, 7–8 February 2002) <<http://www.oecd.org/dataoecd/30/8/1830307.pdf>>. The author illustrates a direct connection between unsustainable mining practices leading to environmental and health problems and harm to people. He also illustrates how growth and economic progress by allowing foreign direct investment and granting mining licences to transnational corporations may create ‘pollution havens’ without proper management and effective enforcement of mining and environmental safety laws for workers).

¹⁵According to the National Forest Commission (2006) about 41 per cent of India’s forest cover has been degraded and dense forests are losing their density and productivity. Seventy per cent of the existing forest has lost the capacity to regenerate naturally and 55 per cent of forests in the country are prone to fire. See Lahiri, above n 8.

¹⁶Enactment of the Forest Conservation Act 1980 left more than 20 million forest dwellers landless and labeled ‘encroachers’; however, in 2006 the government enacted the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006. See Lahiri, above n 8.

¹⁷An instance of human and animal conflict is reflected in over 400 deaths annually in India due to people being killed by wild elephants. See Glethin Chamberlain, *South China Morning Post Magazine* 29 April 2012, 20, 23. From 1999–2003 elephants killed over 580 individuals and ‘unknown perpetrators poisoned over 30 elephants’ in the state of Assam alone. See ‘Stomping Grounds’ *National Geographic Adventure* August 2004. Due to receding forest cover and encroachment of urban space into forests, elephants have also been killed not only for ivory and meat but also by cattle-borne disease, electrocution and being hit by trains while crossing railway lines. Annually over 200 elephants die due to various reasons. See SS Bist, ‘An Overview of Elephant Conservation in India’ (2002) 128 *The Indian Forester* 127.

¹⁸See Indrajit Dubey, *Environmental Jurisprudence: Polluter’s Liability* (LexisNexis Butterworths, 2007) 7.

cannot infinitely abuse natural resources without imposing damage on the economy and resulting in the ruin of common environmental resources.

During the colonial administration and before Independence in 1947, environmental harms causing personal injury and property damage were dealt minimally, under an action of tort of nuisance, negligence and strict liability, for example where a plaintiff harmed by noxious fumes sought an injunction against the harmful activity of the defendant.¹⁹ However, complex environmental problems and increasing pollution of air, water and land resources, soil contamination, conflict between land use and natural resources became a subject of public law only after adoption of the Constitution. An overview of the current statistics from both government sources and non-government institutions indicates multiple causes of environmental damage. These include, but are not limited to, air and water pollution; mismanagement, negligence and lack of effective laws or their implementation for handling environmental media; accidents related to toxic and hazardous substances; poor economic growth and lack of development in certain areas. Conflict between communities and other stakeholders for natural resource consumption contributes to this much maligned environmental damage, resulting in disease, ill-health and fatality in India.²⁰ Pollution control and management of the environmental media have thus gained importance, and environmental law has gained greater significance within Indian context.

C Definitional Discourse

- i. *Definition of the environment.* The legal definition of ‘environment’ within the Indian context is a difficult task. As environmental law is cross-sectoral and based on different disciplines, it takes into account not only natural resource study, pure science, ecology, oceans and the atmosphere but also cultural values, indigenous practices, management, administration, civil law and criminal law. Thus, each discipline may generate its own appropriate definition to address specific objectives. Ordinarily, for legal liability purposes, law and policymakers define ‘environment’ as the surrounding natural resources, the environmental media of air, water, earth, the atmosphere, ecosystems and the interaction of an individual and of communities within this sphere. It also includes a rights-based jurisprudence that deals with the interactions of human activity with the surroundings. Consequently,

¹⁹Ibid, 9.

²⁰See the National Environment Policy 2006 <<http://envfor.nic.in/nep/nep.pdf>>.

environmental law deals with the protection, conservation and preservation of the environment, measures aimed at anticipating preservation, management of resources, licenses, permits, standards of control, sustainable use of resources, institutional facilities for the recognition and controlling use of such resources, human interactions, tax incentives and subsidies, practices for better use and alternatives for newer and less harmful scientific practices, policing, deterrence, and remedial activities in award of compensation, injunction and constant monitoring. In terms of the definition provided by international environmental experts or legal documents, environmental pollution laws and the judiciary 'environment' is defined as the physical surrounding that is common to all including air, space, water, land and wildlife.²¹ Therefore, the interaction and interdependence between the physical and the biological elements of the environment fall under the domain of environmental law.²² International instruments also provide a wide and vague definition for the environment, with each instrument reflecting its objective. The United Nations Stockholm Declaration 1972 did not define the environment per se, but emphasised the interaction between man and the environment and man's capacity to transform it.²³ The Rio Declaration emphasised SD where the highlighted objective was the need for a balance to be struck between environmental protection and development.²⁴ The Indian Environment (Protection) Act 1986 (EPA) defines 'environment' under Section 2(a) as: 'includes water, air, land and the inter-relationship which exists among and between water, air, land and human beings, other living creatures, plants and micro-organisms and property.' This definition similarly reflects the breadth and all-inclusive nature of what law and policymakers consider that 'environment' can include. It is comprehensive enough to undertake and encompass any interaction that causes harm to people or to the environment under its expansive meaning. Furthermore, the Indian judiciary has added deeper meaning and colour to the understanding of the environment by recognising the multiple interactions between the ecological surroundings, people, their cultural and indigenous values and developmental activity that impinges on their rights, interests, values and cultural practices, with public law as well as private law instruments to provide remedies in disputes.

²¹Stuart Bell and Donald S McGillivray, *Environmental Law* (Oxford University Press, 2000) 3, 4.

²²*Ibid.*

²³Declaration of the United Nations Conference on the Human Environment (1972) 11 ILM 1416.

²⁴United Nations Convention on Biological Diversity (1992) 31 ILM 818.

- ii. *Environmental Pollution (A Legal Wrong)*. In accordance with the above illustration of what is regarded as ‘environment’, any disturbance that causes disharmony or any external factor that impinges upon the environment and its processes can be referred to as environmental pollution. The EPA provides the definition of environmental pollutants under Section 2(b). An environmental pollutant is any substance, whether solid, liquid or gas, in such concentrations that may be, or tends to be, injurious to the environment. Thus, environmental pollution is defined under Section 2(c) as the presence of any environmental pollutant in the environment. Within judicial exposition pollution has been described variously with reference to the context and is taken to mean foul, render unclean, dirty the air or water or make impure, defile or desecrate the soil,²⁵ or where there is unwanted sound that exceeds an agreeable amicable quality that may constitute noise pollution.²⁶ Thus, pollution includes any release of material into air or water that makes it unsuitable for breathing and drinking; contaminates the soil, making it unsuitable for growing crops or living on; emissions that cause toxic harm to health or sounds that cause harm to the hearing capacity of people.²⁷
- iii. *Environmental justice*. Environmental justice does not find a precise definition under any legislative enactment but has been recognised within India, similarly to the environmental justice movement started within the US.²⁸ Social and political action has also mobilised the Indian people to seek environmental justice and has been more effective than bringing a law suit.²⁹ For instance, within India one finds examples such as the people-led movement for saving trees ‘Chipko Andolan’ (tree hugging) against the ban on use of fuel wood within communities dependent upon the forest for food and their livelihood, NGO-led actions and social activism by Shiva against the purchase of genetically modified seeds from multinational corporations and the fight against biopiracy, or vindication of the rights of the

²⁵See *Bijaynanda Patra v District Magistrate, Cuttack* MANU/OR/0002/2000 (State of Orissa). The court relied on the definition provided in the Random House Dictionary (College Edition) 1977.

²⁶See also American Heritage and Science Dictionary 2005 definition that defines pollution as contamination of air, water, soil that is harmful for living organisms. Noise pollution is any noise or sound that annoys and is physically harmful.

²⁷Various regulations exist for controlling various types of pollution through legislative enactments in India, see for example the critique of Water Act 1974 and the Air Act 1981. For details see Chapter 6 *infra*, 212, 214.

²⁸See David Scholsberg, *Defining Environmental Justice: Theories, Movements and Nature* (Oxford University Press, 2007).

²⁹See Glyn Williams and Emma Mawdsley, ‘Postcolonial Environmental Justice in India’ (2006) 37(5) *Geoforum* 660, 670. See also P Moore, ‘Environmental Justice and Rural Communities: Studies from India and Nepal’ < http://cmsdata.iucn.org/downloads/iucn_environmental_justice.pdf>.

displaced tribal and forest communities by Patekar against the Narmada Dam project, among others.³⁰ However, the quest for environmental justice is not only reflected in social and political concerns but is also enumerated through the realisation of the fundamental right to life and a healthy environment through the use of public law tools by the judiciary.³¹

- iv. ‘*Dharma*’ is a Sanskrit word that does not have an English equivalent. It arises from the word ‘dhr’ that means to uphold, accept, sustain and uplift.³² It denotes the Indian ideology that includes righteousness of thought, word and action, law of being, law of nature, individual duty, legal duty, social and moral duty, justice, civil law, code of conduct, practice, harmony with nature and living beings and the way of life, among other things.³³ Descriptions and notions of what comprises dharma are gleaned from the ancient Indian scriptures including the four Vedas, upanishads, puranas, the epics of Ramanaya and Mahabharata and shastras (treatises of scholars including Kaulitaya) among others.³⁴ It is a peculiar concept which includes legal, ethical and philosophical values.³⁵ From a Western perspective it is understood as denoting ‘duty’.³⁶ However, within the Indian understanding, dharma connotes the natural order of things, and is different to both positive law and natural law. The dharmic duty does not correspond to the Hohfeldian analysis of jural opposites or correlatives of right but contains within

³⁰See Vandana Shiva, *Earth Democracy: Justice, Sustainability and Peace* (South End Press, 2005a), *Stolen Harvest: The Hijacking of the Global Food Supply* (South End Press, 2000b); *Biopiracy: The Plunder of Nature and Knowledge* (South End Press, 1997); Medha Patekar (ed), *River Linking: A Millennium Folly?* (National Alliance of People’s Movements, 2004) 9, 19. Medha Patekar has been the spokesperson and leading activist for the environmental justice movement of the displaced and tribal people who were moved from their original homes due the construction of the Narmada dam and the Sardar Sarovar Dam. See also Medha Patkar, ‘Drowned and Out’ <<http://www.countercurrents.org/en.patkar040804.htm>> and Medha Patkar, ‘Latest SC judgment Proves it All’ <[www.indiatogether.org/2005/apr/op-vindicate.htm\[5\]](http://www.indiatogether.org/2005/apr/op-vindicate.htm[5])>.

³¹For the judicial approach to vindication of the right to the environment see Chapter 5 infra, 171,180.

³²See Shankara B Khandavalli and Krishna Maheshwari, *Hindu Encyclopedia, Hindupedia* <<http://www.hindupedia.com/en/Dharma>>; JD Mayne, *A Treatise on Hindu Law and Usage*, 9th edn (Madras, 1922); Werner F Menski, in *The Oxford International Encyclopedia of Legal History*, vol 5. (Oxford University Press) 63, 226, 236.

³³See Khandavalli and Krishna Maheshwari, above n 31. See also the Oxford Dictionary definition that defines dharma as the eternal laws of cosmos <<http://oxforddictionaries.com/definition/dharma>>.

³⁴See PV Kane, *The History Dharmasastra*, vol 1 (Bhandarkar Oriental Research Institute, Poona, 1930–53). See also Werner F Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, 2006).

³⁵*Ibid*, vol 1–5; John Carman and Mark Juergensmeyer (eds), *A Bibliographic Guide to Comparative Study of Ethics* (Cambridge University Press, 1991). Elaborating the concept of dharma is beyond the scope of this thesis. For details on Indigenous legal tradition, dharmic values and dharmic environmental values see Chapter 4, infra, 106,108,113.

³⁶Hohfeld describes eight jural opposites and coorelatives of ‘right’, see WN Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ in *Introduction to Jurisprudence*, Lord Lloyd of Hampstead (ed), (Stevens and Sons, 1979) 260, 266.

itself features of positive law, religion, culture and ethical values.³⁷ Neither does the dharmic law arise from a sovereign command or merely religious or divine sources; it is what Hindus regard as a natural order of things, a pre-existing, eternal and cosmic order that is above all laws, religions, teachings and man. The dharmic understanding extends towards respect for the environment and has been reinvented and utilised within contemporary legal environmental context based on the concept of ‘ahimso parama dharma’ (non-violence as the highest duty [against animals and human beings]).³⁸ Dharma has also been compared with modern public law as the duty of the State is to ensure the welfare and happiness of all people, and the dharma of the king—observing ‘Rajdharm’—was responsible for the welfare and happiness of his subjects.³⁹ Accordingly, in such a system, in certain situations private interests may be superceded by the larger public interest.⁴⁰ Academics argue that it does not fit well with the modern understanding of rights.⁴¹ However, as Indian dharmic tradition includes the knowledge of natural processes and utilisation of natural resources that respect the integrity of nature, man and environment⁴² that permeates the Indian culture, the concept is finding a unique revival and is reflected in the decisions of the Supreme Court merging public liability, dharmic liability and private liability law for environmental protection and award of compensation to repair the harm done to the environment.⁴³

D Context in which Environmental Legal Liability Operates for Environmental Justice

Proponents of environmental law recognise that those who earn profits from putting a burden on the environment and the population should also bear the cost—*ubi jus ubi emolumentum*. This principle also leads one to consider the role of civil liability in meting

³⁷Wendy Doniger, *The Laws of Manu* (Penguin Books, 1991), xv, lxxviii, xvi, xix. She states that the dharmic tradition in India inculcates morality based on a religious orientation, cited in CM Abraham, *Environmental Jurisprudence in India* (Kluwer Law International 1999) 86.

³⁸See OP Dwivedi, *Environmental Ethics: Our Dharma to the Environment* (Sanchar Publishing House, 1993).

³⁹Rama Jois, ‘Seeds of Modern Public Law in Ancient Indian Jurisprudence’ (1990) 32 *Journal of Indian Law Institute* 179, 188.

⁴⁰Werner F Menski, ‘Hinduism and Democracy’, in *The Encyclopedia of Democracy* (Congressional Quarterly Books, 1995).

⁴¹See CM Abraham, above n 37, 63,65.

⁴²See Chapter 4, *infra*, for a discussion of tort liability justifications and operation of dharmic liability as evidence of legal pluralism in the environmental context.

⁴³See *MC Mehta v Kamal Nath* (2002) 3 SCC 653. Cases where the Court has revived the forgotten ancient values with respect to protection of the environment and merged these to recognise a right to a healthy environment and provided reparatory damage under the Constitution are discussed in Chapters 5&6.

out environmental justice to victims of environmental disasters. This movement for environmental justice takes in its stride protection of the environment per se, and its people by defending their rights to a healthy environment and sustainable livelihoods based on access to natural assets.⁴⁴ Increasingly, the distributive and retributive function of tort law has gained prominence internationally while dealing with environmental damage caused by multinational corporations in developing countries including India.⁴⁵ In the Indian context, a case in point is the struggle of affected victims against multinational corporations and the inadequate policy objectives of the government for environmental protection and growth and development. The unsatisfactory settlement of claims in the Bhopal Gas tragedy reveals the ambiguous government policy, the gaps in the legal design of existing regulatory standards and the unpreparedness of the state and legal institutions to handle environmental disasters.⁴⁶

Poor communities who should have been protected are at increasing risk of disease and industrial pollution due to administrative inaction, design defaults in regulatory standards, inefficient implementation of law, procedural difficulties of proof and even court decisions.⁴⁷ The prioritisation and development of the industrial sector has marginalised communities who have been victims of industrial excess and accidents due to negligence. At times the perceived necessity for industry has led the court to demand a generally heightened tolerance of risk.⁴⁸ In response to this, the victims' alliance with national and international NGOs and public interest lawyers points towards the 'government deficit' in the regulation of multinationals not only in India but among other developing nations as well.⁴⁹ In this context, the resultant environmental damage and pursuit of civil liability

⁴⁴Krista Harper and S Ravi Rajan, 'International Environmental Justice: Building The Natural Assets of the World's Poor' 2004 *Political Economy Research Institute* <http://www.peri.umass/fileadmin/pdf/working_papers/working_papers_51-100/WP87.pdf>.

⁴⁴Michael Anderson and Peter Newell argue the case for the application of tort law for environmental damage caused by transnational corporations by the highlighting difficulties of imparting environmental justice through international legal treaties and the failure of the regulatory regimes, leaving plaintiffs little scope for effective redress other than tort law. See Anderson, n 6 above; Peter Newell, 'Managing Multinationals: The Governance of Investment for the Environment' (2001)13 *Journal of International Law Development* 907.

⁴⁵*Ibid.*

⁴⁶Charan Lal Sahu v Union of India AIR 1990 SC 1480 (Bhopal Gas case). For the struggle of the victims and the legal battle that ensued after Bhopal see Chapter 6. See also Terrorism Watch, 'Bhoposhima' Disaster <<http://www.terrorismwatch.org/2011/12/bhoposhima-disaster.html>>.

⁴⁷Usha Ramanathan, 'Communities at Risk: Industrial Risk in Indian Law' (2004) 39(41) *Economic and Political Weekly (Industrial Risk)*, Usha Ramanathan, 'Tort Law in India' (2002) *Annual Survey of India* <<http://www.ielrc.org/content/a020.pdf>>.

⁴⁸Usha Ramanathan, *Industrial Risk*, 39–41.

⁴⁹Anderson, above n 6, 399.

claims for environmental justice may shape the public perception of multinationals and the environment at a global level.⁵⁰

However, civil liability holds only a partial answer for holding multinationals liable for environmental damage; other means of human rights language that provide for strong platform for access to justice and vindication of environmental claims provide a better strategy. So pursuit of purely civil liability for environmental claims cannot be a panacea for environmental justice.⁵¹ Additionally, in the pursuit of environmental claims the environmental justice movement has also brought up cases where the Indian Supreme Court and the State High Courts have applied the internationally recognised principles of PPP, SD, PCP, the PTD or intergenerational equity to give relief to the community at risk or protection of natural resources.⁵² The documented legal cases in India have repeatedly brought up the question of prioritising development, the right to livelihood and protection of the environment. In most of the recent cases⁵³ the Court has, however, attempted to adopt a balanced view of priorities while deciding environmental matters.⁵⁴ In this context, the blurring of public law and private law boundaries is seen in recent cases where the Court has not only acknowledged the use and application of tort law for righting the harm in environmental cases but also imposed exemplary damages on errant polluters, for example, in the *Bichri* case in 2011.⁵⁵

In view of the above brief discussion, one can state that tort law, which deals with harm to the person and the individual's property and proprietary interests is confined to narrow

⁵⁰Ibid, 399, 408.

⁵¹See eg, the discussion by the Supreme Court in *Charan Lal Sahu v Union of India* (1990).

⁵²These have included ecologically sensitive zones, coastal and marine zones, protected parks and sanctuaries, rivers waters, groundwater resources, processes against air pollution zones in heavily polluted cities, see eg, Shiv Visvanathan, 'Supreme Court Constructs a Dam' (2000) 35(48) *Economic and Political Weekly* 4176–4180; Armin Rosencranz and Michael Jackson, 'The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power' <http://www.cleanairnet.org/caiasia/1412/articles-69423_delhi_case.pdf>; A Srinivas, 'Polluting Units and Delhi Master Plan: Testimonies of Displaced Workers' (1998) 33(9) *Economic and Political Weekly* 447–449; SP Sathe, 'Judicial Activism: The Indian Experience' (2001) *Washington Journal of Law and Policy* 29, 40; F Pelsy, 'The Blue Lady Case and the International Issue of Ship Dismantling' (2008) 4(2) *Law, Environment And Development Journal* 135–148.

⁵³See eg, *MC Mehta v Union of India* (1997) 2 SCC 411 at 20; *MC Mehta v Kamal Nath* (1997) 1 SCC 388; *TN Godavarman Thirumulpad v Union of India* (Union of India) and Ors, AIR 2005 SC 4256; *Vellore Citizens' Welfare Forum v Union of India*, AIR 1996 SC 2715; *Karnataka Industrial Areas Development Board v Sri C Kenchappa*, AIR 2006 SC 2038; *A.P. Pollution Control Board v Prof MV Nayudu (Retd)*, (1996) 5 SCC 718; *ND Jayal and Anr v Union of India* (Union of India), (2004) 9 SCC 362; *Research Foundation For Science Technology and Natural Resources Policy v Union of India* (Union of India), (2005) 13 SCC 186; *Milk Producers Association, Orissa v State of Orissa*, AIR 2006 SC 3508; *Thervoy Gramam Munnetra Nala v The Union Of India* on 16 September, 2009 (Madras High Court); *Indian Council for Enviro-Legal Action v State of Rajasthan* (2011) 8 SCC 161.

⁵⁴See the *Taj Trapezium case MC Mehta v Union of India* (1997) AIR SC 734 (per J Kuldeep Singh).

⁵⁵*Indian Council for Enviro-Legal Action v Union of India* (2011) 8 SCC 161.

boundaries, as it is not appropriate to be used for the varied environmental interests that are best suited to control by public law instruments. Yet while dealing with environmental damage to an individual or class of people the objectives of tort law and environmental law overlap in deterrence and compensation.

E Nature of Tort: Its Functions and Purpose within the Environmental Context

Tort has been defined variously by many academics but is generally understood to mean a civil wrong—an action or an omission that has violated a duty imposed by law. It is also concerned with the allocation of risk and prevention of losses that are bound to occur in society.⁵⁶ For this tort, law provides a remedy in the form of unliquidated damages.⁵⁷ It also provides the victim with the right to seek an injunction so as to prevent the defendant from continuing to do the wrong, or for abatement. Thus tort law reflects two facets: substantively it protects an interest of an individual person's physical well-being or his or her property from being harmed, and procedurally it provides a remedy in an injunction order or monetary compensation to place the victim in the position as if the harm was not done as far as possible. As tort law is considered to have various aims, one can better comprehend it by understanding its various functions and the objectives that it seeks to achieve.⁵⁸ Further, law recognises certain actions or omissions as torts. These acts are actionable based on certain justifications of whether such an action was just or unjust. Thus, it is reasonable to look at the justice-related arguments that explain why losses ought to be allocated or a person ought to be compensated.⁵⁹ Cane argues that tort has a bipolar nature and one can be looking both at the harm and the causation of harm.⁶⁰

Tort liability can be explained, inter alia, through its corrective justice function, and in an instrumentalist manner where it is used as a tool to award compensation.⁶¹ Here the risk control function, another attribute of tort, is overshadowed by the compensatory one. However, then tort liability also entails a substantive right and in this non-instrumentalist understanding, it protects right of a person or the victim as against the duty of the

⁵⁶See WH Rogers, *Winfield and Jolowicz on Tort*, 18th edn (Sweet and Maxwell, 2010) 2, 6.

⁵⁷*Ibid.*

⁵⁸*Ibid.*, 2, 3, 6–10.

⁵⁹ For the justice-related considerations, see Chapter 4, *infra*, 123, 125.

⁶⁰See Peter Cane, 'Using Tort Law to Enforce Environmental Regulations' (2002) 41 *Washburn Law Review* 427–467.

⁶¹Rogers, *above n* 56, 2, 4, 6.

tortfeasor. Weinrib explains this bilateral role of tort in terms of correlatives, right and duty working in parallel on opposing individuals.⁶² Thus, the focus of tort law has been interpersonal relations and it is a tool that serves as a means of private resolution of disputes.⁶³ Therefore, it is not expressly concerned with the protection of third party objectives such as environmental protection.⁶⁴ Yet, traditionally torts of nuisance and strict liability, negligence, trespass on land or statutory liability have been used for environmental harms, for example in the case of toxic torts, where a plaintiff harmed by noxious fumes seeks an injunction against the harmful activity of the defendant towards her and indirectly benefits the environment.⁶⁵ However, the role of tort in large-scale environmental pollution problems and when the activity impinges on public interest is limited.

The reasons for this limitation are inherent in the nature of common law actions, which are more time-consuming and expensive, fraught with complex technicalities and, in general, only on an individual, rather than a class, basis. A person cannot be the plaintiff in an action at common law unless he has a vested interest in the subject matter of action; so in an action in tort the plaintiff must be the person injured by the wrongdoer.⁶⁶

F Aligning the Reparative and Responsibility-Based Function of Tort in Environmental Claims

Evaluating the features and functions of tort on a theoretical basis one can discern that tort law can work in the following ways for environmental protection, assuming ‘environmental protection’ to be an interest of a person related to the person and their property, or statutorily recognised to be a duty that ought to be complied with by the regulators. In this context it is to be noted that nowhere in the Constitution of India (COI) the ‘environment’ and ‘natural resources’ are classified as having an independent interest translatable into a fundamental right per se. However under the directive principles and

⁶²See Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) 56–83. According to Weinrib, tort law is correlative in the sense that it organises human relationships in terms of two-party—‘bilateral’—relationships between a person under an obligation and a person who has a right, which mirrors (or is ‘correlative’ to) that obligation. In tort law, one person’s obligation is another person’s right; and it is this that makes tort law a vehicle of corrective justice. This understanding of corrective justice provides a strong argument for the non-instrumentalist approach.

⁶³See Mark Wilde, *Civil Liability For Environmental Damage: A Comparative Analysis of Law and Policy in Europe and United States* (Kluwer Law International, 2002) 9, 10.

⁶⁴Ibid, 9.

⁶⁵Ibid, 9.

⁶⁶D Hugh, *Environmental Law*, 3rd edn (Butterworths, 1998) 37.

fundamental duties chapter of the Constitution, the state and the citizens have a duty to respect and protect the environment.⁶⁷ Further, the state also has a sovereign claim over the air, water, unowned land, forests, and other natural resources.⁶⁸

In this context, a unique overlap between the environmental law objectives and tort law function is seen in recent cases and recognition of an ‘environmental interest’ per se. The Supreme Court has interpreted the provisions under the directive principles and fundamental duties to impose a responsibility on the state, which owns the natural resources in trust for the public and has emphasised that the distribution, allocation and use of natural resources for private interests ought to be based upon constitutional procedures and in tune with constitutional principles. The context in which both public and tort liability tools have been employed are those cases where a regulatory authority has granted permission to construct or develop without considering regulatory standards or the exercise of discretion and private polluters have pressured or influenced politicians to pursue profit-based industry in defiance of environmental standards and harmed not only the natural resources, ecology or the environment but also the people in a specific location. In *Reliance Natural Resources Limited v Reliance Industries Limited* (2010),⁶⁹ the Court observed that:

It must be noted that the constitutional mandate is that the natural resources belong to the people of this country. The nature of the word ‘vest’ must be seen in the context of the PTD. Even though this doctrine has been applied in cases dealing with environmental jurisprudence, it has its broader application.

Referring to *in re Special Reference No. 1 of 2001* (2004)⁷⁰ and *MC Mehta v Kamal Nath*⁷¹ the Court observed:

⁶⁷See Part IV ‘Directive Principles of State Policy’, Article 48A and IV-A ‘Fundamental Duties’ obliging the state and citizens to respect the environment, Article 51A(g) (the duty of the citizen to protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for living creatures). See also Durga Das Basu, *Introduction to the Constitution of India*, 15th edn (Prentice Hall, 1993) 131. However both the directive principles and fundamental duties are non-justiciable, see Article 37.

⁶⁸Natural resources are public and belong to the people but legally the state owns the natural resources, see Article 39(b) of the Constitution of India. The Supreme Court has used the provisions of Articles 48A and 51A (g) and Article 21 to carve out a fundamental right to a wholesome environment, thereby creating a body of environmental jurisprudence in India and providing markers for the development of a sustainable environmental protection policy by using public liability law. The use of public liability tools is discussed in detail in Chapters 5 and 6.

⁶⁹(2010) 7 SCC 1, per P Sathasivam J and CJ Balakrishnan.

⁷⁰4 SCC 489.

⁷¹(1997) 1 SCC 398.

This doctrine is part of Indian law and finds application in the present case as well. It is thus the duty of the Government to provide complete protection to the natural resources as a trustee of the people at large.

The Court also held that natural resources are vested with the government as a matter of trust in the name of the people of India, thus it is the solemn duty of the state to protect the national interest and natural resources must always be used in the interests of the country and not private interests.⁷²

G Responsibility for Harm and the Court's Role

Analysing the remedies fashioned in *Span Resorts* towards reparation of the harm done to the environment and the ecology of the area, one can argue that the reparative function of tort has been utilised by the Court in asking the polluter to bear responsibility and to pay damages towards undoing the harm and restoring the damage done. The damages imposed in *Span Resorts* case were to be used in reverting the construction to the Himachal Pradesh government.⁷³ This development seems similar to that advocated by proponents who emphasise that tort law, with its dual nature when used in environmental harms contexts, ought to be understood as dealing with responsibility for harm.⁷⁴ The Court's role here can be said to be that of striking a balance between the plaintiff's interest (in this case a public-spirited lawyer standing for the harm done to an ecologically sensitive area) with the defendant's interest to pursue an action within the right to construct a resort. The tort standard of reparative justice that the Court has adopted seems to imply that the Court has adopted an environmental standard from within the abstract, but flexible, standards that tort liability exhibits to resolve a highly disputed claim. This also rests on the correlative nature of tort liability and its compensatory interpersonal nature and balancing of interests. One can argue that this character of seeking compensation reflects a multifaceted approach the Court has taken upon itself to set regulatory and tort-based standards.⁷⁵

⁷²See Ravi Kant, *Centre for Public Interest Litigation and others v Union of India and others Writ Petition (Civil) 423 of 2010*, Law Reports of India, <<http://www.lawreports.wordpress.com>>.

⁷³*MC Mehta v Kamal Nath WP 182/1996*, 15 March 2002, Imposition of exemplary damages to the tune of ten lakhs INR was imposed apart from damages.

⁷⁴See Peter Cane, 'Using Tort Law to Enforce Environmental Regulations' 41 (2002) *Washburn Law Journal* 427, 429.

⁷⁵See Kenneth Abraham, 'The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview' 41 (2002) *Washburn Law Journal* 379.

Additionally, it may act to provide an incentive to engage the Court against polluters, whether the private or even government regulators are held responsible for harmful environmental actions. This development of the use of tort liability also reflects similar developments within the European Committee's Commission that allows groups to recover costs for the harm or damage done to the environment for its protection, and within⁷⁶ Dutch law that allows pro-environment organisations reparative damages for the harm done to the environment in terms of costs.⁷⁷ The liberal standing to sue accorded to citizens and organisations within India under the Court procedure and the Constitution in environmental cases⁷⁸ provides an incentive to proceed not only against regulators but also for vindication of victims' rights and interests, and an ideological concern for the environment that is discerned in recent cases. This development is a significant feature of the interconnecting and overlapping of tort liability with public liability tools within the environmental law field.

H Context in which Legal Liability Overlaps with Social and Cultural Factors

With respect to the growth of environmental legal liability and its tools, the Indian development has been different to that of other developed countries and reflects the tensions apparent in resorting to tort remedies for environmental public concerns that are at odds with the cultural, social and constitutional ideals. However, environmental conflicts have loomed increasingly large and the strategy to resolve such conflicts reflects consideration of all levels of interests: political, legal, economic and social.⁷⁹ A variety of ideologies and concepts have been relied upon to provide for environmental justice. The Indian indigenous and legal tradition carrying the notion of dharma—both duty and responsibility—as enumerated by academics and comparative lawyers has also presented a strong divergence from the Anglo-American concept of rights and the recognition of private interests in the environment.⁸⁰ This is so even among those who have been educated in the common law tradition.⁸¹ The understanding of 'nature and environment'

⁷⁶Environmental Liability, White Paper for the European Commission, COM (2000) 66.

⁷⁷See Gerrit Betlem, 'Standing For the Ecosystem—Going Dutch' 54 (1995) *Cambridge Law Journal* 153.

⁷⁸The liberal standing and ability of citizens to sue in environmental cases is discussed in Chapter 5, 'Locus Standi and Article 32'.

⁷⁹See CM Abraham, above n 37, 3–4.

⁸⁰For details on dharma and rights see Chapter 4, *infra*, 106, 108, 112.

⁸¹See generally Werner Menski, *Comparative Law in a Global Context* (Cambridge University Press, 2006) 82–128; Masaji Chiba (ed), *Legal Pluralism: Towards A General Theory Through Japanese Legal Culture* (Takai University Press, 1986); Alan Watson, *Legal Transplants: An Approach To Comparative Law*, 2nd

being more in terms of a public duty rather than an individual's right has been implicitly internalised as an indigenous concept of the Indian culture and is reflected in certain judgments pertaining to environment and development conflict claims. This internalisation of the indigenous concepts is said to reflect a unique feature in the growth of environmental jurisprudence in India.⁸² However, this emphasis stays as a persuasive obiter reflection.

1 Social Justice Under Constitutional Ideology

Additionally, the manner in which the pursuit of social justice ideology permeates all public interest issues in India has led to according secondary importance to private law claims under tort. A most exacting example lies in the abrogation of the fundamental right to property that was trumped by a constitutional amendment.⁸³ The 44th Amendment removed the right to property from the Fundamental Rights Chapter by deleting Articles 19(1)(f) and 31 and by inserting the 'Right to Property' under Article 300A in Part XII of the Constitution.⁸⁴ After the Amendment, the manner in which an individual's right to property was affected and the manner in which the Court provided meaning to the Constitutional amendment and basic structure doctrine have also influenced the development of tortious liability for harm to an individual's property. It is argued that most of the times within the environmental law it was state inaction that had transgressed an individual's property or resulted in harm to an individual or to a group of people⁸⁵. In a situation where the state has transgressed a right, a claimant has three options: where a state employee during the course of his employment has negligently caused harm, the state is immune from tort liability if it was a sovereign function that was being performed. A victim could only obtain compensation if it was proven that the harm was due to a non-state function.⁸⁶ Secondly, tortious liability would arise where (a) the statutory

edn (University of Georgia Press, 1993) 108; Esin Orucu, 'Unde Venit, Quo Tendit Comparative Law?' Andrew Harding and Esin Orucu (eds), *Comparative Law in the 21st Century* (Kluwer, 2002) 1–18, 13.

⁸²For details see Chapter 4. See also CM Abraham, above n 37, 3–4.

⁸³See the 44th Amendment to the Constitution and addition of Articles 31(A) and (B) and the IXth Schedule. For a critical review of the abrogation of the right to property see Sushanth Salian, 'History of the Removal of the Fundamental Right to Property', *Working Paper* (2002) *Centre for Civil Society* 231–255 <<http://www.ccsindia.org/ccsindia/interns2002/25.pdf>>.

⁸⁴Article 300A provides: 'Persons not to be deprived of property save by authority of law—no person shall be deprived of his property save by authority of law.'

⁸⁵See also *infra*, Chapter 3. Although tort law principles have been influenced and been built upon British common law within India, the different social justice ideology and the abrogation of right to property under the Constitution may have influenced the evolution of tort liability for protecting a person's right to property.

⁸⁶See *Nagendra Rao v State of Andhra Pradesh* AIR 1994 SC 2663 (The court differentiates between a sovereign and a non-sovereign function of the state, where the state has immunity for the former but is liable for a tort in the latter). For recognition of constitutional tort see *Nilabati Behera v State of Orissa* (1993) 2

authority acts outside its legal authority while purporting to act pursuant to the legal authority conferred upon him and (b) the act or omission which causes or results in damages to a person is not within the purview of the statutory protection, if any, contained in such enactment.⁸⁷ Lastly, where a fundamental right had been violated a victim could seek a constitutional remedy under Article 32 for a constitutional tort. Grant of compensation as a remedy for a constitutional tort is different from a traditional tort and ought to be viewed differently. The recognition of constitutional torts is a development that is parallel to the evolution of the law applicable to actions in tort against the government.⁸⁸ In order to avoid any procedural difficulties that fetter ordinary litigation, the courts do not approach the matter where a victim seeks compensation for violation of a fundamental right like traditional tort litigation. There are two main reasons for this distinction; first, the wrong complained of is not a tort in the traditional sense but a breach of the Constitution, hence the substantive law is different. Second, the forum is a different one as the victims approach the court through writ jurisdiction that is confined to the higher judiciary and the Civil Procedure Code(CPC) does not automatically apply to the writ jurisdiction.⁸⁹ Nevertheless, in examining the liability functions and objectives that tort liability deals with, even Constitutional torts for violation of the virtual right to the environment adopt the corrective and reparative justice argument. Consequently, tort liability and public liability interconnect and overlap within the context of environmental rights violation.

The larger paradigm of the environmental liability regime existing on the current law is built upon regulatory law, a weak command and control regime vacillating between the virtually recognised right to the environment and the concept of the fundamental duty to protect and preserve the environment. Within this paradigm, a new trend has gained a new direction within the contemporary environmental jurisprudence in India: of environmental compensation not only to the victims but also towards reparation of the environment as stated in Chapter One and illustrated above. From a pilot preview of recent literature and cases, it appears that tort liability features are too indistinct and the different objectives of environmental law and tort law reflect non-congruence and in certain

SCC 746, where it was clarified by the Supreme Court that it is always open to the Supreme Court (under Article 32 of the Constitution) and to the High Court (under Article 226 of the Constitution) to award compensation in the exercise of their constitutional powers. It was clarified that such an award did not finally specify, or put an end to, the claim for damages and that such an award is only provisional, and shall be taken into account by the civil court when awarding damages according to law.

⁸⁷See *Martin Burn Ltd v Calcutta Corporation* AIR 1966 SC 529 at 535.

⁸⁸See PM Bakshi, 'Liability of the State in Tort', Final Report on the Consultation Paper of the National Commission to Review the Working of the Constitution, Government of India, 2001, <<http://lawmin.nic.in/ncrwc/finalreport/v2b1-13.htm>>.

⁸⁹*Ibid.*

instances, conflict. The objectives and goals are assuredly different in many respects and provide for different remedies. The uncertainty and unpredictable nature for seeking remedies for an environmental claim in India necessitates the examination and determination of the theoretical basis upon which the law, policy and judicial decisions provide remedies within the present environmental liability framework. This analysis hence becomes vital to secure certainty, predictability and determine the ‘gap-filling’ nature of tort law within the environmental liability regime.⁹⁰

2 Environmental Damage and the Economic Context

Environmental damage and its effect on the people’s rights is a matter to be dealt with by public law and the remedies under tort law are largely marginalised. For now, the ever-present social welfare state is as involved in the developmental process as businesses were in capitalising gains. With different priorities and varying stages of economic development India’s ability to deal with the consequent environmental problems has been directly related to its economic development and limited its ability to meet its international obligations. After the 1992 Rio Conference it was accepted that developing countries had a ‘common but differentiated responsibility’ because the developing countries had relatively different priorities as they were at various stages of economic development and had varying abilities to meet and enforce international environmental obligations.⁹¹ Faure et al state that this notion has been further substantiated by the Environmental Kuznets Curve (EKC).⁹² This analysis suggests that upon an environmental–economic analysis there exists a relationship between environmental protection and national income and environmental performance and national income. This EKC curve relation has been further reiterated by the National Environmental Policy 2006 and the Report to People on the Status of Environment and Forests in India 2010, which categorically recognise that economic growth will be slower if environmental protection is not improved.⁹³ In analysing the EKC curve, Esty and Porter indicate that there is a link between environmental performance and economic vitality and suggest, among other things, that the quality of environmental regulation plays an important role in determining the

⁹⁰ See Mark Latham, Victor E Schwartz and Christopher E Appel, ‘The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart’ (2011)80 *Fordham Law Review* 737–774.

⁹¹ See Ulrich Beyerlin, *Different Types of Norms in International Environmental Law: Policies, Principles and Rules*, 425, 442; Dinah Shelton, ‘Equity’ 639, 656–658 in Daniel Bodansky et al. (eds) *The Oxford Handbook of International Environmental Law* 2007 as cited in Michael Faure, Morag Godwin, Franziska Weber, ‘Bucking the Kuznets Curve: Designing Effective Environmental Regulation in Developing Countries’ (2010) 51 *Virginia Journal of International Law* 95–156.

⁹² Faure, Godwin and Weber, above n 91, 97, 99.

⁹³ See above, Overview of Environmental Problems, Section B, 19–23.

environmental performance of developing countries but this is unconnected to the level of economic development.⁹⁴ Building on this hypothesis, Faure et al state that in order to have an effective enforcement of environmental regulation governments can achieve better protection for both the environment and human health without waiting for poverty to be reduced or economic growth to reach a certain level.⁹⁵ For environmental justice to be actually reflected—to be done and also to be seen to be done—concerted efforts need to be made to adopt a cumulative approach⁹⁶ in the legal policy.

Environmental lawyers argue that environmental protection and environmental justice ‘cannot be translated into an individual perspective for it involves public participation—a socially informed choice by the people whose environment is being affected and it cannot be dealt with in a piecemeal manner.’⁹⁷ For achieving environmental objectives the state must strike a fair balance between private and public interests.⁹⁸

In the last 25 years, despite regulation and the use of the constitutional machinery in controlling environmental damage and providing access to environmental justice, the attempts of most nations, including India, to control pollution and environmental damage have met with only partial success. In the common law world this has further pushed the role of tort, which was the original means to combat environmental problems, to a periphery.⁹⁹ It is only by examining the existing tortious liability systems in the light of wider conceptual theory regarding the functions of tort that a deeper understanding can be gained of the actual nature of tort liability within the environmental liability framework and its interconnections and overlap with public liability law.

⁹⁴Dan Esty and Michael Porter, ‘National Environmental Performance: An Empirical Analysis of Policy and the Determinants’ (2005) 10 *Environment and Development Economy* 391, 397–99.

⁹⁵Faure, Godwin and Weber, above n 91, 95–156, 154, 156.

⁹⁶Faure, Godwin and Weber, above n 91, 95–156.

⁹⁷Ibid, 113; see C Miller, ‘Environmental Rights in a Welfare State? A Comment on DeMerieux’ (2003) 23 *Oxford Journal of Legal Studies* 111, 125–126. Miller argues that judges occasionally grant compensation to those environmental victims who, ‘despite the existence of regulatory regimes over statutory nuisances, pollution and hazard are still obliged to live in conditions which the majority would find intolerable.’ However, Miller argues that such payments could be seen as a mere ‘form of income redistribution rather than as evidence that all Her Majesty’s subjects now enjoy a right to a clean and healthy environment’. See also D Hart, ‘Environmental Rights’, in Rosalind English and Philip Havers (eds) *An Introduction to Human Rights and the Common Law* (Hart, 2000); Philip Havers and Rosalind English, ‘Human Rights: A Review of the Year’ (2003) 6 *European Human Rights Law Review*, 587–600, 594; K Cook, ‘Environmental Claims as Human Rights’ (2002) *European Human Rights Law Review* 196; Richard Desgagne, ‘Integrating Environmental Values into the European Convention on Human Rights’ (1995) 89 *American Journal of International Law* 263, 294; Ole W Pedersen, ‘European Environmental Human Rights and Environmental Law: A Long Time Coming?’ (2008) 21 *Georgetown International Law Review* 73–111.

⁹⁸Desgagne, above n 97.

⁹⁹See Betlem, above n 3.

I Failure of Regulatory Institutions for Civil Liability in the Context of Hazardous Accidents

Faure et al¹⁰⁰ suggest that India, among other developing nations, has neglected important questions of regulatory design for environmental degradation. While economic development remains the long-term goal, in the short term the quality and type of environmental regulation can significantly help further this goal by being effective.¹⁰¹ Thus, if legal regulation for environmental protection is effectively designed the problem of failures in enforcement can be overcome taking into consideration the legal, economic, political and social situations in which such laws operate.¹⁰² Before Bhopal there were no insurance schemes for accidents that may have arisen due to negligence that affected a large number of people. There were few nuisance claims for individuals and public nuisance was dealt with primarily under criminal law rather than tort law. During the 1970s the judiciary was more focused on cases involving the violation of the fundamental right to property, trade, development and the right to life than the 'right' to environment or a private right not to be disturbed by certain actions. The former actions were considered more socially and economically relevant than one individual's inconvenience. One can assume that this might have formed part of the reason why not many tort cases were filed or reported. Galanter provides data from 1976–84 to show that the development of tort claims has been minimal in India and very low amount of damages have been granted in a few cases of the total filed in various courts.¹⁰³ It was only after *Ratlam* and then Bhopal that there was a revival of tort principles and nuisance claims for environmental damage.

However, the potential use of tort doctrines was overshadowed by the evolution and use of the instrument of PIL by the judiciary. Except for modification of the strict liability doctrine into absolute liability in the *Oleum* gas leak case by Bhagwati J, and the introduction of the Public Liability Insurance Act 1991 (PLI, the Act for short in this

¹⁰⁰ Faure, Godwin and Weber, above n 91.

¹⁰¹ Faure, Godwin and Weber, above n 91.

¹⁰² Faure, Godwin and Weber, above n 91, 99.

¹⁰³ Marc Galanter, 'Law's Elusive Promise: Learning from Bhopal' in M Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths -LexisNexis, England, 2002) 172–185. See also M. Galanter, 'The Displacement of Traditional Law in Modern India', (1968) 24 *Journal of Social Issues* 24, 65. There is no mention of tort cases or application of tort law in Alan Gledhill survey in 1951 A. Gledhill, *The Republic Of India: The Development of its Laws and Constitution* (1951) and only a passing reference to tort cases in MP Jain's *Outline of Indian Legal History*, 649-650, 657-658. No tort cases were brought in respect of mine caving, industrial explosion or other mass injury leading to tort claims see G. Wilson and M. Versallies' *Empirical Research On Tort Cases in India from 1975-84* (JD student 1986, 1991, University of Wisconsin, Law School) in M Galanter, 'The Transnational Traffic in Legal Remedies', at <http://marcgalanter.net/Documents/papers/TransnationalTrafficinLegalRemedies.pdf>.

section) the Supreme Court chose to use constitutional and regulatory instruments under public law. The Act was enacted largely in response to the fatal gas leak in Bhopal. The main objective of the Act was to provide for damages to victims of an accident which occurred as a result of mishandling of any hazardous substance causing personal injury or property damage to non-employees, thereby imposing strict liability.

The Act applies to all owners or operators associated with the production or handling of any hazardous chemicals. However one shortcoming that was glaringly evident was that the Act applied only to hazardous substances listed under the schedule to the Act. Under the scheme of the Act, each operator of a hazardous substance is mandatorily required to take out one or more insurance policy providing for contracts of insurance thereby insuring the operator against liability to give relief under the Act.¹⁰⁴ The Act provides that no insurance policy taken out by an owner shall be for a amount less than the amount of the 'paid-up capital' of the undertaking handling any hazardous substance and owned or controlled by that owner and more than the amount, not exceeding fifty crore rupees, as may be prescribed.¹⁰⁵ Further, and most significantly, every owner is also required to pay the insurer an equivalent amount of premium to be credited to the Environment Relief Fund established under Section 7A. Such an amount does not exceed the amount of the premium. The Environment Relief Fund was designed to provide immediate medical relief and compensation for injuries and is capped at a maximum of 25,000 rupees in case of death and 12,500 rupees in case of partial injury. However, the Act does not bar relief for victims through civil suits and is the only insurance liability law that provides a clear and recognisable means for victims to claim compensation.¹⁰⁶ The statutory authority under the Act functions like a civil court for the purposes of taking evidence and examination of witnesses. The Act also provides for criminal penalties for violation of its provisions. However, a major criticism of the Act was that, first, it only applied to accidents occurring while handling or operating hazardous materials and injury and damage or nuisance type

¹⁰⁴See Sections 3, 4(1), 4(2) and 7A, Public Liability Insurance Act.

¹⁰⁵See Section 2A, Public Liability Insurance Act.

¹⁰⁶Under Section 8(1), Public Liability Insurance Act, the right of the victim to relief in respect of the death of, or injury to, any person or damage to any property shall be in addition to any other right to claim compensation in respect thereof under any other law for the time being in force. Section 7(5) of the Public Liability Insurance Act provides that the collector shall have all the powers of the civil court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the collector shall be deemed to be a civil court for all the purposes of Section 195 and Chapter XX of the Code of Criminal Procedure (CrPC), 1973 (2 of 1974). Sections 14–16 of the law provide for penal fines and imprisonment ranging from one year six months to seven years for not taking out an insurance policy. Under Section 6(3) Public Liability Insurance Act, no application for relief shall be entertained unless it is made within five years of the occurrence of the accident.

actions were not recognised. Second, it also barred relief for claims which were not brought within five years of the occurrence of the accident. Obviously, as is evident from the plight of the Bhopal victims, genetic disorders and diseases are still being treated and are likely to occur in future due to the harm done to the water, land and environment around the Union Carbide factory. So environmental harms through slow pollution or through hazardous substances may not manifest early and may take a long period to show significant effects. In this case, the Act found only limited applicability. Furthermore there was no data to point out whether hazardous substances operators were ever prosecuted for not taking up insurance as mandated by the Act. To tide over the non-availability of higher and adequate damages and to provide for better environmental protection, the Parliament legislated the National Environmental Tribunal Act (NETA) 1995, to provide for strict liability for damages arising out of any accident occurring while holding any hazardous substances and for the establishment of a National Environment Tribunal (NET) for disposal of cases with power to give relief and damages to persons and for harm to property and the environment.¹⁰⁷

The Tribunal was vested with civil and criminal powers, and as an investigating authority comprising the judiciary, as well as administrative, scientific and technical experts.¹⁰⁸ As an advanced feature as compared to the Public Liability Insurance Act, the Tribunal could do away with the evidentiary rules of procedure under the Civil Procedure Court 1908 and decide cases based on the principles of natural justice while acting as a civil court.

However, without proper evidentiary procedures and rules and barring the jurisdiction of other civil courts to entertain disputes relating to the environment, the NETA did not function effectively and proved to be an obstacle for private claims for environmental harms. Neither did it explain the rules related to environmental liability or insurance liability, in contrast to the Public Liability Insurance Act. Although the Tribunal was founded, as envisaged under the NETA in New Delhi, the appointment of the requisite number of members and the Chairperson took a lengthy period of time.¹⁰⁹ There were other teething difficulties, but once the Tribunal started to function, cases coming to the Tribunal, having acquired a political character were hotly contested. Most of these cases ended up in the Delhi High Court for judicial review or in appeal to the Supreme Court.¹¹⁰

¹⁰⁷ Act 27 of 1995.

¹⁰⁸ Section 5, NETA.

¹⁰⁹ Sections 9(5), 10, 19, 25, NETA.

¹¹⁰ Section 24, NETA.

To add to further confusion for the victims and the polluters or an industrial enterprise, the National Environment Appellate Authority (NEAA) was established under the National Environment Appellate Authority Act 1997.¹¹¹ Its main objective was to hear appeals with respect to restriction of areas in which any industrial operator could carry out its operations and to provide for a forum for aggrieved individuals or bodies to raise objections to non-adherence or violation of environmental impact assessment (EIA) procedures under the EPA and anti-pollution laws.¹¹² Similar difficulties occurred during the establishment of the NETA were seen in the appointments and budgetary funds for the NEAA. However, after the enactment of the NGTA, the NETA and NEAA were both repealed.

The NGTA was enacted for two purposes. It finally gives statutory recognition to tortious liability principles in that it provides for civil compensation for environmental harm. The Green Tribunal has only been recently set up. In *Union of India v Vimla Bhai and Ors*¹¹³ the Supreme Court, in its latest order dated 11 May 2011, directed the NGT in Delhi to take followup action in cases which were not filed due to the non-functioning of the NGT. Before 30 May 2011 it was directed to also accept cases from all over India until the time the other benches in Pune Kolkata, Bhopal and Chennai are functional. With the enactment of the NGTA there is the hope that with civil compensation and damages on the statute book the courts will take greater consideration of insurance and risk management laws in environmental harm cases and provide solutions that account for the mixed objective approach of the legal liability that tort has to offer and certain functions of tort that can be used to augment the regulatory approach that has been recognised within the environmental law framework.¹¹⁴

J A Forgotten Factor: The Effect of Insurance on the Role of Tort

In respect of tort liability claims in environmental actions tort there must be a strong framework law for insurance. Tort law does not function in India, primarily because insurance laws and insurance schemes are not well developed and are available only within limited areas and not clearly delineated for environmental liability insurance. Of course there are statutes that cover motor vehicles claim, employees' accidents or medical and health insurance, and the Public Liability Insurance Act enacted in 1992 providing

¹¹¹ Act 22 of 1997.

¹¹² Sections 11, 12, 19, NEAA.

¹¹³ SLP (Civil) no 12065/2009.

¹¹⁴ The NGTA is discussed in detail in Chapter 6, *infra*, 231-233.

immediate relief to victims of environmental disasters. However, in the field of operation of industrial plants or hazardous industry from the point of view of environmental liability, the non-availability or limited schemes available for insurance has affected the development of tort law claims generally and an environmental action in particular. It is difficult for impecunious individuals or small scale or even large companies to pay environmental damages without insurance cover. Moreover, in a developing nation the task of providing for insurance is fraught with financial and logistic difficulties. There are also historical reasons for why tort claims and environmental tort claims are not preferred. Active environmental campaigns became significant only after three decades of India's independence. The national priority for a developing nation was focused more towards technical and industrial advancement and use of natural resources for economic growth.

J.1 Evidence from Ancient India

Insurance schemes were recognised in Ancient India in the writings of Manu (*Manusmrithi*), Yagnavalkya (*Dharmasastra*) and Kautilya (*Arthasastra*).¹¹⁵ The ancient economic structure recognised the pooling of resources for re-distribution in times of calamities such as fire, floods, epidemics and famine. There were also provisions for marine trade loans and carriers' contracts.¹¹⁶ This points to existence of an insurance system similar to modern day insurance. During and after the British period, insurance was modelled on the British system. After independence there was not much change in the insurance provisions which existed largely for life insurance, workers' compensation, pension funds, motor accident claims, agriculture and rural schemes, and health and medical benefits.¹¹⁷ However with the growing economy the insurance industry in India has evolved and the Insurance Act 1938 been amended.¹¹⁸ In 1999, the recommendations of the Malhotra Committee report were accepted by the Parliament to enact the Insurance Regulatory and Development Authority (IRDA).¹¹⁹ This is an autonomous body constituted to regulate insurance companies, develop and promote insurance business within the country. The key objectives of the IRDA include the promotion of competition so as to enhance customer satisfaction through increased consumer choice and lower

¹¹⁵ See for example Kautilya's prescriptions on criminal law and against senseless killing of animals protection of nature and financial incentives in B, Rich, *To Uphold the World : A Call for a New Global Ethic from Ancient India*, (Beacon Press, 2010) 30,31, 72-75, 130.

¹¹⁶ See the Insurance Regulatory and Development Authority website <<http://www.irda.gov.in/Defaulthome.aspx?page=H1>>, today there are 24 general insurance companies, including the Export Credit Guarantee Corporation and Agriculture Insurance Corporation of India and 23 life insurance companies operating in the country.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

premiums, while ensuring the financial security of the insurance market.¹²⁰ According to the data provided by IRDA, the insurance industry is growing at a rate of 15–20 per cent and along with the banking services, insurance services add about 7 per cent to the country's gross domestic product.¹²¹

The insurance sector is divided into life insurance, non-life insurance and general insurance (marine, cargo, air freight, bankruptcy, assets, business, home, fire, theft, accidents and third party liability). Yet mandatory insurance schemes for environmental risk management and impairment liability are not clearly spelt out except for hazardous accidents under PLIA 1991 as discussed above in Section immediately above. An industrial plant operator needs to buy various policies to cover its losses and provide for compensation by taking out workers' compensation, assets, business capital, bankruptcy, fire and related insurance policies. Insurance cover for victims of environmental damage other than employees is largely absent. Hence, the victims of environmental pollution or an individual plaintiff who claims under nuisance against a small company is dissuaded by lawyers, the relatively high cost of establishing injury by scientific means and summoning of expert witnesses, and the small amount of compensation awarded by the courts on the basis of precedents.

K Summary and Conclusion

Tort law exhibits multiple features that can potentially play a role in environmental protection. Tort law is concerned with providing a remedy within the interpersonal relationship framework in which it is applicable. It functions to provide an answer to the recognisable harm, to cure the harm, to recompense and to repair rather than punish. It is partly also concerned with risk; however, that becomes incidental as tort liability is primarily fault-based. Environmental damage is not predictable or foreseeable because of various environmental risks and hence statutory law may not be applicable to a situation where such risks materialise. To deal with these kinds of damage one could probably rely on civil liability rules. However, before these rules are applied or enacted, either the courts, within the limits of their jurisdiction, or the legislature should analyse the objectives of

¹²⁰Ibid.

¹²¹Ibid.

these liability rules. Hence, these rules need to be certain and predictable and one also needs to know whether such rules will provide the desired result or cause further difficulties or an unwanted effect.¹²² Thus tort law can help to plug the gaps in the public liability regime in certain situations when a victim is looking towards remedies for personal injury and property damage resulting out of an environmentally harmful activity.¹²³

The question that needs examination is the role that tort law could play in addressing environmental harms—what is the most advantageous feature that might work to enhance environmental values and resolve claims in contrast to the role that environmental regulation plays in India? The discussion in this chapter has proceeded to identify the context in which environmental liability operates keeping in mind the research question as stated above. It has attempted to establish certain inadequacies and gaps within the existing environmental law and policy context. It has highlighted that civil liability and tort law has been used reluctantly and irregularly to plug certain gaps in environmental claims, not all. Yet, within the Indian context, tort liability rules in environmental context are not very clear or certain hence one needs to explore the nature, scope and functions of tort law and its operation to determine its potential use and gap filling nature. Accordingly, Chapter Three explores those environmental torts that have been used to vindicate environmental claims. It explores how tort liability for environmental harm has been used in the UK and contrasts it with the application of environmental torts, especially of public nuisance within the Indian context. This is being examined in order to determine the rules and procedures within which tort liability operates and its limits in actual operation.

¹²²Ibid, 13.

¹²³See Latham, Schwartz and Appel above n 90, (especially in the context of protection of limited individual environmental interests recognised by tort and environmental law).

III CHAPTER THREE: TORTIOUS LIABILITY FOR ENVIRONMENTAL CLAIMS—THE FEATURES AND LIMITS OF TORT LAW AND ITS APPLICATION IN INDIA

A Introduction

This chapter seeks to show how the common law system gave rise to remedies for environmental harms through the use of tort principles. It sketches an overview of how the tort system responded to environmental harm by application of the traditional torts of trespass, nuisance, strict liability and negligence within common law jurisdictions such as the UK. Second, it examines and compares the contours of the tort system that emerged to address certain environmental harms in India through the use of public nuisance. Third, in identifying the limits of environmental tort liability and the reasons it was found inadequate, the chapter sets out the distinct areas within which tort liability can operate or ought to operate for environmental harm.

B Intersection of Tort and Environmental Law

In the last three decades there has been an explosion of legislation in India covering a variety of environmental interests.¹ The current legal framework includes over 200 laws relating to environmental protection, preservation, management and liability, governing hazardous waste, air, water, land, noise pollution, wildlife and the protection of endangered species. It also includes legislation with respect to forest conservation, handling of biomedical and hazardous substances and the establishment of various state authorities under the central government of the Ministry of the Environment and Forests and specific statutes.² The statutory authorities, such as the Central Pollution Control Board (CPCB) and various State Pollution Control Boards (SPCBs) or the Wildlife Protection Authority of India, among others, have been empowered to implement and enforce the regulatory standards. Prior to the 1970s the legal system in India primarily relied on

¹See eg, Water (Prevention and Control of Pollution) Act 1972, Wild Life (Protection) Act 1972, Air (Prevention and Control of Pollution) Act 1981, EPA 1986, Public Liability Insurance Act 1991, National Environmental Tribunal Act 1995, Biodiversity Act 2002.

²See Environmental Compliance and Enforcement in India: Rapid Assessment OECD Report 2006, <<http://www.oecd.org/dataoecd/39/27/37838061>>. See also Government of India, Ministry of Environment and Forests <<http://www.moef.goi>>.

criminal as well as tort law to vindicate environmental wrongs.³ As environmental legislation grew over a period of time, with specific laws being enacted for addressing environmental harms, tort law became relegated, and as some scholars assert, fell into redundancy.⁴

The emergence of environmental law and the relegation of tort law to a lesser-explored tool raises a serious, but largely unaddressed, question within the academic literature as to the role and intersection of tort and environmental law. Perhaps it is better to define the objectives of tort and of environmental law to find where there is overlap and divergence. If the objectives of tort and environmental law are the same, then of course defining the proper role of tort within the environmental context will help an environmental claimant obtain a certain type of remedy. This determination will make the claimant's task easier, provide certainty and guide the judiciary in providing a remedy to the plaintiff and directions to the defendant. However, the objectives of tort and environmental law only overlap where environmental law is also concerned with the deterrence and compensatory functions for a specified environmental interest. Where the purpose or objective of environmental law is, for example, preservation, conservation or zoning then of course tort law does not come into the picture. However, the wider perception is that environmental law, despite the challenges apparent in defining it⁵, is concerned with the liability laws to protect people and the environment from harm.⁶ It is also concerned with the correction of anti-environmental or harmful conduct that one generally observes within pollution correction measures.

Thus, for certain kinds of environmental harms the objectives of tort law and environmental law intersect and hence it is logical to identify the available common law

³See Marc Galanter, 'Law's Elusive Promise: Learning from Bhopal' in Michael Likosky (ed) *Transnational Legal Process* (Butterworths LexisNexis, 2002) 172,176. See also Marc Galanter, 'The Displacement of Traditional Law in Modern India' (1968) 24 *Journal of Social Issues* 65 and Marc Galanter, 'Cease Congregations and Their Careers' (1999) 24 *Law & Society Review* 1201.

⁴See Divan and Rosencranz, 'Environmental Law and Policy in India' (Oxford University Press, 2002), 89–90. See also Galanter, above n 3.

⁵There are difficulties in defining environmental law as it addresses a variety of interests and spans diverse legal fields. It is organic in nature and is a composite of not only common law, constitutional law, administrative law, criminal law, international environmental principles and procedural laws but also customary and indigenous laws and social and economic policies. Within an environmental law framework dissonance and diversity provide a challenge to define it neatly. Within the existing common law jurisdictions with a Western perspective it is stated to be 'ad hoc, a conceptual hybrid, straddling many fault lines, and presumed to have no philosophical underpinnings', see Elizabeth Fisher et al, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 *Environmental Law* 213, 129.

⁶See Robert V Percival, Christopher H Schroeder, Alan S Miller and James P Leape, *Environmental Regulation, Law, Science and Policy*, 6th edn (Wolters Kluwer, Aspen Publishers, 2009) 346.

remedies. This helps to identify how the imposition of tort liability for certain types of environmental harms may help in achieving environmental justice, identify areas where it is not useful and also mark the gaps within the existing legal environmental regime.

In India the tort of public nuisance has been largely invoked to provide a remedy for environmental harms. However, the development and expansion of public nuisance theory has been subsumed under public liability law and a Constitutional rationale. The environmental liability framework now includes a variety of liability tools and policies, but most prominently recognises a virtual environmental rights bundle expanded from within the fundamental rights and duties that provide a basis for vindication of an environmental claim in India.⁷ Nevertheless, apart from limited application of the tort of public nuisance principle, a modified version of strict liability and the *Ryland v Fletcher* rule, private nuisance actions are still available to address various environmental claims in cases of both toxic and non toxic-hazardous industry accidents, especially after the Bhopal gas tragedy. The following section provides analyses of the traditional torts that have been used to remedy environmental claims under common law.

C Common Law Torts for Environmental Harms: Trespass to Land, Nuisance, Negligence and Strict Liability

Common law actions developed from procedural law and specific forms of action.⁸ Under the original forms of action a person could institute a writ for a specific right that had been violated. Of course specific writs were designed for a specific wrong.⁹ Hence, pursuing an incorrect procedure and choice of writ would thwart a plaintiff's claim. Thus, earlier in the UK, procedure more than substantive law held common law in a rigid straitjacket. Gradually, the forms of action were abolished.¹⁰ The UK Judicature Act 1873 replaced the old writs by a single writ in all circumstances, but common law still reflects the old streaks of the earlier times.¹¹ This is reflected in the action of trespass, which requires the plaintiff to show direct interference with the plaintiff's land or property¹² and in actions of

⁷See CM Abraham, 'Environmental Jurisprudence in India' (Kluwer Law International, 1999) 30–34.

⁸See FW Maitland, AH Clayton and WJ Whittaker (eds), *The Forms of Action at Common Law: A Course of Lectures* (Cambridge University Press, 1936).

⁹See M Lunney and K Oliphant, *Tort Law: Text and Materials*, 3rd edn (Oxford University Press, 2008) 43–45.

¹⁰*Ibid*, 21–22, 43–45.

¹¹The old forms of action are still reflected in the common law like a 'petrified forest'; BA Hepple and GL Williams, *Foundations of the Law of Tort*, 1st edn (Butterworths, 1976) 33.

¹²Lunney and Oliphant, above n 9, 43–45.

nuisance, where the plaintiff may bring a cause of action for indirect interference by polluted air, smoke, smell or noise with his or her interest in land or property and the enjoyment of it. Common law-based tort operates in India by virtue of Article 372 of the Constitution, which provides for the operation and continuation of the existing laws before the adoption of the Constitution in 1950.

1 Type of Harm: Trespass to Land

Trespass arose from the writ of *trespass vie et armis*, where a plaintiff alleged in the writ that the defendant had directly and intentionally interfered with the plaintiff's property or person with force and arms.¹³ These actions were originally connected with maintaining the King's peace and order (*contra pacem*) on the land and gradually were recognised as independent actions that included the actions of trespass to land, trespass to chattels, assault and battery.¹⁴ Consequently, the requirement of pleading trespass with 'force and arms' became redundant, and thereafter, trespass actions were recognised as direct interference with a person or a person's land or property.

A physical or tangible interference needs to be shown for an action of trespass. Thus trespass lies where an animal transgresses or trespasses on the plaintiff's land.¹⁵ However, for environmental damage a plaintiff needs to show a direct injury to his surroundings, which makes claims in trespass difficult as pollution of air or water lack a substantial physical interference—they generally are in the form of smoke, poisonous or harmful fumes, heat and noise. Unless the plaintiff claims for damage to their land, for example, contaminated soil where the defendant has actually and directly damaged the land, a plaintiff cannot bring an action in trespass. This is one of the limitations of trespass action in the environmental context. Air pollution and water pollution is subject to, and depends on, the wind and currents and therefore any interference with a neighbouring property cannot be said to be the direct and inevitable result of the defendant's conduct and this is what most of the decisions in England reflect.¹⁶ In *Jones v Llanwrst Urban Council*¹⁷ the defendants were held liable for trespass as due to their actions sewage was discharged

¹³Lunney and Oliphant, above n 9, 43–45.

¹⁴In *Lombe v Clopton* [1276] SS vol 55, 30, the plaintiff sued the defendant successfully for trespass to the person when the defendant, along with four others, attacked him in a village fair. His action for assault was not carried out on his land.

¹⁵See eg, *League Against Cruel Sports v Scott* [1986] QB 240 or *Holmes v Wilson* (1839) 10 A and E 503 where the defendant places some object directly on the plaintiff's property.

¹⁶Lunney and Oliphant, above n 9, 44

¹⁷[1908–1910] All ER 922.

directly into a stream that ran past the plaintiff's fields, which explained the directness of the action as it was inevitable that some of the solid waste would accumulate on the banks of the stream.

(a) Restrictive Application of Directness of Harm for Trespass to Land

This liberal application of directness was distinguished and a more restrictive interpretation was put in *Southport Corporation v Esso Petroleum Co Ltd*¹⁸ by LJ Denning. The action in this case was brought by the plaintiff company when a piece of land on the foreshore was polluted with oil that was discharged by an oil tanker. The action was in trespass, private and public nuisance and negligence. The plaintiff's claim in trespass was unsuccessful as the court held that in order for trespass to lie the defendant's act needed to be direct and where the act was consequential, 'case' was the appropriate action.¹⁹ In this case, the discharge of oil was held to be remote and the plaintiff's foreshore was polluted not due to the defendant's direct action but due to the action of the wind and the tides. However, in *Jones v Llanwrst* one distinguishing factor and a plausible explanation lies in the fact that the defendant had dumped sewage directly into a narrow stream and the force of the stream carried it out, although it was inevitable that much of the solid waste materials would accumulate on the banks where plaintiff's fields were, hence sewage disposal was a direct interference with the plaintiff's land.

While the UK courts have stressed a direct and tangible invasion upon the plaintiff's land, the courts in the US have recognised intangible, invisible invasion of particulate matter through the air and wind to constitute trespass. The only variation is that although at common law an action in trespass would lie without damage, the US courts have added that the plaintiff needs to prove substantial damage where the interference or invasion has been caused due to invisible or intangible matter or energy. For instance, the Supreme Court of Washington in *Bradley v American Smelting Refinery Co*²⁰ held the American Smelting and Refinery Company liable for trespass; however, the plaintiffs were not awarded damages as they failed to prove substantial injury to their land. In this case the plaintiffs were an association of landowners who complained that the heavy metal and

¹⁸[1954] 2 QB 182.

¹⁹LJ Denning explained the distinction between trespass to land and case by citing Prior of Southwark's case decided in the year 1498; [1498] YB 13 Hen 7, f26, pl. 4, the Prior of Southwark had sued the defendant calf skin tanner who had allowed lime from his tanning pit to escape into the Prior's stream, it was held that an action on the case for trespass could lie. See also Sir H Rossi, 'Paying For Our Past: Are We?' (1995) 7(1) *Journal of Environmental Law* 1–10.

²⁰104 Wash.2d 677 709 P.2d 782.

gaseous particles from the defendant's copper smelter constituted trespass and nuisance and that the defendant should be liable for damages. The defendant's smelting operation left a fine residue of microscopic particles of copper and other heavy metals on the plaintiffs' land and although the microscopic particles so deposited could not be seen with the naked eye, airborne particles of heavy metals and gases did travel to the plaintiffs land four miles from the defendant's copper smelter. The Washington Supreme Court, citing *Martin v Reynolds Metals Co*,²¹ the Restatement (Second) of Torts²² and the rationale in *Borland v Sanders Lead Co*²³ held that a trespass could lie in the instance of slightest harm such as vibration of the soil or by concussion of the air. In *Borland* the Court distinguished between trespass and nuisance action where it held that:

Whether an invasion of a property interest is a trespass or a nuisance does not depend upon whether the intruding agent is 'tangible' or 'intangible'. Instead, an analysis must be made to determine the interest interfered with. If the intrusion interferes with the right to exclusive possession of property, the law of trespass applies. If the intrusion is to the interest in use and enjoyment of property, the law of nuisance applies. As previously observed, however, remedies of trespass and nuisance are not necessarily mutually exclusive.²⁴

However, an action for trespass to land has not been invoked for environmental actions in India. A situation with some similarities to the US case of *Bradley* above arose in *PC Cherian v State of Kerala*.²⁵ The affected persons were a church and its parish. They complained that the factory's rubber manufacturing plant was causing the deposition of 'carbon black' onto the walls of residential buildings, on their clothes, affecting their health and contributing to air pollution. Arguably, the affected persons could have brought an action in trespass to land and the tort of nuisance, especially the church and the owners of the buildings where carbon black had been deposited, along with a private nuisance claim. However, in contrast to the *Bradley* case, the preferred manner to deal with this

²¹221 Or.86, 342 P.2d 790; the Oregon Supreme Court held that contamination of the plaintiff's ranch by the deposition of fluorides from the defendant's plant was a trespass and that trespass would lie where there was an invasion of the plaintiffs land and his exclusive possession by '...visible or invisible matter or energy which can be measured by only a mathematical language of a physicist'.

²²The Restatement (Second) of Torts § 821D, comment d, 102 (1979) states: 'For an intentional trespass, there is liability without harm; for a private nuisance, there is no liability without significant harm. In trespass an intentional invasion of the plaintiff's possession is of itself a tort, and liability follows unless the defendant can show a privilege. In private nuisance an intentional interference with the plaintiff's use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability.'

²³*Borland v Sanders Lead Co* (1979) 369 So.2d 523, 530.

²⁴*Ibid.*

²⁵1981 Ker LT 113.

specific situation in India required the affected victims to file a criminal complaint against the factory owner. The magistrate took cognisance of the matter under S133 of the Code of Criminal Procedure (CrPC) to abate public nuisance recognised under S268 of the Indian Penal Code. Although the same contamination may give rise to trespass and nuisance²⁶, in *PC Cherian* public nuisance was considered a better alternative remedial measure.

On appeal to the High Court the appellant contended that it had established its factory according to regulations and a similar operation was also being run by the government. However, arguments on the nature and character of the neighbourhood, and the complainant to the nuisance was not taken up before the High Court, as one would expect for a common law action for nuisance. However, the Court decided on the criminal and public nuisance aspect of health that is recognised under Section 133 of the CrPC, say for instance public nuisance caused due to the noise and sand-laden dust particles from a fodder cutting machine causing annoyance to the public at large. The Court in *PC Cherian v State of Kerala*²⁷ held that the deposit of carbon black in these cases was an instance of public nuisance, and even if the act may not have caused a health hazard to the public it could still constitute ‘nuisance’. Nuisance liability was thus used to make a case for an action polluting the air and environment of a locality.²⁸ However, unlike the arguments in the US courts, which have developed for nuisance cases, the Indian cases justify the decision more on a public law rationale with public interest considerations.

In India, such trespass actions of intentional invasion and even private nuisance are rarely brought to the courts²⁹. Moreover, even in private nuisance actions, especially for environmental harms, claimants have been deterred by the small scale of damages that the courts would award and the judicial attitude in colonial and even post-colonial times that reflected a bias towards industrial growth. Environmental actions involving the use of tortious liability dealt mainly with public nuisance and criminal sanctions under the CrPC and Indian Penal Code rather than private nuisance.³⁰

²⁶See *HE Stevenson et al v EI Dupont De Nemours and Co* 327 F.3d 400 (Supreme Court of Texas). Heavy metal contaminants polluted the plaintiff’s property travelling over a mile through the action of the wind was constituted a trespass on land. The court in this case also recognised that the same contamination may give rise to an action in trespass and nuisance.

²⁷1981 Ker LT 113.

²⁸See *infra*, Public Nuisance in the Indian Context, 77–82.

²⁹See Divan and Rosencranz, above n 4, 89, 96, 101.

³⁰See *infra*, Public Nuisance in the Indian Context, 77–82.

Further, an action in trespass to land brings forth strict liability as the tort protects one's right to land and its exclusive possession. However, actions for trespass to chattels and those to the person in the UK have been qualified with the requirement of fault or want of care. In *Stanley v Powell*³¹ and *NCB v Evans*³² (concerned with personal injury and harm to property) the court introduced and brought forth a requirement of fault. However, it is not absolute liability as the defendant may have involuntarily trespassed the plaintiff's land³³ or might have acted out of necessity³⁴.

2 Type of Harm: Nuisance

Nuisance is among one of the oldest common law actions. It was a crime and a tort, and in most jurisdictions it still maintains its dual headedness.³⁵ It extremely relevant for environmental harm due to the unique flexibility it has shown historically. It largely remains a property-based tort and this principle was reaffirmed by the House of Lords in *Hunter v Canary Wharf*.³⁶ The general and dictionary meaning of the term relates to annoyance and irritation; however, legal nuisance relates this irritation and annoyance to the use and enjoyment of a person's land or any kind of interference with proprietary interests. Nuisance has been earlier described as 'Nusance', 'nucanse', or the Latin 'nocumentum' that translates in legal terms to an 'annoyance' with the use and enjoyment of land.³⁷ Nuisance is also subdivided into public and private. A public nuisance, as defined by Sir James Fitzgerald Stephen is 'an act not warranted by law, or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects.'³⁸ In his seminal work *The Boundaries of Nuisance*³⁹ F.H. Newark has referred to public nuisance as a 'mongrel' tort for being 'intractable to definition' and stating that '[t]he prime cause of this difficulty is that the boundaries of the tort of nuisance are blurred'.

³¹[1891] 1 QB 86 and [1951] 2 All ER 310.

³²[1951] 2 All ER 310.

³³*Smith v Stone* (1647) Sty 65, D was carried on to P's land by force and violence of others, the other people who did this were liable, but not the defendant.

³⁴*Riverwear Commissioners v Admason* (1877) 2 App Cas 743; *Esso Petroleum v Southport Corp* [1956] AC 28.

³⁵Nuisance can be both a crime and a tort under Indian law.

³⁶[1997] AC 655.

³⁷William Prosser, 'Private Action for Public Nuisance' (1966) 52(6) *Virginia Law Review* 997–1027; See also Victor Schwartz and Phil Goldberg, 'The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort' (2006) 45(3) *Washburn Law Journal* 541–583.

³⁸Sir JF Stephen, *A General View of Criminal Law of England* (MacMillan and Co, 1863) 3–7.

³⁹FH Newark, 'The Boundaries of Nuisance' (1949) 65 *Law Quarterly Review* 480.

(b) Origin of Nuisance

As nuisance is a significant liability tool used against polluters, in order to understand its nature and role it is logical to trace its origins. The earliest references to nuisance-like action can be observed from the Statute of Bridges 1530.⁴⁰ This statute listed an action of ‘annoyance’ specifically and apart from interference with land and the use and enjoyment of it, and included an action when there was an infringement of right of easement or servitude over land.⁴¹ As the defendant’s act occurred outside of the land it was different from *disseisin* and trespass, being neither dispossession nor entry upon the plaintiff’s land. A special type of remedy was available for ‘nusance’ in the thirteenth century in the form of ‘assize of nuisance’ which was a criminal writ, but as with other criminal writs, such as assault and battery it also provided for civil remedy as well. Obviously, apart from keeping peace and order in the King’s land the intent was also to restore the landowners’ related rights to the ownership of land without which recognition of ownership would have been useless.⁴²

However, modern action for nuisance developed from ‘action on the case’ for nuisance, which in time superseded the writ of assize of nuisance.⁴³ The right to land for these purposes then included a right to enjoy abundant light, clean air and water and all the ordinary uses of land in which an owner may enjoy.⁴⁴ Any interference with the use and enjoyment of land would allow a plaintiff to claim in an action for nuisance for interference with the use and enjoyment of the owner’s land. Later, this recognition was realised in *sic utere tuo ut alienum non laedus* (use your own so as you do not harm another’s property). During the Industrial Revolution as pollution of the air, water and soil in the towns, urban areas and developing rural areas increased nuisance actions were filed in various situations to claim against defendants whose actions resulted in gaseous emissions from kilns,⁴⁵ furnaces,⁴⁶ and chemical dyeing factories.⁴⁷

In Aldred’s case the court held that ‘a man has no right to maintain a structure, upon his own land, which, by reasons of disgusting smells, loud or unusual noises, thick smoke,

⁴⁰22 Hen. VIII, c. 5. (UK, 1530)

⁴¹Prosser, above n 37.

⁴²Lunney and Oliphant, above n 9, 633.

⁴³See Prosser, above n 37, 998, who quotes Newark, above n 39.

⁴⁴Aldred’s Case (1611) 9 Coke Rep.f.57b.

⁴⁵Aldred’s Case, above n 44.

⁴⁶Morley v Pragnell Cro. Car 510.

⁴⁷Jones v Powell, Hutton, 136, Palmer, 539.

noxious vapors, the jarring of machinery, or the unwarrantable collection of flies, renders the occupation of adjoining property, dangerous, intolerable or even uncomfortable to its tenants.’⁴⁸

(c) *Private and Public Nuisance*

Nuisance actions are more widely used for tort to land than for trespass.⁴⁹ However, an action for private nuisance is different from that for public nuisance in that for the former the defendant’s act must emanate from neighbouring land.

Most of the earlier case law suggests that nuisance has been used to settle disputes between neighbours and this point was emphasised by L.J. Denning in *Southport Corporation v Esso Petroleum*⁵⁰ where he stated that no action could be founded in private nuisance because the discharge of oil resulted from the use of a ship at sea and not on land neighbouring the plaintiff’s on the foreshore.⁵¹ However, in the same case Lord Devlin stated that it was not necessary to show that pollution stemmed from land owned or occupied by the defendant, since for private nuisance tort jurisprudence the UK has generally been restricted to activities emanating from neighbouring land.⁵² All of the very useful and sophisticated economic analyses of private nuisance remedies published in recent years proceed on the basis that the goal of nuisance law is to achieve efficient and equitable solutions to problems created by discordant land uses.⁵³

⁴⁸Martha C Nussbaum, *Hiding From Humanity: Disgust, Shame and the Law* (Princeton University Press, 2004) 158–162.

⁴⁹Schwartz and Goldberg, above n 37, 541.

⁵⁰[1954] 2 QB 182, 196.

⁵¹However, the contrary view has been taken in Canada where it has been held that a plaintiff will have a cause of action in nuisance against an aircraft carrier where such an airplane has discharged a deleterious substance wrongfully onto the land of another; See *Bridges Bros Ltd v Forest Protection* (1976) 72 DLR (3d) 335 concerning crop damage to the plaintiff caused by drifting insecticide discharged by the airplane.

⁵²Atp 196, per Lord Dvelin.

⁵³*Hunter v Canary Wharf* [1997] 2 All ER 426 and *Cambridge Waters v Eastern Counties Leather* [1994] 1 All ER 53 discusses case law on both private and public nuisance requirements in the UK; for US case law see *Carroll v Absolute Tank Removal LLC*, 834 A.2d 823 (Conn Super 2003), dealing with contamination of the plaintiff’s property by oil leaking from an oil tanker installed by the defendant but situated on her own property. The court had to determine whether for private nuisance the act must emanate from another’s land and answered that for historical reasons the tort of private nuisance provides a cause of action to a plaintiff where the defendant’s activity has arisen from outside the land that it has affected. The action by the plaintiff in this case was rejected for nuisance, however she had also filed for separate counts for negligence; See also *Pestey v Cushman*, 259 Conn. 345, 355, 788 A.2d 496 (2002); *Philadelphia Electric Co v Hercules, Inc*, 762 F.2d 303 (3rd Cir), cert. denied, 474 U.S. 980, 106 S. Ct. 384, 88 L.Ed.2d 337 (1985). See also *Moore v Texaco, Inc*, 244 F.3d 1229, 1232 (10th Cir 2001); *Rosenblatt v Exxon Co*, 335 Md. 58, 80, 642 A.2d 180 (1994); *Donald v Amoco Production Co*, 735 So.2d 161, 170 (Miss. 1999); *Hydro-Manufacturing, Inc v Kayser-Roth Corp*, 640 A.2d 950, 957 (R.I.1994). American courts have also recognized the right of the sovereign over public natural resources similar to the Indian Courts and the Indian Constitution See *Missouri v Illinois* 200 U.S. 496 (1906) and *Georgia v Tennessee Copper Co*. 206 U.S. 203 (1907) these cases were

(d) Elements to Establish Nuisance Action

Nuisance is mostly closely concerned with ‘environmental protection’. Nuisance actions include the pollution of air through noxious fumes and smoke⁵⁴, pollution of water bodies by oil⁵⁵, offensive smells emanating from the keeping animals on land⁵⁶ or noise from industrial plants⁵⁷ and interference with leisure activities,⁵⁸ among others. In order to determine whether an actionable nuisance lies the court will take into account the following factors:

- a) The neighbourhood or locality where the activity is alleged to have occurred,
- b) Abnormal sensitivity of plaintiff,
- c) The right to prescription,
- d) Fault of the defendant,
- e) Negligence subsuming nuisance, and
- f) Statutory authority.

(i) The Neighbourhood or Locality

The assertion of adverse interference with natural rights which would usually give an action in nuisance did not find favour during the period of industrialisation as it had done earlier, as this would have hampered growth.⁵⁹ Thus, judges took into consideration the political promises, the social philosophy as well as the economic implications of large-scale development while weighing factors to make decisions for or against the industry or use of land for traditional purposes.⁶⁰ In *St Helens Smelting v Tipping*⁶¹, the nuisance was caused by the defendant’s copper smelting plant that emitted smoke, fumes and particulates which killed the plaintiff’s orchard.

historically very significant Supreme Court decisions in respect of environmental law where the Court recognized the actions by the defendants (especially the state which had control over natural resources and public land) could be liable for public nuisance. In India public nuisance cases are recognized under the Indian penal Code and the Code of Criminal Procedure and are statutory crimes. See infra pp41, 52, 80)

⁵⁴*St Helen’s Smelting Co v Tipping* (1865) 11 HLC 642.

⁵⁵*Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218.

⁵⁶*Rapier v London Tramways Co* [1893] 2 Ch 588.

⁵⁷*Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683.

⁵⁸*Bridlington Relay v Yorkshire Electricity Board* [1965] Ch 436.

⁵⁹See JPS Maclaren, ‘Nuisance Law and the Industrial Revolution: Some Lessons From the Social History’ (1983) *Oxford Journal of Legal Studies* 155, 169–190.

⁶⁰*Ibid.*

⁶¹(1865) 111 HLC 642.

In the *St Helens* case the House of Lords decided against the defendant but arrived at a solution by considering the policy implications of the economic benefits of industrialisation, and the need for balancing the harm done to the environment and the right of a private landowner. Discernibly, this created boundaries which seemed to mark a path for the interplay of industrialisation and development on the one hand and the need for protection of the environment and landowners' rights on the other.⁶² It was held that an action would lie for nuisance where the defendant's act had visibly diminished the value of the property and the use and enjoyment of it.⁶³ To find whether the land's utility had visibly diminished, all the circumstances of the case must be considered, including the nature of the locality and its utility to the community as a whole.⁶⁴ Lord Westbury stated that tangible damage could never be reasonable and would continue to be actionable per se⁶⁵.

Similarly, in *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd*⁶⁶ it was held that the character of neighbourhood test is still the determining factor in an action in nuisance where a planning decision alters the nature and character of the neighbourhood. Buckley J analysed the law to state that:

In the days before there was much legislation on public health matters, public nuisance was the only offence for which it was possible to prosecute those who stank out the neighbourhood with fumes from glassworks, tanneries and smelters, or who kept pigs in the streets, or kept explosives in dangerous places.⁶⁷

However, the decision by Buckley J did not clarify the exact nature of relationship.⁶⁸ In another view, Penner argued that the Gillingham decision represented a significant shift

⁶²Mark Wilde, *Civil Liability for Environmental Damage* (Kluwer Law International, 2002) 23.

⁶³*St Helens Smelting* (1865) 11 HLC 642, 650–653.

⁶⁴*St Helens Smelting* (1865) 11 HLC 642, 650–653.

⁶⁵*St Helens Smelting* (1865) 11 HLC 642, 651–652.

⁶⁶[1992] 3 All ER 923.

⁶⁷Colin Crawford, 'Public Law Rules over Private Law as a Standard for Nuisance: OK?' (1992) 4 *Journal of Environmental Law* 261. See also Buckley J in *Gillingham Borough Council v Medway (Chatham) Dock Co, Ltd* [1992] 3 All ER 923, quoting JR Spencer, 'Public Nuisance—A Critical Examination' (1989) 48 *Cambridge Law Journal* 55, 76.

⁶⁸Crawford, above n 66. Crawford states that there could be two interpretations of the decision in that that the existence of the planning permission changed the character of the neighbourhood so that what would have been considered a nuisance before the permission was granted was no longer sufficiently detrimental because the nature of the area, and thus the standard of nuisance required, had changed, and that second, Buckley actually decided or intended the case on the wider principle.

from the traditional neighbourhood test.⁶⁹ However, the determination has now become more complex as it takes into account the reasonableness of the activity not only by examining the character of neighbourhood but also the ‘aspirations of the planners’ rather than ‘the situation on the ground’.⁷⁰ This has in some cases led to radical departures in the determination of an action in nuisance from earlier cases. In *Wheeler v JJ Saunders*⁷¹ it was established that a development that has gained planning permission remains subject to the law of nuisance. However, it was also accepted that the grant of a ‘strategic planning permission affected by considerations of the public interest’ might alter the nature and character of the locality to such an extent that the activities that take place as a result of that permission are considered reasonable.⁷² The decision in *Watson v Croft Promo-Sport*⁷³ in 2009, which applied *Wheeler*, establishes that that planning permission was capable of effecting a change in the nature of the locality so as to alter the standard of a reasonable user.

However, it is still appropriate to consider the continuing role of private nuisance and the legal effect it has on the use of land and developmental activities despite planning regulations that exclude an action in nuisance in the case of important infrastructure projects.⁷⁴ Thus, an action in private law could be an indirect means to challenge a planning process and the courts ought to adopt an approach that provides an adequate remedy.⁷⁵ Similar recognition of the change of neighbourhood with rapid industrialisation can be seen in the decision by the courts in the US and India while determining nuisance liability.⁷⁶

⁶⁹See J Penner, ‘Nuisance and the Character of the Neighbourhood’ (1993) 5(1) *Journal of Environmental Law* 1 argues that Gillingham may not have been rightly decided as then the law of nuisance for environmental protection would be much less effective: ‘This cost benefit balancing of course brings the theory of nuisance from a traditional tort analysis in which the plaintiff is regarded as suffering a harm and a violation of his rights, to one much closer to the economic analysis of law and also casts doubts whether law of nuisance can be effectively used as tool for protecting the environment or against environmental harm.’

⁷⁰See A Waite, ‘The Gillingham Case: The Abolition of Nuisance by Planning Controls?’ (1992) 4 *Land Management and Environmental Law Report* 119.

⁷¹[1996] Ch 19, CA.

⁷²In this case, the defendant owned a pig farm and the plaintiffs bought a farmhouse adjacent to the pig farm and converted the outbuildings to use as holiday accommodation. In order to construct two more pig housing units the defendants subsequently sought permission from the authority, which was granted. The new pig housing units were just 11 metres from the plaintiff’s holiday accommodation.

⁷³[2009] 3 All ER 249.

⁷⁴See eg, UK Planning Act 2008.

⁷⁵See P Bishop and V Jenkins, ‘Planning and Nuisance: Revisiting the Balance of Public and Private Interests in Land-Use Development’ (2011) 23(2) *Journal of Environmental Law* 285–310.

⁷⁶Dobbs states that an action in nuisance would lie as a matter of law without regard to the character of the neighbourhood when the defendant’s act seriously affected the physical integrity of the land when toxic chemicals contaminated groundwater resources; see D Dobbs, *The Law of Torts* (West Group, St Paul, Minnesota, 2001) 1330.

(ii) Abnormal Sensitivity of the Plaintiff

In determining whether the defendant's activities constitute a nuisance with the plaintiff's enjoyment of his or her land, the courts use an objective test of an 'ordinary' plaintiff, pursuing objectively 'normal' activities. Thus, the discomfort claimed by the plaintiff must be of such a degree that it would be substantial to any person occupying the plaintiff's premises, irrespective of the position they have, their age, or their state of health. In *Walter v Selfe*⁷⁷, V-C Bruce Knight held that the inconvenience must materially interfere with the ordinary comfort of human existence and not merely 'according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people'. Inevitably this takes into account the character of the neighbourhood. In considering what is reasonable, modern methods must be considered.⁷⁸ The 'ordinary' plaintiff needs to tolerate such reasonable operations on the part of a neighbour notwithstanding that they involve *some* interference with the enjoyment of the plaintiff's own land. Further, the activities that the plaintiff carries out on their land must be assumed to be 'normal'; if the plaintiff is undertaking any special activities then he or she cannot put the burden on the defendant. In *Robinson v Kilvert*⁷⁹ the plaintiff was unsuccessful when the defendant's heating of his own property damaged abnormally sensitive brown paper stored on the plaintiff's premises.

In *Delaware Mansions Network Rail Infrastructure Ltd v Morris*⁸⁰ the concept of 'abnormal sensitiveness' as enumerated in *Robinson v Kilvert* was examined by applying modern principles. In this case, the plaintiff alleged that defendant's signalling system caused electromagnetic interference to the music created by electric guitars in the plaintiff's recording studio, some 80 metres away. In the Court of Appeal, Lord Phillips of Worth Matravers, MR, held that if the earlier cases on 'abnormal sensitiveness' remained good law, the plaintiff's amplified guitars fell into the category of extraordinarily sensitive equipment that did not attract the protection of the law of nuisance, essentially because the interference that the plaintiff complained of was a very rare occurrence.

(iii) Coming to Nuisance and the Right of Prescription

⁷⁷(1851) 4 De G and Sm 315 at 322.

⁷⁸*Andreae v Selfridge and Co Ltd* [1938] Ch 1.

⁷⁹(1889) 41 Ch D 88.

⁸⁰(2004) EnvLR 41.

The plaintiff may further lose the action in nuisance where the defendant proves that he or she has a prescriptive right to cause that nuisance. The defence of prescription was reiterated by the courts in England in the late nineteenth century. Earlier cases demonstrate the emphasis on the landowner's right to his or her land and its enjoyment, including the plaintiff's right to clean air. In *Bliss v Hall*⁸¹ the court held that the plaintiff had a right to 'wholesome air' and that the defendant could not take a defence that the business had been running three years prior to the plaintiff's move to the area. Thus 'coming to the nuisance' was not a good defence. However where the defendant has been operating a plant lawfully that is not dependent upon any express grant or authorisation from the neighbouring land and the activity has been going on for at least 20 years the defendant can be successful under the defence of prescription.⁸²

Similarly, in the US the plaintiff who comes to the nuisance and moves to a place where factories or industries have been operating does not have a basis to claim in nuisance, as in these circumstances the character of the locality or neighbourhood is etched in non-residential use and the plaintiff needs to bear the consequences that can be reasonably expected of living in such an area.

Although this is the general presumption but in some cases the US courts have struck a different chord and have adopted a less rigid approach. This is reflected in the decision in *Spur Industries Inc v Del E Webb Development Co.*⁸³ This case is an example where the court in Arizona tried to arrive at a practical and fair solution in balancing the competing land use interests of various individuals and the wider economic community interest. This case is also significant as it reflects the application of tortious liability for environmental harms and its role within environmental context. The trial court permanently enjoined the defendant from operating feedlots. The defendant argued that it was the plaintiff who had moved next to the defendant's cattle feedlot and hence the plaintiff had 'come to the nuisance'. This defence was not accepted by Supreme Court of Arizona and the defendant was asked to move the cattle feed station. The court held that Spur's operation was both a public and private nuisance and the plaintiffs could have successfully maintained an action to abate the nuisance. Moreover, it was implied that although the defendant was the first to arrive and start its business operation this did not necessarily result in its monopolising the

⁸¹(1839) 4 Bing NC 183, per Tindal CJ.

⁸²*Sturges v Bridgman* (1879) 11 Ch D 852.

⁸³1972 Ariz.4 ERC (BNA) 1052, Supreme Court of Arizona. The court held although there was nuisance, the developer had brought the resident to a nuisance and in this case the plaintiff rather than the defendant was ordered to pay damages.

land use for its purposes and excluding others who arrived later. Obviously the Court's decision recognises that with changing times land use patterns may change. Surprisingly, the most unusual part of the decision was that the plaintiff was asked to compensate the defendant, although the defendant was required to stop operations and move its cattle station elsewhere.

(iv) Nuisance and Fault

The element of fault on the part of defendant in nuisance actions is difficult to establish. Earlier private nuisance protected the plaintiff's interest in their land and the undisturbed enjoyment of one's property and hence any action of the defendant which interfered with this right entailed strict liability. However, the development of the common law of tort reveals two diverging trends. First, a situation where a defendant who has caused harm to a plaintiff is liable only if the defendant intended to harm the plaintiff or failed to take reasonable steps to avoid inflicting the harm. Second, a situation where the defendant is made strictly liable for the harm whether or not either of the conditions relating to negligence and intent is fulfilled.⁸⁴ With the development of common law to provide relief for plaintiffs in industrial or environmental actions the action in nuisance changed its character and gave way to complex issues that made the tort somewhat uncertain⁸⁵ and courts began equating nuisance with negligence.

As a nineteenth century tort the source of negligence was the action upon the case for negligence, and this led to the inevitable overlapping of negligence with other nominated forms of tort, such as nuisance, where there was advertence or 'total or partial inadvertence to an act or omission or its undesired consequence.'⁸⁶ In various cases⁸⁷ the judges made their decisions by 'treating negligence as substance of the action, and nuisance as an untechnical term.'⁸⁸

⁸⁴Richard A Epstein, *A Theory of Strict Liability* (Cato Institute, 1980) 5; For an account of why negligence subsumed the tort of strict liability in this manner see Jeffery L Johnson, 'Explanation, Human Nature and Tort Theory' (2006) 4 *Georgetown Journal of Law and Policy* 1.

⁸⁵Newark, above n 39; Maclaren, above n 59, 169–190; DM Provine, 'Balancing Pollution and Property Rights: A Comparison of the English and American Nuisance Law' (1978) 7 *Anglo-American Law Review* 31.

⁸⁶PH Winfield, 'Nuisance as a Tort' (1931) 4(2) *The Cambridge Law Journal* 189.

⁸⁷*Coupland v Hardingham* (1813) 3 Camp. 398; *Wilkins v Day* (1883) 12 QBD. 110; *Gandy v Jubber* (1864) 5 B and S 78; *Borough of Bathurst v Macpherson* (1879) 4 App. Cas. 256.; *Tarry v Ashton* (1876) 1 QBD. 314.

⁸⁸PH Winfield (1926) 42 LQR. 148 quoted in Winfield, above n 86, 197–198.

However, private nuisance actions encompassing the traditional character as an independent tort came to be analysed differently in the *Wagon Mound (No 2)* case.⁸⁹ Here the House of Lords, through Lord Reid, merged the origins of the tort of private nuisance and public nuisance. In this case Lord Reid stated that although negligence was not an essential element in nuisance nevertheless fault of some kind was almost always necessary and fault generally involved foreseeability.⁹⁰ According to Lord Reid, the idea of fault in nuisance was that the fault would lie in failing to abate the nuisance, and the defendant ought to be aware that such nuisance would likely injure his neighbour. In other words, a defendant would be liable where the defendant could foresee that due to unabated nuisance the plaintiff would suffer injury. However, the court did not further clarify as to whether the defendant would still be liable even where the defendant may have taken reasonable steps to abate the nuisance. The decision in *Wagon Mound No 2* was reconsidered in the *Cambridge Waters v Eastern Leather Counties*⁹¹ case by the House of Lords.

(v) Negligence Subsuming Nuisance

In *Cambridge Waters* an action was brought against the defendant tannery for contamination of groundwater from which the plaintiff extracted drinking water. The defendants had been involved with the degreasing of pelts and leather by using perchloroethene. Over time, and due to spillage, the chemical seeped into the ground and permeated the porous layers of the defendant's factory to contaminate the underground water source. The plaintiff sued for an action in nuisance, negligence and *Rylands v Fletcher*, claiming one million pounds as damages for the cost of finding a new bore and an unsuccessful attempt to decontaminate the original bore, and an injunction to prevent any further use of perchloroethene.

In the High Court of Justice, J. Kennedy dismissed the plaintiff's case under all three heads of nuisance, negligence and *Rylands* on the grounds of the harm not being foreseeable. On

⁸⁹RWM Dias, 'Trouble on Oiled Waters: Problems of the Wagon Mound (No 2)' (1967) 25(1) *The Cambridge Law Journal* 62.

⁹⁰The *Wagon Mound (No 2)* [1967] AC 617, p637D–E, Although Lord Reid also stated that as nuisance had grown to encompass a number of activities, it could not be right to discriminate between different types of nuisance so as to make fault an issue in certain cases but not in others.

⁹¹[1994] 2 AC 264; [1994] 1 All ER 53. The plaintiff was a water utility company that started extracting water in 1976 from a bore near the defendant's factory. The contaminated water was not discovered until much later when the plaintiff was required to monitor the water quality and found it to be far in excess of the actual limit set by the Department of the Environment. Up until then, water had been habitually extracted by the plaintiff from the bore. A new requirement to check the quality of water was introduced in 1980 under a Directive on Water Quality by the Council of the European Community. This required members to reduce the quantity of perchloroethene.

appeal to the Court of Appeal (L.J. Nolan, L.J. Mann and Sir Stephen Brown) through Mann, the Court reversed the decisions and did not apply foreseeability as part of the elements that constituted nuisance. Mann rejected Lord Reid's formulation in the *Wagon Mound No 2*. Instead, the Court relied on *Goldman v Hargreaves*⁹² and *Ballard v Tomlinson*⁹³ to conclude that negligence is only a part of nuisance in some cases and that in the present case the liability of the defendant ought to be strict. However, this formulation was rejected by the House of Lords who reinstated Kennedy's decision.

The House of Lords held that a claim in nuisance was necessarily based (in current times) on the foreseeability of harm. Lord Goff reiterated Lord Reid's views that foreseeability is a prerequisite of recovery of damages in private nuisance as in the case of public nuisance.⁹⁴

In *Rylands*, however, it was stated that nuisance covered 'anything *likely* to do mischief if it escapes', and that liability should be to 'answer for the natural and *anticipated* consequences'; this wording implies that he intended for 'knowledge to be a prerequisite for liability'.⁹⁵ However, in deciding *Cambridge Waters*, the House of Lords took into account policy reasons and held that once it was established that perchloroethene was harmful if the defendant was held strictly liable without the foreseeability requirement it would make the defendant liable for historic pollution. The contamination was now beyond their control and was caused before it was established that perchloroethene was hazardous and it would be imposing retroactive liability on the defendant.⁹⁶ Nevertheless, Lord Goff did maintain that the standard of liability in nuisance still differs from the standard of liability in negligence. Hence, the courts use the concept of the 'reasonable user' as a control mechanism to determine the defendant's liability in nuisance.⁹⁷

⁹²[1967] 1 AC 645.

⁹³(1885) 29 Ch D 115.

⁹⁴[1994] 2 AC 264, 301C.

⁹⁵Peter B Kutner, 'The End of *Rylands v Fletcher*? *Cambridge Water Co v Eastern Counties Leather Plc*' (1995) 31(1) *Tort and Insurance Law Journal* 73; On criticisms of Lord Goff's judgment see Sandra Morton, 'Cambridge Water Company v Eastern Counties Leather Plc' (1993) 2 *Nottingham Law Journal* 59; John C O'Quinn, 'Not-So-Strict-Liability: A Foreseeability Test for *Rylands v Fletcher* and Other Lessons from *Cambridge Water Co v Eastern Counties Leather Plc*' (2000) 24(1) *Harvard Environmental Law Review* 287; David Wilkinson, 'Cambridge Water Company v Eastern Counties Leather Plc: Diluting Liability for Continuing Escapes' (1994) 57(5) *Modern Law Review* 799.

⁹⁶[1994] 2 AC 264, 307C-D.

⁹⁷Wilde, above n 62, 35.

Following the *Cambridge Waters* case, in *Graham and Graham v Re-Chem International*⁹⁸ the UK High Court had occasion to reiterate the formulation that a defendant would be liable where it was foreseeable that an activity would give rise to a nuisance even if reasonable steps were taken. Similar overlap of nuisance and negligence has been recognised by the courts in the US and in Canada. In the Alberta Court of Appeal, Canada, in *Abbott v Kasza*⁹⁹ the court held that in respect of motor vehicles using the highway an action could be framed both in negligence and nuisance as foreseeability was an essential element in determining liability in both actions. A similar sentiment was echoed by the Supreme Court of Canada in 1999 in the case of *Ryan v Victoria (City)*¹⁰⁰ following *Wagon Mound No 2*. In 2001 in *Olden v LaFarge Corporation*,¹⁰¹ the US District Court for the Eastern District of Michigan held that the emission of cement kiln dust from a cement manufacturing facility and subsequent accumulation of the dust on private property did not give rise to a trespass or public nuisance claim, but could form the basis for a private nuisance or negligence claim.

Finally, in *Transco v Stockport MBC*¹⁰², the House of Lords reiterated that the rule in *Rylands* was a subset of nuisance. Application of the rule should be confined to circumstances where the occupier has brought some dangerous item onto his land that poses an exceptionally high risk to neighbouring property should it escape, and that amounts to an extraordinary and unusual use of land. Nevertheless, fault in nuisance and fault in negligence have developed their own characteristics which the courts have discernibly distinguished. In the Australian case of *Burnie Port Authority v General Jones Pty Limited*¹⁰³ the High Court held that the principle of *Rylands v Fletcher* should be regarded as overtaken and replaced by the principles of liability in negligence. Thus, while public nuisance has the element of fault ingrained in it, in certain situations claims for private nuisance still conflict with central elements of environmental law.¹⁰⁴

⁹⁸[1996] EnvLR 158.

⁹⁹(1976) 71 DLR (3d) 581.

¹⁰⁰[1999] 1 SCR 201; See also Restatement Second on Torts § 821B(1) (1979); Chapter 29.04, '[a] public nuisance is an unreasonable interference with a right common to the general public', and private nuisance as 'a nontrespassory invasion of another's interest in the private use and enjoyment of land.' § Chap 29.01 (owners and neighbours).

¹⁰¹203 FRD 254, Oct. 24, 2001.

¹⁰²[2003] 3 WLR 1467; [2003] UKHL 61.

¹⁰³(1994) 120 ALR 42.

¹⁰⁴For the discussion of successful private nuisance actions, see JPS Maclaren, 'The Common Law Nuisance Actions and the Environmental Battle—Well-Tempered Swords or Broken Reeds' (1972) 10 *Osgoode Hall Law Journal* 510, quoted in Conor Gearty, 'The Place of Private Nuisance in a Modern Law of Torts' (1989) 48(2) *Cambridge Law Journal* 214, 242.

(vi) Statutory Authority and Tort Liability

If the Parliament has authorised an activity that creates a nuisance it will not be actionable as long as all due care and skill has been taken to avoid it. Thus, where by virtue of a statute, an authorised body undertakes an activity that causes nuisance to the residents, the authority is justified in doing its duty as long as it has not been negligent and an action against such an authority is statute barred. In *Allen v Gulf Oil Refining Limited*¹⁰⁵, the local residents complained against the defendant, an oil refinery, whose activities had caused unwanted vibrations, noxious fumes and offensive odours through its drilling operations. The Court of Appeal and then the House of Lords held that an express statutory authority to construct an oil refinery carried with it the authority to refine. It was impossible to construct and operate the refinery upon the site without creating a nuisance.

The question whether a statutory body was, in any particular case, under a positive duty of care to exercise its statutory functions to prevent a particular kind of harm has arisen in a number of negligence cases.¹⁰⁶ In such cases the courts considered a number of factors for imposing a duty or denying negligence on behalf of the statutory authority. These include, inter alia, whether the complaint by the plaintiff involved the weighing of competing public interests or not, whether the damage complained of was foreseeable and proximate, and whether it was just fair and reasonable to recognise a duty of care. Where the complaint involved weighing of public benefit, inevitably the issue was non-justiciable on the ground that the decision was in the exercise of a statutory discretion.¹⁰⁷

In *Marcic v Thames Water Utilities Ltd*¹⁰⁸ the defendant statutory authority was held not liable. Under the Water Industry Act 1991, s.94(1)(a) imposed a statutory duty on sewerage undertakers to provide a public sewerage system for their area to ensure that their area was sufficiently drained. The plaintiff argued that Thames Water owed him a *Leakey*¹⁰⁹ duty of care to take reasonable steps to abate the nuisance. The plaintiff succeeded in the Court of Appeal but the decision was reversed by the House of Lords. The House of Lords, through Lord Hoffman, held that the existence of a *Leakey* duty

¹⁰⁵[1981] 1 ALL ER 353, [1981] AC 1001, HL; See also Simon Ball, 'Nuisance and Planning Permission: Wheeler v JJ Saunders Limited' (1995) 7(2) *Journal of Environmental Law* 278.

¹⁰⁶See eg, *Stovin v Wise* [1996] AC 923; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; *Barrett v Enfield LBC* [2001] 2 AC 550; *Phelps v Hillingdon LBC* [2001] AC 619; *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42.

¹⁰⁷*Caparo Industries Plc v Dickman* [1990] 2 AC 605.

¹⁰⁸[2004] 2 AC 42.

¹⁰⁹*Leakey v National Trust* [1980] QB 485 established that a private person occupying land owed a measured duty of care to adjoining occupiers in relation to damage caused by a naturally occurring hazard on his land.

would be inconsistent with the statutory scheme whereby Parliament had decided that decisions on whether the public sewerage system should be improved should be left to the Director General of Water Services.¹¹⁰

It is obvious from the above decision that an omission to exercise statutory powers cannot constitute ‘negligence’ in the *Allen v Gulf Oil* sense if the alleged common law duty to exercise such powers would be inconsistent with the statute.¹¹¹

(e) Progressive Shift in Judicial Attitude in the UK

The above cases and more recent case law and discussion suggests a progressive shift in the judicial approach that necessitates a new approach towards resolving environmental claims using tortious principles.¹¹² In fact, many scholars have stressed the usefulness of environmental tort liability which is being increasingly overshadowed by public law liability and environmental regulation.¹¹³ In most of the cases, specific statutory provisions have provided a defence for nuisance actions. Similar defence of statute can be seen in *Wheelers v Saunders* and recently in *Wildtree Hotels Ltd v London Borough Council*.

¹¹⁴The defendants in the *Wheelers* case obtained planning permission to build two pig houses close to the plaintiff’s cottages. The inevitable result of the pig farm was that it resulted in strong odours that drifted across the plaintiff’s cottages. The Court of Appeal confirmed that planning permission could only be taken as authorisation of nuisance if its effect was to alter the character of the neighbourhood so that the nuisance could not be

¹¹⁰Marcic [2004] 2 AC 42, Para 70, per Lord Hoffmann.

¹¹¹*Dobson v Thames Water Utilities Ltd* [2007] EWHC 2021 (TCC). The court held that there was a distinction between ‘policy matters’ or ‘capital works’ on the one hand, and ‘operational negligence’ on the other. Insofar as the nuisance was caused by the defendant’s negligent failure to allocate funding to capital works, or to carry out capital works, the Marcic defence would apply; however, insofar as the nuisance was caused by the defendant’s negligent failure in its day-to-day operation of the existing works, the defence would not apply and the defendant would be liable.

¹¹²Mark Latham, Victor E Schwartz and Christopher E Appel ‘The Intersection of Tort and Environmental Law: Where the Twain Should Meet and Depart’ (2011) 80 *Fordham Law Review* 737. American courts have also recognized the right of the sovereign over public natural resources similar to the Indian Courts and the Indian Constitution for evolutionary US history see *Missouri v Illinois* 200 U.S. 496 (1906) and *Georgia v Tennessee Copper Co.* 206 U.S. 203 (1907).

¹¹³See Peter Cane, ‘Using Tort Law to Enforce Environmental Regulations?’ (2002) 41 *Washburn Law Journal* 427–467; Kenneth S Abraham, ‘The Relation between Civil Liability and Environmental Regulation: An Analytical Overview’ (2002) 41 *Washburn Law Journal* 379–398; Latham, Schwartz and Appel, above n 112, 737; McLaren, above n 104.

¹¹⁴[2001] 2 AC 1.

considered unreasonable. However, in this case the planning permission did not have that effect.¹¹⁵

(f) Limitations on Nuisance Liability

Defences to the tort of nuisance may work as limitations that may have to be overcome by a plaintiff in a successful action for nuisance. A statutory authority may preclude an action in nuisance as it is democratically legitimate.¹¹⁶ Further, some plaintiffs may be unsuccessful as the defendant may have earned the right by way of prescription, while in other cases a plaintiff may lose as he or she is hypersensitive to the nuisance action complained of. The discussion in the above paragraphs illustrates that a plaintiff can claim in an action for nuisance only where it is determined that ‘fault’ accompanied with ‘foreseeability’ and/or knowledge can be established on the part of the defendant. However, a claim may still be defeated if there are major environmental policy concerns as indicated in *Cambridge Waters* and then again in *Transco v Stockport MBC*.¹¹⁷

3 The Rylands v Fletcher Rule

The rule in *Rylands* holds a person strictly liable where the defendant brings or holds on its land something likely to do mischief if that thing escapes, and damage arises as a natural consequence of its escape. Blackburn enunciated the rule thus:

That the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his own peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.¹¹⁸ ... and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril

¹¹⁵See also consideration of *Allen v Gulf* in *Gray and Anor v Macquarie Generation No 3* [2011] NSWLEC 3, per J Pain.

¹¹⁶General defences to nuisance. See also Schwartz and Goldberg, above n 37.

¹¹⁷[2003] 3 WLR 1467; [2003] UKHL 61.

¹¹⁸*Rylands v Fletcher* (1866) LR 1 Ex 265, 279–80, per Blackburn J; [1868] UKHL 1.

keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stench.¹¹⁹

The House of Lords, through Lord Cairns LC, agreed with Justice Blackburn but added a further limitation on liability, which is that the land from which the escape occurs must have been modified in a way which would be considered non-natural, unusual or inappropriate. The liability rule however in the UK is generally qualified by the following exceptions: act of god (for instance, a flood, tsunami, or earthquake); act of stranger (theft and sabotage or terrorism); the plaintiff's fault and consent; the natural use of the defendant's land and statutory authority. However, in India, where an escape is of acutely hazardous substances the rule in *Rylands* has been changed from strict liability into the rule of absolute liability. This is so particularly in the case of chemical industries manufacturing hazardous substances. Such activities are necessary because of their social utility; however, any such industry bears an absolute burden of causing environmental damage or harm and is liable to pay compensation. This principle was developed after Bhopal and in the Shriram gas leak case¹²⁰, where the court declared a standard stricter than strict liability.¹²¹ This standard was later on recognised statutorily under the Public Liability Insurance Act 1991. In the Shriram case CJ Bhagwati held that:

upon toxic escape of a 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*.¹²²

(g) Has Rylands v Fletcher rule been subsumed under requirement of 'foreseeability'?

For environmental and tort lawyers the case of *Rylands v Fletcher* marks a beginning point for the application of nuisance principles and tortious liability in the environmental context in unique escape events. However, when the case was decided, it did not hold that kind of

¹¹⁹Ibid.

¹²⁰MC Mehta v Union of India AIR 1987 SC 1086.

¹²¹Divan and Rosencranz, above n 4, 104, 105.

¹²²Ibid, 1099.

significance. Nor was it thought to be a common law tool of immense help to private individuals for claiming remedies within environmental context. However, in earlier times the courts did impose liability regardless of wrongful intent or negligence.¹²³ Gradually the common law courts placed more emphasis on, and stressed the development of, nuisance and negligence and the tort of strict liability did not enjoy significant importance or mention until its revival in *Rylands*.¹²⁴ The decision did not face noteworthy critical analysis within England and Wales, but it was criticised in the US¹²⁵. According to Newark, in his decision *Blackburn* stated nothing but a mere alternative method of application of the nuisance principle, in that that the judge was seeking to clarify the situation where an individual landowner was liable in respect of an isolated escape of things in contrast to the continuous and ongoing state of affairs that nuisance necessitated. In *Cambridge Waters v Eastern Counties Plc*¹²⁶, Lord Goff states the same and explains that the rule in *Rylands* originated only as a species of nuisance.

The decision in *Transco Plc v Stockport Metropolitan Borough Council* goes further and confirms that *Rylands* is ‘a remedy for damage to land or interests in land. It must ... follow that damages for personal injuries are not recoverable under the rule.’ However, according to the House of Lords, which disapproved the decision of the Australian High Court in *Burnie Port Authority v General Jones Pvt Ltd Rylands*¹²⁷ should continue to exist but, as Lord Bingham said, as a ‘sub-species of nuisance ... while insisting upon its essential nature and purpose; and ... restate it so as to achieve as much certainty and clarity as is attainable.’ Consequently, *Rylands* remains an underdog tort rather than an independent one.¹²⁸

The conjunction of *Rylands* with nuisance has definitely cast doubts over the continuity and advantage that it might have had over other torts and it has, in words of Lord Hoffman,

¹²³*Vaughan v Menlove* (1837) 132 ER 490.

¹²⁴See Wilde, above n 62. See also John Murphy, ‘The Merits of *Rylands v Fletcher*’ (2004) 24(4) *Oxford Journal of Legal Studies* 649.

¹²⁵See Francis H Bohlen, ‘The Rule in *Fletcher v Rylands*: Part I’ (1911) 59 *University of Pennsylvania Law Review and American Law Register* 373, 388 in Jed Handelsman Shugerman, ‘The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of *Fletcher v Rylands* in the Gilded Age’ (2000) 110 *Yale Law Journal* 333.

¹²⁶[1994] 2 AC 264, 297–306.

¹²⁷[1994] 179 CLR 520.

¹²⁸Other authors argue that *Rylands* should not be considered as part of private nuisance because private nuisance requires the claimant to have an interest in land, while *Rylands* does not; although exceptions to this rule have occasionally been made in private nuisance. In *Hunter v Canary Wharf Ltd* [1997] UKHL 14, the House of Lords ruled that to make exceptions would transform nuisance from a tort against land to a tort against the person, and should not be permitted. John Murphy makes the additional point that nuisance is focused on a loss of enjoyment to land, not physical damage as *Rylands* is. It has also been considered that the reasonable use test, which appears in nuisance, is not applicable to cases brought under *Rylands*; see Donal Nolan, ‘The Distinctiveness of *Rylands v Fletcher*’ (2005) 121 *Law Quarterly Review* 421; Murphy, above n 124.

become a ‘mouse’ with rather limited use.¹²⁹ Lord Hoffman states that the very limited circumstances to which the rule has been confined includes five instances: (a) the rule may apply in disputes between property insurers and liability insurers as it is a remedy for damage to land or interest in land; (b) it does not apply to works or enterprises authorised by statute. This means that it will usually have no application to very high risk activities;¹³⁰ (c) it will not apply where the activity is intentional e.g., vandalism or act of god; (d) where there is an escape that is not attributable to an unusual natural event or the act of a third party will, by the same token, usually give rise to an inference of negligence; and (e) there is a broad and ill-defined exception for the ‘natural’ uses of land.

Nevertheless, from the above it retains some key points in that despite inclusion of the requirement of foreseeability of harm, nuisance still imposes a higher duty of care than negligence. Thus a plaintiff claiming under *Rylands* would rely upon a stricter standard of care and would do so without the need to demonstrate an interest in the land. Additionally, it may also change the character of the neighbourhood test, as according to Lord Goff, the issue of whether or not an activity constitutes an ‘unnatural use’ of land should be judged by reference to the activity itself and not the predominant land use in that area. Thus, if the defendant is engaged in a hazardous activity in an industrial area, a plaintiff who otherwise might be defeated under the character of the neighbourhood test may succeed under *Rylands*. Of course the list of things which make up what is currently considered hazardous or ‘unnatural’ is becoming increasingly shorter. Moreover, decisions in the environmental context involve complex planning and development considerations, including the economic and social benefits or policy considerations. Thus, polluters who are involved in hazardous manufacturing activity reaping an economic benefit but also creating a risk ideally ought not to be able to escape the cost of that activity and if damage results in the form of harm to the victim or to the victim’s environment then a polluter must pay the cost.

In *Colour Quest Ltd & Ors v Total Downstream UK Plc & Ors* (Rev 1¹³¹), the Buncefield case, an explosion in an oil tanker blew up the storage depot and wreaked havoc in the surrounding area. Although the surrounding shops and area were affected, fortunately there were no deaths. The victims whose businesses had been affected and those who were

¹²⁹See Nolan, above n 128, 421–451; *Transco Plc v Stockport MBC* [2003] UKHL 61, per Lord Hoffman, Para 39.

¹³⁰As Brian Simpson points out in ‘Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v Fletcher*’ (1984) 13 *Journal of Legal Studies* 209–225 that the Bradfield reservoir was built under statutory powers. In the absence of negligence, the occupiers whose lands had been inundated would have had no remedy.

¹³¹[2009] EWHC 540 (Comm); [2010] EWCA Civ 180 (Court of Appeal) (the Buncefield litigation).

living near the area sued the defendant in negligence and nuisance both private and public and under the rule in *Rylands* were awarded damages of over 750 million pounds.¹³² The defendants were held liable but the operator of the facility was held more responsible for the disaster.

The Buncefield case is important as it reflects the usefulness of nuisance both private and public in the context of an environmental accidents as well as the fact that it sets a standard where large industries and corporations and joint venture companies should make provision for liability for major accidents. It also reflects how the courts may look beyond the wording of the agreements to identify the person with *de facto* control of pollution or the actual operations. However, similar accidents in India have not been very neatly handled, although the Public Liability Insurance Act 1991 comes into play where accidents are caused due to the escape of hazardous substances. The defendants are strictly liable and are required to provide compensation in the event of such an accident. For this, the Public Liability Insurance Act requires all such industrial owners to contribute to a Public Liability Environment Fund set up as a statutory insurance fund. In the event of an accident such as a gas leakage or an oil explosion causing injury to persons and environmental damage, the statute allows for a limited compensation to the victims for personal injury and harm to property. Further, it does not preclude a civil action.¹³³

(i) Public Nuisance and Overlap with Private Nuisance

As stated above, public nuisance deals with issues within the environmental context but on a larger scale and in many instances overlaps with private nuisance as well. Many pollutants, such as chemical pollutants in water bodies, the escape of fumes and gas from petroleum tankers, oil from tankers in the sea or oceans, spread quickly and can affect a large population. Those who suffer from a special or particular harm over and above the general inconvenience suffered by the public at large may pursue private claims in respect of that loss.¹³⁴ In contrast to private nuisance claims, however, public nuisance is not associated with restoration of an interest in land.

¹³²The Buncefield oil storage was a facility that was operated by a joint venture company between Total (60 per cent) and Chevron (40 per cent).

¹³³Under Section 8(1), Public Liability Insurance Act, 1991, the right of the victim to relief in respect of the death of, or injury to, any person or damage to any property shall be in addition to any other right to claim compensation in respect thereof under any other law for the time being in force. See above Chapter 2, Section I, 41-42.

¹³⁴Buncefield, Exxon Valdez 104 F 3d 1196 (9th Cir, 1997).

In *Attorney General v PYA Quarries*,¹³⁵ LJ Denning formulated the test for determining whether an activity constituted a private or public nuisance in that that a public nuisance was one that was so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings as his or her own responsibility to put a stop to it, but that it ought the responsibility of the whole community at large. Most of the public nuisance cases arose in the situation of obstruction of highways and often overlapped with ‘action on the case’. Public nuisance also overlapped with crimes and it was often equated with the fault standard of liability.

4 Tort of Negligence

The tort of negligence remains the general starting point for liability under tort within the environmental context. What is true for product liability and consumer protection is thus also true for environmental liability as well. In *Blyth v Birmingham Waterworks*¹³⁶ Alderson encapsulated the essence of the tort of negligence as follows:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

A similar understanding of negligence is reflected and followed today while determining the reasonable standard of care of a defendant’s activity.¹³⁷

As stated above, negligence in tort displays two characteristic features: ‘negligence as a tort’ that has its own characteristic and constitutes a cause of action, and fault/negligence in nuisance, which is now a factor to determine liability as mentioned above in Section 3.2.4. The tort of negligence has been influenced by a number of moral factors through its development and this has had an equal impact on the development of environmental law and liability for environmental harm.

¹³⁵[1957] 2 QB 169.

¹³⁶(1856) 11 EX 781, 784, per Lord Alderson.

¹³⁷*Donoghue v Stevenson* [1932] AC 562, 580; the famous neighbour principle now applicable to most of the product liability and consumer protection law, among other areas. ‘You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question’ per LJ Atkin. See also *Glasgow Corp v Muir* [1943] AC 488; *Bolton v Stone* [1951] AC 850; *Pais v Stephney* [1951] AC 367.

(j) Tort of Negligence in the Environmental Context

Within the environmental context the tort of negligence becomes significant as it provides a path for the plaintiff to pursue a claim for damages or injunction in situations where the harm has occurred personally and is not related to harm to his or her land or interest in land. With the increasing number of scientific studies that establish a causal link between human diseases and contaminated air, water and other pollutants, legal actions in the UK and in the US have resulted in protracted litigation.¹³⁸ Situations involving the inhalation of asbestos dust from working in the construction industry or in cement factories leading to mesothelioma or lung cancer, lead and hexavalent chromium poisoning within drinking water, chronic exposure to radioactive isotopes or nuclear radiation from unprotected dumpsites has seen a rise in cases hinging on negligent causation in the disposal or handling of pollutants by industries.¹³⁹ These cases were the forerunners for claims in negligence within the environmental context.

More recently, in 2009 in *Lambert and Ors v Barratt Homes Ltd (Manchester Division) and another*¹⁴⁰ [2009], the defendants were held liable for flooding of the plaintiff's neighbouring properties as a consequence of a development. The plaintiff sued both the developer and the local authority. The former was sued for acting negligently when it filled a ditch during the development, which caused the flooding, and the latter in omitting its duty to abate the nuisance. The local authority had owned the higher land from where the water had come, and as it was aware of the problem and of the new development, it was reasonably foreseeable that if it did not abate the nuisance the plaintiff was likely to suffer injury, which was enough to make it liable. In this case, the local authority, or the landowner, was made liable in failing to take remedial steps when in fact it had not caused the actual injury. Perhaps in this case the decision can be explained on the basis that for defendants with deep pockets and better resources, when the courts impose liability judges will consider factors like the availability of sufficient funds to carry out preventative works once the problem has been identified.¹⁴¹

¹³⁸See generally Wilde, above n 62, Chapter 3.

¹³⁹*Margereson v JW Roberts Ltd; Hancock v JW Roberts Ltd; Hancock v T N Plc* [1996] EnvLR 304 (joint cases); See J Steele and N Wikely 'Margereson v JW Roberts Ltd' (1997) 60(2) *Modern Law Review* 265 quoted in Wilde, above n 62, 51.

¹⁴⁰[2009] EWHC 744 (QB).

¹⁴¹See also *Latimer v Carmarthenshire County Council* (2007, unreported); *Bybrook Barn Centre Ltd and Ors v Kent County Council* [2001] EnvLR 544.

However, the success rate of plaintiffs in such cases has been low and fraught with difficulties of causation and fault on the part of the defendant. The difficulty of proving fault on the part of the defendant was amply demonstrated in the case of *Esso Petroleum v Southport Corporation*.¹⁴² Here, the claim was not only in negligence but also trespass and nuisance. Although the plaintiff alleged that the captain of the ship ought not to have navigated the narrow channel once it was established that there was a fault in the steering mechanism, this cause of action failed. In the circumstances, it was held that as the weather conditions were worsening it would have been more risky to weigh anchor and that it was an emergency situation in which the ship had to be made lighter by discharging the crude oil in order to save the crew and the ship from extreme damage. Similarly, in *Cambridge Waters v Eastern Counties Leather Plc*,¹⁴³ the court dealt with the claim in negligence by dismissing that there was any fault on part of the defendant, as under the circumstances in the late 1970s it was unforeseeable that the amounts of the chemical that spilled during the tanning process, even in low concentrations, would percolate into the potable water underground and prove harmful to the health of the local residents. The same water had been used and had not been tested previously when the European Directive for clean drinking water was issued. Thus, the defendants could not have taken steps to avoid the activity with a view to avoiding an unforeseeable harm.

In *Graham and Graham v Re-Chem International*¹⁴⁴ the plaintiff had alleged that the defendant had operated the incinerator in a negligent manner and that they often left the doors of the furnace open which resulted in the temperatures of the furnace within the incinerator being below that required to burn out the chemicals properly, which caused damage to the plaintiff. The defendant argued that during the period the incinerator was operative, the scientific knowledge available to the defendant and within the industry was not conclusive on whether a residual emission of furans and dioxins would be generated that could cause harm to the plaintiff.

The issue of fault on the part of the defendants thus did not form the crucial question; rather, the case turned on causation. Although foreseeability, as established by the *Cambridge Waters* case, was a requirement the threshold to prove negligence as compared with negligence in nuisance proved to be a difficult challenge to be surmounted. Thus, this

¹⁴²[1956] AC 218.

¹⁴³[1994] 2 AC 264.

¹⁴⁴[1996] EnvLR 158.

case reflects the difficulties that a plaintiff faces when proving a breach of the defendant's duty of care in addition to the foreseeability of injury.

In contrast, in nuisance, the threshold of negligence is for determination of liability. In *Graham* the defendant was held liable as the defendants knew that the incinerator was producing pollutants as it was foreseeable in such an operation that it would, and that was what had caused harm to the plaintiff.¹⁴⁵ Additionally, the presence of multiple factors of causation and the diffuse nature of the pollutants, whether in air or water, make it much more difficult for an individual plaintiff to prove causation in negligence and establish liability. Similar issues of establishing causation and a link between the disease and the pollutant is seen in the cases in American courts.¹⁴⁶

In the Indian context, a negligence action may be brought to prevent environmental damage but the plaintiff must show that the defendant owed him or her a duty to take reasonable care to avoid the damage complained of; the defendant breached its duty, and that the breach caused the damage, which was not too remote. The duty owed by the defendant depends on the circumstances and the risk of the activity in various situations. Negligence actions are rarely brought independently and may be sometimes coupled with nuisance.¹⁴⁷ Therefore, foreseeability of harm and standard of reasonableness by the defendant becomes a necessary factor. It may also be a breach of strict liability and the *Rylands* rule where the negligent act allows the escape of a dangerous thing that the defendant has brought on to his land. In *Mukesh Textiles Mills (P) Ltd v HR Subramanya Shastry*¹⁴⁸ the plaintiff brought an action in, inter alia, negligence and violation of the rule in *Rylands* causing damage to his rice and sugarcane fields. The Court held that the defendant owed a legal duty to take reasonable care in maintenance of its plant. The defendant was held liable from both the foreseeability test and the initial causation as it had omitted its duty to do what a reasonable person ought to have done. Secondly, a duty situation also emerged upon consideration of the *Rylands* rule as the escape of molasses was a consequence of the non-natural use to which the defendant had put his land. However, the causal link between the negligent act and the damage to the the plaintiff is hard to prove in environmental pollution cases.¹⁴⁹ Where a toxic substance escapes where

¹⁴⁵Wilde, above n 62, 64.

¹⁴⁶*Shockley v Hoechst* ELR 20155. No. 6:90-0018-3, 793 F. Supp. 670/35 ERC 1304/(D.S.C.); *Sterling v Velsicol Chemical Corporation* 855 F2d 1188 (6th Cir. 1988).

¹⁴⁷Divan and Rosencranz, above n 4, 99, 101.

¹⁴⁸AIR 1987 Kant 87

¹⁴⁹See Divan and Rosencranz, above n 4, 104, 105.

the effect is immediately apparent, as in the case of methyl isocyanate in the Bhopal case¹⁵⁰, the link may be easier to prove. However, where the damage is latent then the defendant can argue that there may be other factors that have contributed to the plaintiff's injury and in such cases the link is more difficult to establish.

5 Breach of Statutory Duty: Overlap of Negligence Standards and Nuisance

In the UK the tort of breach of statutory duty¹⁵¹ is an independent tort, different from the claim in negligence.¹⁵² In such a situation a plaintiff can bring a claim where a specific common law right, different from a claim in negligence, has been violated. In the context of environmental regulation, a specific law would provide an objective standard or requirements that the defendant should follow. Consequently, where the defendant breaches its duty then liability is determined by reference to the statutory regulation that is broken rather than the standard in negligence.¹⁵³ A plaintiff could claim only in the situation where the specific law creates a duty on the defendant that is specifically owed to the plaintiff.¹⁵⁴ The harm must be the one that the statute recognises¹⁵⁵ and the defendant must have breached its requirement under the specific regulation or the statute, and there must be a direct causal connection between the defendant's breach of duty and the plaintiff's injury.¹⁵⁶

The decision in *Dobson and Ors v Thames Water Utilities Ltd*¹⁵⁷ is noteworthy. It reflects the intersection between private law and public law and the similarity in fashioning remedies for victims by providing compensation not only under private nuisance but also under the Human Rights Act 1998. A similar trend is observed within the Indian context of award of damages for violation of the fundamental right to a healthy environment (a constitutional tort) and traditional tort.¹⁵⁸ The Court of Appeal confirmed that it was possible for those without a proprietary interest to be compensated under the Human

¹⁵⁰ See *Infra* Chapter Six, Lessons from Bhopal, 275,276,.

¹⁵¹ See eg, the Environmental Protection Act 1990, S 73(6) provides compensation to victims who may be injured or whose property may be damaged due to breach of the requirements under S 33(1) and S 63 (2) (licensee's duty in depositing controlled waste) UK Nuclear Installations Act 1965 which provides compensation to a victim who suffers injury as a result of breach of any of the duties under the Act. The defendant in such a case could be an operator, licensee, the regulatory authority or the government.

¹⁵² *LPTB v Upson* [1949] AC 155, 168–169, per Lord Wright; See WVH Rogers, *Winfield and Jolowicz on Tort*, 18th edn (Sweet and Maxwell, 2010) 170–171.

¹⁵³ *Upson* [1949] AC 155.

¹⁵⁴ *Hartley v Mayoh and Co* [1954] 1 QB 383.

¹⁵⁵ *Gorris v Scott* (1874) LR 9 Exch 125.

¹⁵⁶ *Ginty v Belmont Building Supplies Ltd* [1959] 1 All ER 414.

¹⁵⁷ [2009] EWCA Civ 28.

¹⁵⁸ See Chapter 5, *infra*, 227.

Rights Act 1998, even if others in their home had already been compensated in damages under private nuisance.¹⁵⁹ The decision in *Dobson* opens the door for claims against public bodies for compensation under the Human Rights Act 1998 even if the claimants have no interest in the property.

D Development of Common Law Liability in the Indian Environmental Context

The common law principles began to be applied in India by virtue of the Charter Acts around the end of seventeenth century during the Moghul rule.¹⁶⁰ The legal system was comprised in part of indigenous cultural, personal and religious laws. When English courts were established to settle disputes between locals and English traders, judges applied the principle of 'equity, justice and good conscience' for civil cases where there was no existing law or a legal source that could remedy the situation.¹⁶¹ Gradually, as the English control over Indian territory grew, common law concepts were introduced and subsequently applied to smooth out situations where customary law did not provide a remedy or where there was a conflict in the operation of various cultural or legal traditions. Comparative lawyers emphasise that over time the application of common law concepts and then English law principles paved the way for the evolution of an Indian legal system with modified features.¹⁶² These new concepts also applied tort liability in appropriate situations; however, application of tort principles proved difficult and unsuitable in many situations within India.¹⁶³ Tort law principles found statutory standing for motor vehicle accident claims, insurance, workers' and employees' compensation, employer's liability or liability under legislation for carriage of goods by sea, among others. Unlike the codification of tort principles in the US under the Restatement of Torts, Second and Third,¹⁶⁴ in India, tort law principles have not been codified. However, specific legislation recognising tortious liability, for example in the protection of consumers, exists in Indian

¹⁵⁹The defendant argued that that would make them liable twice for the same loss for which they had already compensated the owner. The second question for consideration was whether the Court had the power to allow compensation in the event that damages in private nuisance were lower than those under HRA 1998.

¹⁶⁰Charter Acts 1661 and subsequent Charters, see MP Jain, *Outlines of Indian Legal History*, 2nd edn (Tripathi Publications, 1966).

¹⁶¹See AC Banerjee, *English Law in India* (Ahbinav Publication, 1984) in Abraham, above n 7, 40–41.

¹⁶²See JDM Derrett, *Essays in Classical and Modern Hindu Law*, vol 4 (EJ Brill, 1978) 143, 150.

¹⁶³R Ramamoorthy, 'The Difficulties of Tort Litigants in India' (1970) 12 *Journal of Indian Law Institute*, 312–321.

¹⁶⁴See Percival et al above n 6.

law as the Consumer Protection Act 1986,¹⁶⁵ recognising fault liability for defective products, similar to legislation found in the UK. However, substantive tort law principles forming part of common and pre-existing law before the Constitution have not been gathered in a code, but are applied in cases after being adapted and modified to suit Indian circumstances.¹⁶⁶

6 Public Nuisance Under the Indian Penal Code: Criminal Liability

In contrast to the application and expansion of the tort of nuisance in Anglo-American jurisdictions for addressing environmental harms, its application and expansion in addressing environmental harms in private law claims has been limited. Also in contrast to private nuisance principles, the tort of public nuisance also recognised under criminal law has led to the early development of environmental jurisprudence and some basis for vindication of an environmental claim. Obviously, such a claim includes standing requirements where the plaintiff needs to prove particular damage over and above that of the public. Legal standing requirements have been filtered and modified through judicial interpretation of procedural law under Article 32 of the Constitution. A public interest or a social interest petition can be brought to the Supreme Court or a State High Court by ‘any person in public interest’ on behalf of the victims against an action of a ‘state’ (the constitutional boundaries of what entities comprise a state have been expanded) infringing the public interest.¹⁶⁷ However, public nuisance liability has operated through statutory provisions in India. The Indian Penal Code 1860 (IPC) and the Code of Criminal Procedure 1973 contain specific provisions for public nuisance. The offences dealt under the IPC include, inter alia, prohibited acts against public health.¹⁶⁸ Section 268 defines public nuisance in relation to the wrongdoer so that:

¹⁶⁵See Section 14 CPA 1986 which recognises manufacturers and product liability allowing for compensation and even punitive damages. See also the UK Consumer Protection Act 1987 recognising strict liability for damage arising from defective products implementing the European Directive 85/374/EEC and Restatement of Torts Second 1965–79, Restatement of Torts Third (Product Liability 1998).

¹⁶⁶See Article 372 by virtue of which the provision that all laws in force immediately before the commencement of the Constitution continue to be in force. Certain laws in the area of governmental liability for torts committed by the government have led to a few constitutionally irreconcilable situations. See IP Massey, *Administrative Law* 2nd edn (Eastern Book Company, 1985) 322–323.

¹⁶⁷For details on Social Action Litigation and Public Interest Litigation (PIL) see Chapter 5, *infra*, 186.

¹⁶⁸Sections 269–271 deal with the spread of infectious diseases. Other provisions dealing with public nuisance in an environmental context include fouling of the water of public springs or reservoirs (Section 277); making the atmosphere noxious (Section 278); negligence in respect of machinery, buildings and animals (Sections 287, 288, 289); negligence in the handling of poisonous substances, combustible items and explosives (Sections 284–286, 426).

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.

The instances of public nuisance as enumerated in the Section above are read with Section 290 of the IPC which provides for punishment in cases not otherwise covered by the IPC.¹⁶⁹ However, the punishment in such cases is a criminal penalty of a paltry sum of two hundred rupees. Nevertheless, courts have applied the provisions of Section 268 for holding a defendant liable for public nuisance, as in the case of *Phiraya Mal v Emperor*.¹⁷⁰ In this case the plaintiff complained that the working of husking machinery for rice paddies throughout the night in a residential area constituted annoyance, inconvenience and disturbance to the plaintiff and the community and was covered under Section 268. The Court held that ‘if an act is found to be injurious to the physical comfort of a neighbour it must also then be held that it is injurious to the physical comfort of the community,’¹⁷¹ thus explaining that it was not essential that such an interference or annoyance should injuriously affect every member of public within its range of operation but it was sufficient that it affects the people dwelling in the vicinity.

Of further relevance to actions which may constitute public or private nuisance in other common law jurisdictions are two provisions of the IPC under Sections 277 and 278 dealing with the fouling of any public spring or reservoir and making the atmosphere noxious to health. Both these provisions can arguably be used against polluters for cases of water and air pollution. However, the higher burden of proof required in criminal cases has proven to be a difficult obstacle for the prosecution.¹⁷² Thus, it becomes easier for the wrongdoer to escape the penal provisions on mere technical interpretation. In *Queen v Vitti*

¹⁶⁹As it is beyond the scope of this thesis to analyse all cases dealing with public nuisance related to environmental matters, only a few significant cases have been studied. Moreover, there is a dearth of literature available on this particular topic. For this section I have primarily relied upon the ‘Indiannannon’ website listing earlier Indian cases; Abraham, above n7; Divan and Rosencranz, above n 4; and Michael Anderson, ‘Public Nuisance and Private Purpose: Policed Environments in British India 1860–1947’ (1992) 1 *SOAS Law Department Working Series Papers* 1–39.

¹⁷⁰(1904) 1 CrLJ 512.

¹⁷¹See also *Gajadhar v Emperor* AIR 1934 Nag 193.

¹⁷²See Section 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 is ordinarily used, shall be punished, with imprisonment of either description for a term which may extend to five hundred rupees, or with both.’

Chokkan and Ors,¹⁷³ one of the earliest cases decided by the Madras High Court, it was held that ‘the words ‘public spring’ or ‘reservoir’ under Section 277 did not include a river. All five accused escaped penalty as none of the actions of the accused could be interpreted or applied under Section 277, the only section of the IPC with respect to the fouling of waters. Consequently, the conviction of the first accused was quashed as his action of washing his bullock had contaminated the only drinking water source situated in the river and not any ‘public spring’ or ‘reservoir’ as envisaged by Section 277.¹⁷⁴ The other four persons had also contaminated the water, rendering it unfit for bathing or drinking. They had even interfered with the rights of the riparian owners downstream by damming the river for catching fish, but none of these actions could prove them criminally liable for ‘fouling public spring or reservoir waters’ under Section 277.

In order to avoid conflicts due to strict application of the penal section under 277, public nuisance action under Section 290 was applied to prosecute wrongdoers for fouling the river waters in 1904 by the Bombay High Court in *Emperor v Nama Rama*.¹⁷⁵ Although Section 277 was found inadequate to prosecute the nine accused for fouling the rivers’ waters and rendering them unfit for bathing and drinking, the High Court held that it was better to prosecute the wrongdoers for public nuisance, if evidence was provided that the acts were such as to cause common injury or danger to the public.

With the changing judicial understanding on environmental pollution matters, decisions have begun to reflect better use of public nuisance provisions for prosecuting persons who foul river waters. In *Berkefield v Emperor*¹⁷⁶ the manager of a bone mill was convicted and found guilty of committing public nuisance when he did not cover or properly dispose of a stack of bones.

7 Penal Provisions and Difficulties of Burden of Proof

The above cases show that the application of the criminal provisions and the public nuisance remedy of punishment and abatement did not allow the development of a clear

¹⁷³(1876–77) ILR 4 Mad 229.

¹⁷⁴The term ‘public spring’ has been given a limited interpretation in some other decisions as well, for example *Empress v Halodhur Poroe*, (1876–77) ILR 2 Cal 383 and *Emperor v Nama Ram* (1904) 6 Bom LR 52. Fouling of the water of a river running in a continuous stream may well be a nuisance under Section 290, IPC (vide (1904) 6 Bom LR 52). See also *Member, Secretary, Kerala v The Gwalior Rayon Silk Mills*, AIR 1986 Ker 256. See Abraham, above n 7, 44–45.

¹⁷⁵(1904) 6 Bom LR 52.

¹⁷⁶(1906) ILR 34 Cal 73.

path for the determination of environmental harm cases. The challenges of air, water and noise pollution or urban development problems were inadequately covered under the penal provisions. The higher burden of proof required in criminal law, and the attitude of the judges in emphasising ‘black letter’ law interpretation in most cases, has had a futile effect on the application of penal remedies to address environmental claims. Further, the provision under IPC Sections 277 and 278 were not applied in a manner to address the problems of the pollution of river water or dust particle air pollution, but were evidently ignored or avoided. The miserly application of these provisions, which could have been interpreted in a broader and more environmentally sensitive manner, can be seen even post-independence.¹⁷⁷ Instead of applying Section 277 provisions for obstructing a water course leading to stagnation, foul odours and the breeding of mosquitoes that caused interference with the public interest and the population within the vicinity, the court held the defendant liable under Section 290 as it caused danger to the health of the people living in the neighbourhood.¹⁷⁸

In *Puranchand v State of Uttarpradesh*¹⁷⁹ one can observe how the application of the public nuisance provisions under criminal law by the Supreme Court was inhibited due to the prioritisation of industrial growth and development, the utility of the defendant’s activity and technical requirements findings. In this case, the Court held that where the chimney of a mill (a socially useful activity) is of a prescribed height (municipal regulations) and if it emits smoke the defendant cannot be held liable for public nuisance under Section 290. Further, elsewhere, in applying the common law presumption it has been held that the defendant employer or principal is not liable for the continuing acts of his agent where environmental damage has been caused due to an industrial activity.¹⁸⁰ However, this understanding as observed in the earlier cases seems to have changed in the 1970s, when in the case of *Kurnool Municipality v Civic Association, Kurnool*¹⁸¹ the High Court of Andhra Pradesh held the municipal corporation of Kurnool liable for public nuisance for the acts of its agent. This case led to a different understanding of the urban environmental harms faced by citizens and established a path towards a serious attitude in understanding and resolving such environmental harms by the judiciary.¹⁸²

¹⁷⁷See Abraham, above n 7, 45–46.

¹⁷⁸See *Acchammagari Venkata Reddy v State of Tamil Nadu* AIR 1953 Mad 242.

¹⁷⁹Cr AP 166 of 1959 DOJ 13 July 1962.

¹⁸⁰See eg, *Re: Nagappa Thevan* (1915) ILR 38 Mad 602 in Abraham, above n 7, 46 and the decision of the Calcutta High Court in *Bibhuti Bhusan Biswas v Bhuban Ram* (1918) ILR 48 Cal 515.

¹⁸¹1973 CrLJ 1227.

¹⁸²See Abraham, above n 7, Chapter 3.

Cases from the pre-independence era reflect the fact that the legal rationale for the understanding and resolution of environmental claims or matters that involved both private as well as public rights was primarily influenced by the judicial attitude that prevailed at that time.¹⁸³ However, during the 1970s the legal rationale and understanding of the courts towards such environmental problems underwent a marked change, especially with the decision of the Supreme Court in *Ratlam v Vardichand*, decided in 1980.¹⁸⁴ With the changing needs of a developing society and the constant conflicts between development and environmental rights a new consciousness and newer rationale was adopted that opened the way for avoiding legal and procedural obstacles and laid the foundations for further development of an environmental liability framework.

8 Public Nuisance and applicability of the Civil Procedure Code and Criminal Procedure Code in environmental infractions

The provisions under the CrPC Parts B, C and D public nuisance provisions contained in Sections 133–144 have been used most significantly to deal with urgent cases of nuisance in an environmental context, among others.¹⁸⁵ Section 133 empowers a magistrate to remove or abate a nuisance apart from a civil action which can be brought before the District Court.¹⁸⁶ Nuisance actions under Section 133 CrPC became more popular as an environmental starting kit tool with Justice Krishna Iyer's decision in *Ratlam v Vardichand*.¹⁸⁷ Generally, Section 133 operates to address public nuisance under which

¹⁸³See Anderson, above n 168, 1–33.

¹⁸⁴AIR 1980 SC 1622. Before *Ratlam* and during the period of 1950 to the-late 1970s there have been no significant cases with respect to environmental actions. Search through Indian database, especially the Supreme Court reported cases did not reveal any significant case during the decade of 1970s. See also Abraham above n7,44, 45.

¹⁸⁵Part A deals with unlawful assemblies under sections 129–132, Part B with public nuisance, Part C with urgent cases of nuisance or apprehended danger and Part D with cases relating to immovable property.

¹⁸⁶Section 16 CPC 1908 provides for a claim or more specifically a civil suit to be filed in the court where the subject matter of the dispute is situated. Suits to be instituted where the subject matter is situated, subject to financial or other limitations prescribed by any law, suits:

- (a) for the recovery of immovable property with or without rent or profits,
- (b) for the partition of immovable property,
- (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,
- (d) for the determination of any other right to or interest in immovable property,
- (e) for compensation for wrong to immovable property,
- (f) for the recovery of movable property actually under distraint or attachment, shall be instituted in the Court within the local limits of whose jurisdiction the property is situated:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant, may where the relief sought can be entirely obtained through his personal obedience be instituted either in the Court within the local limits of whose jurisdiction the property is situated, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain. Explanation: In this section 'property' means property situated in India.

¹⁸⁷(1980) 4 SCC 162.

provision a magistrate can make conditional orders for the removal of nuisance from any public place, river or channel used lawfully by the public. It also includes situations where the conduct of any trade or occupation or the keeping of goods is injurious to the health or physical comfort of the community, or any construction or building or disposal of any substance is likely to occasion an explosion, or where a tree or structure is in a condition that it is likely to fall and cause injury, or where any tank or excavation adjacent to a public place ought to be fenced, or a dangerous animal be destroyed or confined. In all situations as prescribed under Section 133 (1) a–f(i–vi) a magistrate is empowered to issue an abatement notice to remove, desist, or prevent and meet with urgent or emergent situations of public interest as a preventive measure. Thus, public nuisance would lie where there is a grievance from the public at large against the carrying out of, for example, the trade of fodder-cutting and selling by the defendant at a place where it causes annoyance to the public at large.¹⁸⁸ In *Himmat Singh and Ors v Bhagwan Ram and Ors* the Court held that:

Carrying on noisy trade which blows out sand-laden wind containing particles of fodder which go over the roofs or inside the houses of residents will amount to a public nuisance, if by reason of the injury done to neighbourhood, it interferes with the comfort and enjoyment of all those persons who come within the range of it. Once the noise and dust wind is considered to be a nuisance of the requisite degree, it is no defence to contend that it was in consequence of the lawful trade or business.¹⁸⁹

In this case the nuisance was caused due to the noise and a sand-laden wind spreading when the ‘fodder-tals’ (fodder cutting) machines were being run on open land with no mechanical device or contrivance to prevent the dust from spreading through the air and reaching the houses in the neighbourhood. In holding the defendants liable in this case, although the court recognised the damage that was wrought to the health and comfort of the people in the locality and denied the defence of the fodder cutting mills operating before the area developed as a residential locality, similar to the defence recognised in other common law jurisdictions of the plaintiff coming to the nuisance, the court denied it, stating that ‘there was no prescriptive right to commit public nuisance and a long enjoyment could not legalise public nuisance.’¹⁹⁰ The provisions of Section 133 are read

¹⁸⁸ See *Himmat Singh and Ors v Bhagwan Ram and Ors* (1988) CrLJ 614.

¹⁸⁹ (1988) CrLJ 614, para 12.

¹⁹⁰ *Ibid*, paras 13–15. See also *Lalman v Bishambar Nath* AIR 1931 All 433; *Raghunandan v Emperor* AIR 1943 Mad 357; 1943–44 CrLJ 533; *Rajagopala v Samdum Begum* and AIR 1920 Cal 550 (1): 1920–21

with other provisions as contained in Sections 134–143 of the CrPC to provide for a comprehensive procedure for dealing with public nuisance. Additionally, where there is an urgent case, Section 144 provides the magistrates with wide powers to abate, or remove or direct authorities or persons to take steps to remove the apprehended dangers to maintain public tranquility. Despite its wide potential to cover environmental harm situations, Section 144 has been seldom used for preventing environmental harm. In contrast, it has been widely applied for controlling public order, unlawful assemblies and in riot situations.¹⁹¹ Post-emergency, the provisions of the CrPC, hereto unexplored, have been applied to resolve environmental harm situations, reflecting the struggle to administer criminal liability tools for resolving environmental claims and a reorientation of the judicial approach towards such matters.¹⁹²

E The Civil Procedure Code 1908 and Civil Suits

Similarly, under the Civil Procedure Code (CPC) 1908, Sections 9 and 91 provide for a civil claim for public nuisance. However, due to standing requirements prior to 1976 a civil claim could only be brought after seeking approval from the Advocate General's office. An amendment to this standing requirement, which was an obstacle to bringing of civil claims, was thus removed to make the procedure for a civil claim easier for an individual person.¹⁹³ Consequently, it was theoretically possible for an individual to institute civil proceedings for an environmental claim under Section 91. This procedural development further reflects the opening up of the legal liability framework for public interest cases, including environmental claims.¹⁹⁴ This development also reflects how a civil remedy could be instituted for PIL and denotes the interconnectedness of tort and environmental law questions.

In *Datta Mal Chiranjil Lal v L Ladli Prasad and Anr*¹⁹⁵ the plaintiff complained that noise, dust and vibrations from the defendant's shop, where the latter operated an electric flour mill, caused nuisance. The Court at the first instance held that the running of the electric

CriLJ 669; Sheikh Mohidin (1883) 2 Weir 59 Cf Bliss v Hall (1838) 4 Bing NC 183, 186, per Tindal CJ and Miller v Jackson (1977) 3 All ER 338.

¹⁹¹See Manzur Hasan and Ors v Muhammad Zaman and Ors (1921) ILR 43 All 692 and Shaik Piru Bux and Ors v Kalandi Pati and Ors (1973) 2 SCR 563. Contra Bharat Prasad and Ors v State of Bihar and Ors Supreme Court Criminal Appeal 953 of 2009, DOJ 6 May 2009.

¹⁹²See Abraham, above n 7, 49.

¹⁹³Ibid, 49.

¹⁹⁴See J Swaigen, 'The Role of the Civil Courts in Resolving Risk and Uncertainty in Environment Law' (1991), 1 *Journal of Environmental Law and Policy* 199.

¹⁹⁵AIR 1960 ALL 632.

mill produced a very unpleasant noise which caused ‘great inconvenience to the plaintiff and the members of his family and that it generates vibrations on account of which the walls, floor, doors, windows, furniture or utensils in the plaintiff’s house appear[ed] to be shaking and rattling.’ On appeal, the High Court affirmed the order passed by the lower court and held that:

Every owner of the property is entitled to use it beneficially subject to such limitations as may be incidental to similar and beneficial enjoyment of other owners of their properties. The plaintiff in the instant case is therefore entitled to reside comfortably in his own house, and if the defendant by running his flour mill produces such noise and vibrations as to cause substantial discomfort to the plaintiff and does not allow him to reside comfortably in his own house the defendant’s action amounts to a nuisance.¹⁹⁶

Section 91(1)(b) of the CPC provides for recognition of acts for which proceedings could be instituted for public nuisance by two or more persons, where a wrongful act of the defendant affected the public, for seeking a suit for declaration and injunction. Further, Subsection 91(2) provides that where a person has an independent right to sue another then Section 91 does not limit that person’s right to pursue an independent claim. Additionally, Order 1 Rule 8 (read with Section 91) allows a person to sue or defend on behalf of all persons affected by a single cause of action to avoid a multiplicity of suits. This provision has significantly helped claimants in environmental cases and is similar to the procedure followed in a representative suit in other common law jurisdictions.¹⁹⁷

9 Code of Civil Procedure and Representative Suits

Normally in a representative suit, where the common interest of the community or a class of people has been affected by a wrongful action of one or more defendants, the court is empowered to direct one person or an organisation to represent the affected community or class. Such a representative suit is for administrative and economic efficiency.¹⁹⁸ Order 1 Rule 8 CPC does not bar an individual person from seeking relief in the form of an injunction or damages. Further, after receiving a person’s complaint the Court may appoint a commissioner to investigate the defendant’s activity and the harm alleged by the plaintiff.

¹⁹⁶Ibid, para 5.

¹⁹⁷See Divan and Rosencranz, above n 4, 104–105.

¹⁹⁸Ibid.

The power to appoint commissioners in matters of a civil nature is found in Order XXVI CPC and Order XLVI Supreme Court Rules, 1966. In several environmental dispute cases the Supreme Court has employed this tool to gather detailed facts and evidence and understand the complexities and nuances of the economic, social, cultural and administrative conflicts within an environmental dispute. However, with the Court stepping into the shoes of a regulator and taking up a role in environmental governance, environmental claims have become rather complicated and have acquired more of a public interest character even where some specific harm was alleged.

10 Class Actions

In *MC Mehta v Union of India* (Ganga River pollution cases, municipalities and tannery cases)¹⁹⁹, the Court made an order under Order 1 Rule 8 by publishing the crux of the PIL filed by Mr MC Mehta directing all municipal corporations and industry owners discharging trade effluents into the river to show cause as to why directions should not be issued to them to stop the flow of trade effluents and the sewage into the river Ganga. This PIL was in the form of a representative suit where all affected defendants were covered under the notice published in the newspaper directing them to show cause. The modification made in the CPC Order 1 Rule 8 allowing for representative suits, and the procedural modification under Article 32 accepting a simple letter for a public interest cause and making the legal standing requirements easier for the Supreme Court, paved the path for a human rights-oriented approach.

This development has been significant for the evolution and expansion of a liability framework for environmental claims in India, as it also reflects the manner in which the functional corrective justice aspect of tort law and environmental law has overlapped to provide a remedy for an environmental action. This constitutional and civil law modification in procedural law has also shaped the substantive development of environmental law and the recognition of a virtual environmental right under Article 21 read with the fundamental duties chapter and Article 51A(g).²⁰⁰ The recognition and evolution of a constitutional tortious remedy in the form of compensation, not only for the claimants but also reparative damages for the harm done to the environment, mark a significant development of environmental jurisprudence in India.

¹⁹⁹ AIR 1988 SC 1037 and 1038.

²⁰⁰ See Chapter 5, *infra*, 163,171.

F Remedies for Civil Wrongs: Higher Reliance on Injunctions

Sections 94, 95 and Order 39 CPC provide for the remedy of temporary and perpetual injunctions for civil actions.²⁰¹ Upon the final adjudication of a civil matter, for example, an environmental claim where the plaintiff has sought a temporary injunction, the court may also issue a perpetual injunction. In such a case the defendant is permanently restrained from doing the wrongful act which the plaintiff has complained of.²⁰² The Court may grant an injunction where there is a *prima facie* case that the plaintiff is likely to succeed in the suit; that there is a likelihood of irreparable harm and that the Court is satisfied that the damage the defendant would suffer is outweighed by the damage the plaintiff would suffer in case the injunction is refused.²⁰³ The courts also have an inherent power to issue a temporary injunction in circumstances that are not covered by Order 39 when a court is satisfied that the interest of justice would require so. Generally, in environmental matters claimants seek an injunction or an abatement of nuisance rather than damages. However, in private nuisance actions the claimants have sought relief not only in the form of an injunction but also in damages.²⁰⁴ In contrast to damages, temporary and perpetual/permanent injunctions are issued in environmental pollution matters more often than orders for grant of damages. However, the recent trend of the Supreme Court indicates that in appropriate cases the Court will not desist from granting compensation to victims and damages for repairing the harm done in cases where pollution has been endemic.²⁰⁵

G Grant of Compensation and Application of Tortious Liability

In *Ram Baj Singh v Babulal*²⁰⁶ the polluter was permanently restrained from operating his brick grinding machine which was causing annoyance and disturbing his neighbour, a medical practitioner. The decision in this case was made more on the common law of nuisance as applied and understood in other common law jurisdictions, rather than the

²⁰¹See also Section 39(2) of the Specific Relief Act, 1963.

²⁰²*Glaxo SmithKline Consumer Healthcare Limited and Ors v All Stores through its proprietor SM Abdul Gani* 2009 (8) MLJ 8 45.

²⁰³Order 39 Rule 1–5 provides for conditions for the grant of a temporary injunction. For common law conditions see also *Martin Burns v RP Banerjee* AIR 1958 SC 79.

²⁰⁴The three conditions for the grant of a temporary injunction have been reiterated in *Glaxo Smithkline Consumer Healthcare Limited and Ors v All Stores through its proprietor SM Abdul Gani* 2009 (8) MLJ 8 45. See also Abraham, above n 7, 47 and Divan and Rosencranz, above n 4, 114–118.

²⁰⁵*Enviro-Legal Action v Union of India*, (2011) 8 SCC 161, (the Bichri II judgment). See also *MC Mehta v Union of India* (1987) 1 SCC 395, 421.

²⁰⁶AIR 1982 All 285.

trend of not granting damages or only providing for temporary injunction. Some academics observe that this decision raises a question as to how far the common law standard of ‘reasonableness’ provided a satisfactory basis for regulating pollution and that it was not best suited to the Indian situation as it would not protect the most vulnerable sections of society.²⁰⁷

Similarly, in *Mukesh Textiles Mills v HR Subramanya Sastri*²⁰⁸ the Karnataka High Court applied the rule in *Rylands v Fletcher* and held the defendant, the owner of a sugar mill, liable for damaging the plaintiff’s paddy crop and cane fields when the molasses stored in an earthen tank collapsed. The Court held that the plaintiff was entitled to damages as this was a clear case of liability arising out of application of the *Rylands* principle. Again, it should be noted that although the High Court upheld the decision of the lower court in awarding damages to the victim, the final judgment came after a period of 17 years. The case involved questions of both negligence and nuisance and application of the *Rylands* rule.

Whereas earlier, these delays and long periods of adjudication had deterred claimants from pursuing nuisance or tort actions, the current trend as reflected in Supreme Court decisions provides for a noticeable change, especially in environmental damage cases. In contrast to the Mukesh case where only 12,000 rupees were awarded as damages after a litigation of 17 years, currently an award of damages is not seen as inefficient or illusory.²⁰⁹ Rather, in environmental harm cases the Supreme Court has increasingly adopted the corrective and reparative justice functions of tort in environmental damage cases and awards compensation not only to the victims but also for rectification of the damage to the environment.²¹⁰

H Private and Public Nuisance: Grant of Injunction and Compensation

²⁰⁷See Abraham, above n 7, 50. For a discussion of what is reasonable and how the court has determined what is excessive noise see *Radhey Shyam v Gur Parasad Serma* AIR 1978 ALL 86. See also *B Venkatappa v B Lovis* AIR 1986 AP 239 (a mandatory injunction was issued against the defendant for closing the holes in his chimney that faced the plaintiff’s property as smoke and fumes caused an inconvenience and discomfort to the plaintiff in his enjoyment of his property).

²⁰⁸AIR 1987 Kant 87.

²⁰⁹See Marc Galanter, above n 3.

²¹⁰See eg, *the Indian Council for Enviro-Legal Action v Union of India* (2011) 8 SCC161 (Bichri II).

Similarly, the operations of a bakery using a clay oven with a chimney in a residential area was both a subject of private and public nuisance in *Gobind Singh v Shanti Swarup*.²¹¹ In this case the Supreme Court restored the magistrate's order that had been reversed by an Additional Sessions Judge Chandrachud J held that:

In a matter of this nature where what was involved is not merely the right of a private individual but the 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. The evidence disclosed that the smoke emitted by the chimney constructed by the appellant was 'injurious to the health and physical comfort of the people living or working in the proximity' of the appellant's bakery.²¹²

Further, in *PC Cherian v State of Kerala*,²¹³ the factory involved was engaged in the large-scale mixing of rubber with carbon and the buildings in which the mixing operations were being carried out were not adequately ventilated, with sufficient devices to prevent the carbon black from escaping into the atmosphere. Hence, it spread through the atmosphere and in the vicinity of the factory, which affected the life of the local people, resulting in disastrous injury and discomfort to the public at large. Arguments on the nature and character of the neighbourhood and the complainant coming to the nuisance were not pursued before the High Court as one would expect for a common law action for nuisance; however, the Court decided on the criminal and public nuisance aspects of health that is recognised under Section 133 of the CrPC. The Court held that the deposit of carbon black in the instant cases was an instance of public nuisance, even if the act may not have caused a health hazard to the public. In *Krishna Gopal v State of Madhya Pradesh*²¹⁴ a manufacturer of glucose saline solution was being operated by the defendant using a coal boiler that emitted considerable smoke and ash in a residential area. On the complaint by one of the residents, the subdivisional magistrate ordered the closure of the polluting factory by taking action under Section 133 CrPC. The defendant filed a revision²¹⁵ with

²¹¹1979 SCR (1) 806.

²¹²At 809.

²¹³1 January 1981, Kerala High Court, JJ Amma and U Bhat.

²¹⁴[1986 CrLJ 396].

²¹⁵Revision petition lies against an order for which the statute does not provide for an appeal. It can be filed under Sections 362, 397, 398 of the Criminal Procedure Code (CrPC). Normally an appeal and revision under the Criminal Procedure Court reviews the decisions of the lower court. The lower criminal court which has passed the order can review its order under Section 362 only to correct clerical or arithmetical orders. In contrast, in the CPC 1908, the court which passes the order or decree has to a large extent wider powers to review its own order under Section 114 of the CPC which is not the case under Section 362 of the CrPC.

the sessions judge who modified the order of the lower court and allowed the factory to work but without the boiler. However, in a further revision petition by the state to the High Court it was held that the evidence and witness statements clearly indicated the degree of nuisance and the deleterious effect it was having on the residents of the area and in order that the nuisance be removed, the subdivisional magistrate's order ought to be restored. This case reflects the increasing usage of Section 133 CrPC for public nuisance cases even if in this instance it was brought by an individual person.²¹⁶

I Public Nuisance Moving Towards the Public Law Rationale

Public sentiment, as well as the sensitivity of the government, in resolving environmental harms, including public nuisance, has evolved from an approach that indicated indifference or conflict of interest status during the British regime, to being mildly responsive after independence until the 1970s, and finally, to being environmentally aware. This evolution of environmental sensitivity can be seen in the judicial decisions post-emergency and by adoption of human rights-based solutions within the public liability framework.²¹⁷ Earlier cases of public nuisance indicate that the defences available under public nuisance, especially that of proving substantial damage, locality doctrine and the plaintiff coming to the nuisance had been successfully pleaded by the polluters and upheld by the courts in British India. These cases also reflected the judicial attitude, which was less sensitive to environmental and public interest. Such cases were largely dealt with under CrPC Section 133 and common law where the courts operated based on self-imposed limitations. It also reflected an approach that was pro-industry and over-legalistic.

11 Applicable Defences in British India

In *Lalman v Bishambhar Nath*,²¹⁸ decided in 1931, a lime kiln belonging to the defendant had operated in the area for over 45 years. On a complaint by the plaintiff, the magistrate ordered the defendant to stop the kiln and relocate it due to the substantial damage done to

Order XLVII Rules 1–9, CPC, deal with applications for review, while under Section 115 of the CPC a revision can only be filed to the High Court. Orders and Rules are part of CPC and not criminal procedure code.

²¹⁶See also *Mukesh Textiles Mills v HR Subramanya Sastry* AIR 1987 Kar 87: leakage of molasses, application of *Ryland v Fletcher*; *Mahadevi v Thilikan* 1988 KLT 730: closure of a factory generating noise and pollution; *Ram Baj Singh v Babulal* AIR 1982, ALL 285: Doctor and brick making factory.

²¹⁷See Charu Sharma, 'Human Rights and Environmental Wrongs—Integrating the Right to Environment and Developmental Justice in the Indian Constitution' in *Human Rights, Criminal Justice and Constitutional Empowerment*, C Raj Kumar and K Chockalingam (eds), (Oxford University Press, 2011) 321–347.

²¹⁸(1931) ILR 54 All 359.

the plaintiff by noxious fumes that caused interference in the enjoyment of his land and constituted a nuisance to the community and public safety. The magistrate also considered the fact that the fumes from the lime kiln had led to several deaths in the area as well in making this order. However, J Pullan, in the Allahabad High Court, reversed the lower courts' order on various grounds. Among others, without referring to the English cases and the defences available under nuisance, J Pullan applied the locality doctrine and the defence of the plaintiff coming to the nuisance. It was held that the complainant himself had only recently chosen to occupy the house opposite the kiln, which was built by the owner of the kiln, and when he did so he was well aware of any discomfort that might be caused by the burning of the lime. Secondly, the defendant had been operating the brick kiln for the last 45 years and conducting his business in a lawful manner, having obtained a licence under the municipal local health authority. Considering the evidence provided by witnesses, J Pullan agreed to accept the statements of two medical experts who had stated that the smoke from the kiln would not cause a danger to the residents at all over those of other witnesses and held that:

I do not consider that the kiln at present is in any way dangerous to the health of the public, and in the second, I am not prepared to find that any inconvenience that is being caused by it will be diminished by the erection of a wall such as that proposed by the Sessions Judge. ... I am of opinion that in any case such an order by a Magistrate is open to general objection in so far as it must inevitably reflect on the orders of the Municipal Board, and in this case in particular, that it has no justification because the lime kiln in question is not a danger to the community, and if it causes discomfort to anyone it is only to the complainant and his immediate neighbours who have deliberately chosen to reside in a position where they are liable to be inconvenienced by the smoke and smell from the kilns.²¹⁹

Similar to this case was the decision in *Manipur Dey v Bindhu Bhusan Sarker*²²⁰ and *Kahir Din or Ors v Wasan Singh*²²¹ where the arguments recognised by common law of longstanding nuisance and that of the complainant coming to the nuisance were accepted as overwhelming defences against an action for nuisance.

²¹⁹(1931) ILR 54 All 359, paras 7, 8.

²²⁰(1914) ILR 42 Cal 158.

²²¹AIR 1935 Lah 28.

Insensitivity of the judiciary towards environmental harms matters with a public interest rationale can also be seen in the technical and strict interpretation of legal provisions and their application in the decisions of the Patna High Court in 1926 in *Desi Sugar Mills v Tupsi Kahar*.²²² Here the question involved the public health and safety of over 100 people who allegedly were affected by the actions of two sugar mills that polluted the river and contaminated the drinking water source of the people in the neighbourhood. The question of whether there was public nuisance and the mills ought to stop their operations was at the first instance decided by the magistrate under Section 133 CrPC wherein the magistrate ordered the mills to stop discharging effluents directly into the river based on complaints of noxious smell, contamination of water leading to death of cattle and danger to the community of illness due to polluted waters. However, on appeal significant emphasis was laid on whether there was any substantial damage caused to the people and the proof of whether on scientific enquiry the discharge by the mills into the river had contaminated the waters so as to pose a risk to the health and safety of the community.

The High Court, (BK Bucknill and B Mulick JJ), held that although it was of utmost importance that sources of public water supply must be maintained pure and free from pollution by industrial factories, such pollution must be convincingly proved against the wrongdoer before any order can be passed by a magistrate under Section 133 CrPC.²²³ Emphasising the scientific enquiry and lack of evidence that substantial damage was caused due to the discharge of effluents into the river Daha, the Court quashed the orders of the magistrate against the defendant mill owners. A similar judicial approach of mild interest, also reflecting a lack of environmental sensitivity is seen in the decision of the Supreme Court in *Autar Singh v State of Uttar Pradesh*, decided in 1962.²²⁴

12 Shift in the Judicial Attitude and Development Post Emergency

Research through the database of Supreme Court for environmental tort claims under nuisance does reveal any significant cases during the period of 1970s. However with the shift in judicial attitude in post-emergency decisions starting with *Maneka Gandhi v Union of India* ²²⁵ and related cases indicate attempts to resolve various socio-economic, legal

²²² AIR 1926 Patna 506.

²²³ Ibid, 507.

²²⁴ AIR 1962 SC 1794.

²²⁵ (1979) 3 SCC 489 (expansion of right to life under Article 21 of the Constituion of India.; Radhey Shyam v Gur Parasad Serma AIR 1978 ALL 86.;B Venkatappa v B LovisAIR 1986 AP 239 (a mandatory injunction was issued against the defendant for closing the holes in his chimney that faced the plaintiff's property as smoke and fumes caused an inconvenience and discomfort to the plaintiff in his enjoyment of his property)Mukesh Textiles Mills v HR Subramanya Sastry AIR 1987 Kar 87: leakage of molasses, application

procedural and industry versus environment issues from a different policy perspective of furthering a human rights-based approach and use of nuisance provisions under the IPC and CrPC, especially with the Ratlam case.²²⁶

13 Balancing of Interest of the Plaintiff and the Defendant

In yet another air pollution case caused primarily by smoke and grime from an open clay bakery, the Supreme Court recognised that apart from the right of the baker to ply his trade in a certain manner there was also a question that hinged upon the safety and health and convenience of the public in that area. It was held that the bakery that emitted noxious fumes ‘day in and day out was a hazard to the community’ and that the defendant ought to stop until he could take measures to install a higher chimney so as not to cause nuisance to the residents. Further, the Supreme Court also recognised that although the baker had a right to trade under Article 19 of the Constitution, he ought not to cause any unreasonable discomfort to the community. The observations of the Court on the course of action ordered by the magistrate, but also allowing the defendant to carry on with his trade in recognition of his right to trade, reflect the mildly responsive attitude of the Court towards environmental harms and the approach to resolve public interest issues. However, this cautious judicial approach became a significantly impassioned one in a decision rendered by Krishna Iyer J in *Ratlam v Vardichand*²²⁷ in 1980. This decision highlights the major impact upon the expansion an application of Section 133 Cr PC and set the trend for a new environmental jurisprudence through judicial innovation.²²⁸

of *Ryland v Fletcher*; *Mahadevi v Thilikan* 1988 KLT 730: closure of a factory generating noise and pollution; *Ram Baj Singh v Babulal* AIR 1982, ALL 285: Doctor and brick making factory. Development of expansion of fundamental rights happened mostly after 1976-77, especially from the case of *Maneka Gandhi v Union of India* (1978) 1 SCC 478..See *Infra* Chapter 5, 180-187.

²²⁶ *Ratlam Municipality v Vardichand* AIR 1980 SC 1622; *State of Bihar v Murad Ali Khan*, AIR 1989 SC1; *Tarun Bharat Sangh Alwar v Union of India* AIR 1992 SC 514; *State of Himachal Pradesh v Ganesh Wood Products* (1995) 3 SCC 363 (hereinafter *Ganesh Wood Products*); *Subash Kumar v State of Bihar* (1991) 1 SCC 598 : AIR 1991 SC 420; *Bombay Dyeing and Mfg Co Ltd* AIR 2006 SC 1489; *Ahmadabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11 SCC 121; *State of Himachal Pradesh v Umed Ram Sharma* AIR 1986 SC 847 (the Court includes the right to good roads as a fundamental right under Article 21); *MC Mehta v Union of India and Others* (1997) 2 SCC 411 at 20; *MC Mehta v Kamal Nath and Ors* (1997) 1 SCC 388; *TN Godavarman Thirumulpad v Union of India and Ors* AIR 2005 SC 4256; *Vellore Citizens’ Welfare Forum v Union of India and Ors* AIR 1996 SC 2715; *Karnataka Industrial Areas Development Board v Sri C Kenchappa and Others* AIR 2006 SC 2038; *AP Pollution Control Board v Prof MV Nayudu (Retd) and Ors* (1996) 5 SCC 718; *ND Jayal and Anr v Union of India and Ors* (2004) 9 SCC 362; *Research Foundation for Science, Technology and Natural Resources Policy v Union of India and Anr* (2005)13 SCC 186; *Milk Producers Association, Orissa and Others v State of Orissa and Others* AIR 2006 SC 3508; see also *Indian Council for Enviro-Legal Action v Union of* (2011) 8 SCC 161 (*Bichri II*).

²²⁷ AIR 1980 SC 1622.

²²⁸ See Abraham, above n 7, 54.

14 Omission by Statutory Authority

In this public nuisance case a complaint was made to the magistrate under Section 133. The plaintiff complained of noxious smells from the open drain and garbage lying outside on the streets and the smell from an alcohol treatment plant near the locality to the municipality of Ratlam. These complaints had gone unheeded and no action was taken by the municipality. Further, there was no system for disposal of fecal matter, public toilets and drainage of dirty water in the slum dwellers' colony. The condition of the streets was such that it was impossible to breathe the polluted air due to the filth and the public refuse, which was left untreated, and caused a major public health and sanitation problem to the local residents. The Council came up in appeal before the Supreme Court, alleging lack of funds and resources for implementing a plan for better sanitation facilities and the removal of garbage and refuse from the locality, in effect arguing a common defence with municipalities pleading lack of financial resources.²²⁹ In giving judgment against the municipal council of Ratlam, the Court defined the power of the first class magistrate under Section 133, taking effective action in public nuisance cases and stated that such an action was available for correcting environmental harms that caused a danger to the health and safety of the community. It also spelt out the constitutional dimensions of environmental protection along with the scope of the concept of tortious liability in controlling public nuisance actions which harmed the environment. The Court held that Section 133 operated against statutory bodies and others regardless of the 'cash in their coffers', even as human rights under Part III of the Constitution must be respected by the State regardless of budgetary provisions. This case provided a clear linkage where tort and environmental law were interconnected and spelled out the potential use of public nuisance tools in India under public law. Krishna Iyer J held that:

Section 133 CrPC is categoric, although [it] reads discretionary. Judicial discretion when facts for its exercise are present shall, passing through the procedural barrel, fire upon the obstructions or nuisance, triggered the jurisdictional facts ... the imperative tone of S 133 CrPC, read with the punitive temper of S 188 IPC²³⁰ makes the prohibitory act a mandatory duty.²³¹

²²⁹The court did not agree with the plea of the municipality that it was unable to take care of the public nuisance due to insufficient financial resources.

²³⁰Section 188 of the IPC provides that 'Whoever knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain

The Court also emphasised that although CrPC and IPC were ‘vintage codes’, the social justice orientation imparted to them by the Constitution Of India makes it a remedial weapon of versatile use and hence an order to abate the nuisance by taking affirmative action in a timely manner was justified in the circumstances.²³² The Court upheld the order of the magistrate and the High Court and indicated that a local government could indeed be ordered to take appropriate action to stop the pollution caused by effluents from an alcohol plant. In cases such as this, the Court ought to give priority to public health instead of being partial to the industries that were polluting the environment in order to make a profit. The defence of coming to nuisance by the people dwelling in the slum was also rejected as an ugly plea by the Court. Further, in admitting that penal strategies and public law liability may not be justifiably efficient in handling matters that had come up in adjudication in this case, the Court also stressed the need to devise of new strategies to balance environmental interests through an activated tort consciousness.²³³

15 Recognising an Activated Remedy in Tort

This emphatic exposition by the Court of making use of an activated tort remedy provides the interconnectedness of tort law and public liability for environmental harm situations. The rationale portraying the use of both tort law and public law was further developed by the Court after Bhopal in a series of PIL cases for environmental causes filed by one of India’s most active and leading environmental action counsels, Mr MC Mehta.²³⁴ In 1987 in *MC Mehta v Union of India* the Supreme Court held that victims of environmental harm are entitled to claim compensation against a defendant industry. In recognising and reiterating the corrective justice parameter of tort law the Court held that the victims may be provided compensation against a polluter in proportion to the magnitude and capacity of the enterprise.²³⁵

order with certain property in his possession or under his management, disobeys such direction and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.’

²³¹ AIR 1980 SC 1622 at 1628, per J Krishna Iyer.

²³² Ibid, 1628–1629.

²³³ Ibid, 1631.

²³⁴ See MC Mehta decisions where compensation has been granted by the Supreme Court in public interest environmental cases, not only to the victims for corrective justice but also for setting up a reparative fund for the environment. See especially *Enviro-Legal Action v Union of India* (2011) 8 SCC 161, (the Bichri II judgment). See also *MC Mehta v Union of India* (1987) 1 SCC 395, 421.

²³⁵ *MC Mehta v Union of India* (1987) 1 SCC 395 at 421.

16 Compensation and Deterrence: Corrective Justice Functions—Where Tort Law Meets Environmental Law

The function of granting compensation in such cases is to take advantage of the deterrent effect that provision of compensation would perform. The Court went a step further in *MC Mehta v Kamal Nath and Ors*²³⁶ (the Span Resorts case) and *Indian Council for Enviro-Legal Action v Union of India*²³⁷ in 2011 (Bichri II) judgment. In the former case the Court ordered the polluting hotel industry to provide compensation in order to repair the harm done to the river basin, and in the latter the Court recognised not only that the victims of the village of Bichri in Udaipur ought to be compensated for the harm done to them and the physical damage to their property and land, but also that the defendant industries ought to provide damages to contribute to the reparative fund for repairing the harm done to the village water sources and the environment.²³⁸ The rationale of corrective justice, compensation and the reparative functions provided by tort law and the public nuisance rationale are now being used as an effective tool for the removal of pollution and filling the gaps which specific legislation has left.²³⁹ The *Ratlam* judgment also recognised the impact of a deteriorating urban environment on the poor, and links the provision of basic public health facilities to both human rights and the directive principles in the Constitution.²⁴⁰

Some scholars comment that the *Ratlam* judgment, with its potential to address environmental harms, at least for pollution matters and within the urban environment, is still under-utilised as not many cases have been brought to the courts via citizens' petitions.²⁴¹ However, it can be argued that the direction provided by the decision in *Ratlam* provides a catalytic path towards environmental consciousness and the evolution of tools of public liability law in India. During the expansion and evolution of a public liability regime for the resolution of environmental harms the courts also faced difficulties where law was either non-existent, inadequate or poorly enforced. The problems identified with the efficiency and efficacy of public liability law and regulatory standards found a

²³⁶(1997) 1 SCC 388.

²³⁷IA Nos 36 and 44 in Writ Petition(Civil) No 967 of 1989, Supreme Court, DOJ 18 July 2011= (2011) 8SCC 161 and *Indian Council for Enviro-Legal Action v Union of India* AIR 1996 SC 1448.

²³⁸See Chapter 6, *infra*, 256-257, corrective and reparative justice functions and deterrent functions of tort law applied in a PIL against polluting industries in Udaipur for groundwater contamination, harm to the people and their property in the State of Rajasthan.

²³⁹See Divan and Rosencranz, *above* n 4, 112–116.

²⁴⁰*Ibid*, 114.

²⁴¹*Ibid*, 119.

partner to supplement and plug the gaps when the Court began addressing environmental law issues through exploration of forgotten functions of tort law and the Indian indigenous legal and cultural tradition in specific spheres where tort law and environmental law meet. This aspect is further explored and enumerated in Chapters Five and Six.

Parallel to the evolution of environmental jurisprudence through public liability tools, public nuisance provisions and Section 133 of the CrPC have been used in several cases using the public interest rationale and interpretation of procedural law with wider parameters. As mentioned earlier, in *PC Cherian v State of Kerala*²⁴² the High Court considered whether the carbon particles emitted by the factories amounted to an actionable public nuisance. Applying the *Ratlam* rationale, the Court stated that such air pollution was a challenge to the social justice component of the rule of law and held that deposit of carbon particles contaminated the air and was an outstanding instance of air pollution. In this case, the Court prioritised the interest of the public in having better quality of air over the rights of the employees working in the defendant factories who lost their employment due to the cessation of the industry.²⁴³ Similarly, in *Nagarjuna Paper Mills Ltd v Sub Divisional Magistrate and Divisional Officer, Sangareddy*, the Court upheld the action of the magistrate for stopping the paper mill causing public nuisance by polluting the air and water of the locality where it operated. The mill operated under a licence, and challenged the magistrate's decision on technical grounds that the action was bad in law as only the Andhra Pradesh Pollution Control Board had jurisdiction to proceed against the mill, and as it had not done so the order of the magistrate ought to be quashed. The Supreme Court rejected this argument and reinstated the magistrate's order, holding that under Section 133 a magistrate had wide power to restrain a defendant from causing public nuisance and regulating pollution.

In *Krishna Gopal v State of Madhya Pradesh*²⁴⁴ Section 133 was invoked based upon a complaint by the plaintiff alleging 24 hours of noise, ash dust, smoke and vibrations caused a nuisance not only to her husband, who was a heart patient, but also to the community in the area where the defendant's glucose factory was situated. The High Court rejected the argument that Section 133 was inapplicable as the issue related to a private complaint rather than affecting the community around the factory. Elsewhere, it has been held that environmental crimes dwarf other crimes against safety and property, but the position of

²⁴²1981 KLT 113.

²⁴³*Ibid*, 119–120.

²⁴⁴1986 CrLJ 196.

law as it stands in the matter of sentencing such environmental crimes is rather comfortable.²⁴⁵ Section 133 has been held to have a broad application and covers a range of activities including emission of smoke from boilers from manufacturing industries that affect the health of the people.²⁴⁶

J Limits of Tort Liability

The review and analysis of environmental torts as applicable in the Indian context allows one to discern that among the various tort actions theoretically available in an environmental action, the tort of public nuisance has been primarily used to abate pollution and seek remedies against harm. Significantly, this development in India has been applied to combat environmental harm not only for individual but also for community actions.²⁴⁷ However, while earlier Constitutional law and the public law rationale was employed to resolve environmental harms actions, the current trend indicates that other functions of tort law, such as those of deterrence, compensation and reparation are being used in conjunction with public liability tools and there is a revival and rethinking of the application of tort principles for environmental actions.²⁴⁸

According to some scholars, this move towards revitalisation of tort law principles within the public liability environmental regime is not a neat fit and is incapable of finding the means to resolve all environmental actions.²⁴⁹ Similar problems faced in other common law jurisdictions, such as no recourse under tort for historic pollution, burden of proof, proving causation and of legal standing have also been encountered in India. Additionally, similar defences that are available for plaintiffs in the UK or the US can be observed in the Indian cases, which have included the defence of prescription—long-standing nuisance, plaintiff coming to the nuisance, delay in filing a nuisance action, consenting to the defendant's wrongful act or acquiescence and preclusion of tort liability by a specific statute. While the development of tort liability theory and various environmental torts employed in other common law jurisdictions has provided a rich literature, among which

²⁴⁵*Ibid*, 201.

²⁴⁶See *PC Cherian v State of Kerala* 1986 CrLJ 396. See also *Antony v Commissioner of Cochin*, 1994 (1) KLT 169.

²⁴⁷See P Leelakrishnan, 'The Law of Public Nuisance: A Tool for Environmental Protection', (1986) 28 *Journal of Indian Law Institute* 229–231.

²⁴⁸See further discussions in Chapters 5 and 6.

²⁴⁹See JR Spencer, 'Public Nuisance—A Critical Examination' (1989) 48 *Cambridge Law Journal* 55–84; Conor Gearty, 'The Place of Private Nuisance in a Modern Law of Tort' (1989) 48 *Cambridge Law Journal* 214–242; Larry D Silver, 'The Common Law of Environmental Risk and Some Recent Applications' (1986) 10 *Harvard Environmental Law Review* 61–98.

the tort of nuisance has seen its share of attacks as to its usefulness, in India tort liability doctrine has not developed and expanded to a comparable degree except in fits and starts.

‘As new interests in matters, such as privacy or pollution are recognised, and new forms of interference emerge from the complexity and interdependence of modern society, the principles of tort can be used to provide an appropriate response.’²⁵⁰ Although tort law is limited and only nuisance and negligence liability have provided limited remedies to cover specific environmental situations, such cases have been confined to claims where the plaintiffs’ interest in land or its enjoyment of land has been affected. In other fields of environmental law, for example, the conservation and preservation of biodiversity, zoning of protected area, planning of natural reserves, listing of endangered species, tort law does not have a role to play.

Where situations of environmental harm have involved people’s health and property and negligence liability is applicable there is an argument advanced for establishing a uniform standard for negligence liability.²⁵¹ Obviously, this would limit nuisance and strict liability cases and specific statutes may preclude tort liability altogether.²⁵² However, then negligence itself raises the difficult issue of causation. On the other hand it should be noted that the larger objectives of the public interest in environmental harm cannot be entirely met with claims under private law. Most decisions reflect that tort law largely performs the corrective justice function and the distributive function aspect of tort can be seen in only a few decisions. While following the economic efficiency rationale both the operator and the polluter could manage to internalise the risk of damage occurring in the future; however, this principle also falls short in cases of historic pollution. Despite these limitations within tort law, its positive potential to deal with environmental damage and enforcement should not be underestimated, and it can be adopted as one of the many tools in the Indian legal arsenal to combat environmental pollution and damage.

K Summary and Conclusion

According to some academics tort law is a blunt instrument.²⁵³ Consequently, it had a very limited use in India, especially as it was a foreign concept that was imposed on an existing

²⁵⁰ Anthony M Dugdale (ed), *Clerk and Lindsell on Torts*, 18th edn (Sweet and Maxwell Ltd, 2001).

²⁵¹ See Latham, Schwartz and Appel, above n 112, 737.

²⁵² See Cane, above n 113; Abraham, above n 113.

²⁵³ See Latham, Schwartz and Appel, above n 112.

indigenous cultural tradition that was more duty-bound and ruled by Dharma.²⁵⁴ In this context, scholars such as Derrett,²⁵⁵ Ramamoorthy,²⁵⁶ Dwivedi²⁵⁷ and Singh,²⁵⁸ among others, explain that tort is about righting wrongs, while the Indian cultural and legal tradition before common law came to be used as a dispute resolution tool laid more emphasis on duties rather than rights. Modern application of tort liability within the present legal system has its critics as well.²⁵⁹ The usefulness of tort law has had its share of criticism even in the West; nevertheless, legal academics and private law advocates adopting an instrumentalist view (tort law as a tool to achieve certain aims e.g., compensation, deterrence and reparation) recognise that tort law has limited use within the environmental field and its role must be acknowledged.²⁶⁰ For example, Cane concludes that structurally tort law is not a suitable vehicle for environmental standard-setting as it is concerned more with interpersonal relationships and is not concerned with social design and hence is not suited to performing public law tasks²⁶¹. Nevertheless, tort law has certain defined characteristics. Significant among these is the objective of providing corrective justice.²⁶² Tort law functions to restore the wronged party to its original position before the harm was caused due to the wrongful conduct of the defendant. The wrong or the fault is corrected and compensation is therefore a remedy for vindicating the tort victim's right.²⁶³ The fact that compensation is to be given by the defendant for doing any recognised conduct that is harmful also promotes the deterrence feature of tort.²⁶⁴ The objective of

²⁵⁴OP Dwivedi, *Environmental Ethics: Our Dharma to the Environment* (Sanchar Publishing House, 1993); see also OP Dwivedi, 'Global Dharma to the Environment' (1993) 39 *The Indian Journal of Public Administration* 566–576.

²⁵⁵For a discussion on application of principles of common law and this conflict see JDM Derrett, *Essays in Classical and Modern Hindu Law*, vol 4 (EJ Brill, 1978); JDM Derrett, 'Justice, Equity and Good Conscience in India', (1962) 64 *Bombay Law Report* 129–138. See also Chapter 4 for a brief explanation on the concept of Dharma.

²⁵⁶R Ramamoorthy, 'Difficulties for Tort Litigants in India' (1970) 12 *Journal of Indian Law Institute* 313–321.

²⁵⁷See Dwivedi, above n 251.

²⁵⁸Chhatrapati Singh, 'Dharmashastras and Contemporary Jurisprudence' (1990) 32 *Journal of Indian Law Institute* 179–188.

²⁵⁹See Galanter, above n 3.

²⁶⁰See Cane, above n 113; Abraham, above n 113; Latham, Schwartz and Appel, above n 112; McLaren, above n 104.

²⁶¹See Cane, above n 113.

²⁶²See Ernest J Weinrib, 'The Gains and Losses of Corrective Justice' (1994) 44(2) *Duke Law Journal* 277–297; Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16(3) *Oxford Journal of Legal Studies* 471–488; Jules L Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 361–385.

²⁶³See Nathan Issacs, 'Fault and Liability: Two Views of Legal Development' (1918) 31 *Harvard Law Review* 954, 956.

²⁶⁴See William Prosser, Kathryn Kelly, David F Partlett, *Prosser, Wade and Schwartz's Torts: Cases and Materials* 12th edn (Foundation Press, 2010) 1–2.

‘righting a wrong’ propels the development of tort and has expanded its application in various fields.²⁶⁵ It can be stated to define what harms tort law should address.²⁶⁶

Traditionally, environmental harms have been addressed within common law jurisdictions such as those in England and the US by various torts such as nuisance, trespass, negligence and strict liability. The position is similar in India. It is in this context that tort and environmental law intersect. The tort of nuisance emerged as a commonly used tool for addressing environmental harm and nuisance theory has been expanded to explain the intersection between tort and environmental law generally within common law jurisdictions. Courts in the UK, the US and India have considered the public nuisance theory to address various situations evincing environmental harm. However this application has also raised many controversies and paved the path for the enactment of specific environmental regulation.²⁶⁷ Nevertheless, the tort law functions of corrective justice and compensation have provided solutions for environmental harms where the purpose of environmental law has been prevention, protection, deterrence and conservation. This overlap of tort law and environmental law is seen most often in cases where environmental interests relate to personal injury and harm to property.²⁶⁸ The interconnection also demarcates the boundaries of tort law and helps policy and lawmakers to develop adequate strategies and principles in order to provide a framework to address environmental claims.²⁶⁹

In fact, the tort of nuisance has been expanded to meet various challenges faced within the environmental context.²⁷⁰ Consequently, ‘nuisance law continues to be the fulcrum of what is called as environmental law today’.²⁷¹ However it can be argued that if tort law is considered valuable for providing a damage repair mechanism and if it outweighs the

²⁶⁵Negligence: duty of care categories, product liability law, professional liability. For an expansion of fault liability in tort, see generally Rogers, above n 151.

²⁶⁶See Latham, Schwartz and Appel, above n 112.

²⁶⁷For example, in India it led to enactment of the Public Liability Insurance Act 1991 and the National Environment Tribunal Act 1995 (NETA). Attempts have been made in the US to apply tort law principles for claiming remedies against oil refineries, electric power plants and other entities for harm associated with alleged anthropogenic climate change. Such claims have been rejected by the Courts so far. See Victor E Schwartz, Phil Goldberg and Christopher E Appel, ‘Does the Judiciary Have the Tools to Regulate Greenhouse Gas Emissions?’ 46 *Valparaiso Law Review* (forthcoming 2012) in Schwartz et al (2011) 80 *Fordham Law Review* 748.

²⁶⁸Schwartz, Goldberg and Appel, above n 246.

²⁶⁹*Ibid.*

²⁷⁰See Richard A Epstein, ‘The Harm Principle and How it Grew’ (1995) 45 *University of Toronto Law Journal* 369, 400.

²⁷¹*Ibid.*

negative regulatory or compensatory effects then one ought to accept it despite its costs.²⁷² This kind of argument can be seen in the recent decisions by the Supreme Court in environmental cases where the Court has recognised grant of compensation, especially for reparative objectives. A case in point is *Bichri*,²⁷³ although in analysing the costs and the reparative damages that the Court ordered the polluter to pay, it did not discuss the theoretical underpinnings of why the responsibility-based harm repair principle of tort law was being adopted by the Court.

This chapter has outlined the role, features and operation of various tort in environment context in India in order to determine its scope and operation. The next chapter examines the theoretical underpinnings and the foundational theories of tort law and how these theories have been applied within the environmental context to ground justifications for tort liability. It then compares it with the Indian indigenous legal tradition that reflects an understanding of environmental sensitivity in the context of dharmic duties on the one hand, balanced with application of modern common law concepts and constitutional foundations on the other, to devise remedies for environmental harm and justice in the Indian context.

²⁷²For a discussion on functions of tort law in environmental, see Cane, above n 113.

²⁷³*Indian Council for Enviro-Legal Action v Union of India* (2011) 8 SCC 161 , (*Bichri II*).

IV CHAPTER FOUR: THEORETICAL UNDERPINNINGS OF TORT LIABILITY AND DHARMIC DUTY—LOOKING FOR COMMON GROUND★

A Introduction

Laws are designed and enacted to reach a policy objective and must function to achieve the desired goal. They are also culture specific. Hence, any legal liability regime may have the following features: that of a formalist¹, conventionalist² or instrumentalist³ explanation of law and its characteristics. Formalist rules will include rules that a legal command should be complied with and must be public; conventionalist rules have a basis in social convention and provide a clear basis as to circumstances where state coercion will or will not be applicable;⁴ while instrumentalists proceed on the basis of examination of legal liability as a tool to achieve a certain objective.⁵ This chapter explores the role and philosophy of law in ancient Indian jurisprudence and those principles that have restricted the application of the English common law of tort to environmental damage claims in India by

★An article entitled ‘Remedies for Environmental Harm-Dharmic Duty and Tort Liability In India -Is There A Common Ground?’ from this chapter has been published in (2012)8 (2) *MqJICEL* 48.,70.

¹Formalist rules will include rules that a legal command should be complied with and must be public; see J Rawls, *A Theory of Justice* (Oxford University Press, 1973) 237–239.

²Leslie Green, ‘Positivism and Conventionalism’ (1999) 12 *Canadian Journal of Law and Jurisprudence* 35.

³Lucas Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in An International Context* (Kluwer Law International, 2001) 68–154.

⁴See Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986) 100–108; HLA Hart, Joseph Raz and Penelope A Bulloch (eds), *The Concept of Law* (Oxford University Press, 2012); See also JL Coleman, *Risks and Wrongs* (Cambridge University Press, 1992) 197–211, where Coleman distinguishes between these concepts; NE Simmonds, ‘Why Conventionalism Does Not Collapse into Pragmatism?’ (1990) 49(1) *Cambridge Law Journal* 63; Green, above n 2.

⁵Bergkamp, above n 3, 68–154.

examination of liability from a theoretical perspective. Although public law instruments will provide one of the main tools for achieving environmental protection and in providing access to justice, one method that has been asserted in the development of Indian environmental jurisprudence is the recognition of ‘dharmic ecology’ and the development of a ‘neo-dharmic’ tradition and the debunking of colonial legislation. The focus on the indigenous tradition and revitalisation of Vedic philosophy with the help of public law instruments does not necessarily lean away from the use and application of common law principles.

On the surface, as the Indian legal system is based on the common law system, the Indian legal indigenous system is mostly considered to be redundant and forgotten. However, the old traditions in the legal system have been retained and have in fact ‘thrived but [are] hidden from the official view of legal science.’⁶ This chapter will examine environmental liability as an instrument to achieve certain legal objectives.

It first explores and analyses the ancient Indian understanding of an individual’s duty towards the environment—one’s dharma—the Indian indigenous understanding of rules of law and duty to determine the theoretical underpinnings. The chapter then contrasts this view with the existing theories of justice that have been postulated by Western legal scholars to explain the objectives and functions of tort law and the modern understanding of the theoretical justifications provided by Western philosophers as adopted and modified by the Indian judiciary.

The issue of the critical theoretical underpinnings of tort liability for designing a liability system for dealing with environmental harms will be determined by analysing the justice-related arguments posited by tort scholars from the West to determine their

⁶WF Menski, ‘Review of Galanter, *Law and Society in Modern India*’ 1995 *Law Quarterly Review* 11; Masaji Chiba, *Legal Pluralism: Toward a General Theory Through Japanese Legal Culture* (Tokai University Press, 1989) 28–38; Masaji Chiba (ed), *Asian Indigenous Law: In Interaction With Received Law* (KPI, 1986) 1–12, 351–358. See also *infra*, nn16,22.

application, conflict or parallel coexistence with the theoretical philosophy as rationalised in the Indian indigenous tradition and culture of dharma reflecting legal and cultural pluralism.

This chapter argues that justifications of the distributional and corrective justice principles from the West have been adapted to suit the Indian tradition, having transformed the character of environmental law into a unique form that exhibits pluralistic justifications and mixed objectives. It is a pragmatic legislative and judicial approach that attempts to adopt a balanced view within which the role of tort can be used to augment and supplement the public law instruments for better enforcement of environmental standards. This chapter asserts that the blurring of the boundaries of public and private law will provide a wider set of strategies for victims of environmental injustice. This provides another justification to explore the advantages and disadvantages of the tort law system that may require specific modifications and adjustments suited to the Indian environmental problems.

B Social Context for the Operation of Indigenous Legal

Culture—Identifying Legal Pluralism

To achieve environmental justice within the Indian context a framework of environmental liability should have clear objectives, a valid theoretical basis and appropriate procedural tools. The instrument of civil liability as a tool for settling environmental claims in India in modern times was seriously recognised only after Bhopal (1984) and then the Shriram Gas Leak case (1987). Subsequently, environmental jurisprudence developed largely based on the procedural mechanism provided by the COI and the legislative framework as envisaged in the Water Pollution (1974), Air Pollution (1982) and the Environmental Protection (1986) Acts through judicial activism. As this chapter reflects, a thorough analysis of

environmental liability using tort law as an instrument to achieve individual justice for environmental harm is still underdeveloped in India, in contrast to other common law jurisdictions. However, to know more about the objectives of a legal system one needs to understand the concept of law and how liability, whether private or public, functions as a tool to reach the law's objectives efficiently. The nature of such a legal system and its objectives governs how the concept of law and liability, duty and rights is understood and applied, primarily through the courts within the contemporary legal system, and especially to what extent is civil liability being used as a tool to address environmental damage claims and deal with environmental justice.

Academic scholars, particularly Baxi, lament the fact that the development of environmental law is limited in India due to defaults in the institutional design of environmental protection law, as most of these laws are 'transplants' of legislative and administrative models from the 'first world', being neo-colonial in nature.⁷ The borrowings from the West undermine the rights of the people, as planned law and administration is too narrow⁸ and does not leave scope for out-of-the-box strategies suited to the Indian scenario. This has given rise to ecological conflicts and social environmental movements that are redefining the social culture within communities which rely upon indigenous social and cultural traditions.⁹ Two contemporary examples of the social environmental movement can be seen from the conservation of the forest lands by the indigenous communities in North East India and the Western ghats by declaration of certain biodiversity rich areas as sacred groves.¹⁰ A second

⁷Upendra Baxi, 'Environmental Law: Limitations and Potential for Liberation' in J Bandhopadhyay, *India's Environment: Crises and Responses* (Natraj Publishers, 1985) 291–309.

⁸Bandhopadhyay, above n 7.

⁹See M Gadgil and Guha Ramchandra, 'Ecological Conflicts and Environmental Movements in India' in D Ghai (ed), *Development and Environment: Sustaining People and Nature* (Blackwell Publishers, 1994) 101–136, 119–125.

¹⁰See G Oviedo, S Jeanrenaud and M Otegui, *Protecting Sacred Natural Sites of Indigenous and Traditional Peoples: An IUCN Perspective* (Gland, 2005); KC Malhotra, Y Gokhale, S Chatterjee and S Srivastava, *Cultural and Ecological Dimensions of Sacred Groves in India* (Indian National Science Academy, New Delhi and Indira Gandhi Rashtriya Manav Sangrahalaya, Bhopal, 2001).

example is the conservation of forests in the state of Uttar Pradesh by forest dwellers and people working and living off the forest through the 'Chipko movement' (embracing trees literally and shielding them from being cut for commercial use) against indiscriminate felling of trees in the Himalayan region of the state for commercial purposes.¹¹ According to social activist Sunderlal Bhaguna, one of the leaders of the Chipko movement, the solution to over-felling and the current problems of people being deprived of their livelihoods:

rested in the re-establishment of a harmonious relationship between man and nature. To keep this relationship permanent we will have to digest the definition of real development: development is synonymous with culture. When we sublimate nature in a way that we achieve peace, happiness, prosperity and ultimately, fulfilment along with satisfying our basic needs, we march towards culture.¹²

Trees within the Himalayan forest communities have been worshipped as guardians of gods—'deodhars'—and forests as the manifestation of 'Aranyani,' the goddess of forests revered as the primary source of life and fertility. Shiva observes that this 'aranyani sanskriti' (forest culture) is not a primitive notion but a conscious choice among the forest communities in India.¹³ Strong, Vannuci and Chaitanya¹⁴ illustrate the attitude of reverence to the environment within cultural traditions to indicate the common attitude of the people towards the environment. Echoing views that are similar to those of Baxi, other academics like Singh, Chowdhary, Sen, Aggarwal and

¹¹'We the Peoples: 50 Communities', International Institute for Sustainable Development on the Chipko movement in India, <<http://www.iisd.org/50comm/default.htm>>.

¹²Quote by Sunderlal Bahuguna, on returning to the ancient tradition of revering the forests and maintaining a sustainable way of life in 'We the Peoples: 50 Communities', above n 11.

¹³See Vandana Shiva, *Staying Alive: Women, Ecology and Development* (Zed Books Ltd, 1998) 55.

¹⁴Maurice F Strong, 'Only One Earth' in Geeti Sen (ed), *Indigenous Vision: Peoples of India Attitudes to the Environment* (Sage Publications and India International Centre, 1992) 49–52; Marta Vannucci, 'Tradition and Change' in Sen, 25–33; Krishna Chaitanya, 'The Earth as Sacred Environs', in Sen, 35–48.

Shiva reiterate the flaws of the neo-colonial laws with respect to the environment and urge a rethinking of environmental protection laws in terms of change in the epistemology and acceptance of the inter-linkages that exist between man and nature and revival of the Vedic philosophy from ancient India.¹⁵ CM Abraham emphasises that the development of environmental jurisprudence in India manifests a neo-dharmic jurisprudence.¹⁶

The Indian legal culture that exists is flexible enough to internalise the ideas that international contemporary scholars assert for protecting the environment.¹⁷ However, India's indigenous legal tradition has a unique character as it reflects interconnections between law, philosophy and religious traditions different from the natural law or positive law tradition in the West.¹⁸ The development of an indigenous environmental jurisprudence has largely been through public law; however, this chapter posits that the domain of private law and public law that is often held to be separate is not entirely mutually exclusive and as developments in other countries and recent case law indicates, tort law in India could be used successfully to uphold this indigenous tradition and supplement the public law domain for the achievement of environmental objectives.

C Legal and Cultural Pluralism

¹⁵See C Singh, 'Dharmashastras and Contemporary Jurisprudence' in C Singh, *Common Property and Common Poverty: India's Forests, Forest Dwellers and the Law* (Oxford University press, 1986); K Chowdhary, *Industrialisation, Survival and Environment: A Dialogue on Development* (The Indian National Trust for Art and Cultural Heritage, 1989); Sen, above n 14.

¹⁶CM Abraham, *Environmental Jurisprudence in India* (Kluwer Law International, 1999) 98–99.

¹⁷See generally Christopher K Chapple and Mary E Tucker, *Hinduism and Religion* (Centre for Study of World Religions, 2000).

¹⁸See generally, Abraham, above n 16; Singh, above n 15, 179–188; R Davan, 'Dharmasastra and Modern Indian Society: A Preliminary Exploration' (1992) 34 *Journal of Indian Law Institute* 515; SK Purohit, *Ancient Indian Legal Philosophy: Its Relevance to Contemporary Jurisprudential Thought* (Deep and Deep Publications, 1994); B, Rich *To Uphold The World : A Call for a New Global Ethic From Ancient India*. (Beacon Press, 2010),130,131.

1 The Ancient Legal System and Indigenous Tradition

In terms of the environmental objectives of the Indian law, the instrument of public law has been used variously, embedded within the matrix of the dharmic ideology and emergence of a new legal order, especially within environmental jurisprudence in India. Application of the ancient indigenous concepts relating to environmental concerns can be now traced in the development of a new modern environmental regime. The concept of dharma, which lays down various values, is an aspect of Hinduism and all other religious teachings within Bhuddhism and Janisism and stands for 'self righteousness', virtues and duty to do the right thing within each varna or caste. Hence, each member of a particular caste is obligated to perform his dharmic karma (obligatory action) to maintain order in the cosmic world.¹⁹ Dwivedi states that following the path of right behaviour within a set of circumstances signifies the true nature of any object.²⁰ On a comparative scale, the liability regime exhibits features that point to a dharmic ideology based on a strong value-based religious, moral and spiritual foundation rather than only on natural law values. A review of the literature published during the last few years, especially after Bhopal, indicates a new trend that brings together values and religious concepts to ecology and nature preservation to add to environmental philosophy in India.

Various authors and environmentalists have emphasised that unless one understands how (religious) values have affected cultural views on the environment one will fail at meaningful environmental discourse, and will not be able to design successful liability

¹⁹ Christopher K Chapple, 'Hinduism, Jainism, and Ecology' 1998 (10:1) *Earth Ethics* <<http://fore.research.yale.edu/religion/hinduism/>>. See also Christopher Chapple and Mary E Tucker (eds), *Hinduism and Ecology: The Intersection of Earth, Sky and Water* (Centre for Study of World Religions, 2000), Chapter 1.

²⁰See generally OP Dwivedi, *Environmental Ethics: Our Dharma to the Environment* (Sanchar Publishing House, 1994).

models to achieve environmental justice.²¹ These issues deserve deeper research and are beyond the scope of this study. However, the following sections examine the nature and concept of law and liability with respect to the environment by briefly exploring the ancient indigenous tradition based on what contemporary scholars have written.

2 Influence of Indigenous Cultural Tradition on the Legal System

Legal anthropologists and comparative law jurisprudence scholars show how a legal system is influenced and shaped by cultural and traditions.²² More specifically, they illustrate that all legal systems are indicative of legal pluralism, whether they have Western or non-Western characteristics.²³ Menski agrees with the Japanese scholar, Masaji Chiba, when he observes that law everywhere is a culture-specific plural phenomenon and that different sources of law have different impact in all places.²⁴ The values reflected in cultural communities are part of their legal structures and are significantly important in a plurality conscious legal analysis. Within the pluralistic understanding of law, the Indian system (divided into pre-classical, classical, late classical, post-classical and modern) is a holistic one, existing within the socio-cultural traditions where earlier social, religious and legal authorities were not treated as separate distinct elements, but part of cultural-specific visions of a larger

²¹See Abraham, above n 16, 77, 96; Pankaj Jain, *Dharma and Ecology of Hindu Communities: Sustenance and Sustainability* (Ashgate New Critical Thinking in Religion, Theology and Biblical Studies, 2011) 105, 116 and Rich above n 18, 130, 75-78.

²²See generally Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, 2006) 128; Chiba, above n 6; Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd edn (University of Georgia Press, 1993) 108; Esin Orucu, 'Unde Venit, Quo Tendit Comparative Law?' in Andrew Harding and Esin Orucu (eds), *Comparative Law in the 21st Century. WG Hart Legal Workshop Series, vol 4*, (Kluwer Academic, 2002) 1-18, 13.

²³Chiba, above n 6; Menski, above n 22, 128.

²⁴Chiba, above n 6; Menski, above n 22, 128; Watson, above n 22, 108; Harding and Orucu, above n 22, 13.

whole, which tend to be inherently global.²⁵ The Indian legal system has also been described as a *sui generis* one. The current Indian legal system comprises the COI, based on the English common law system, has features borrowed from the other common law jurisdictions such as the US, recognises local and ancient Indian customs within Hindu law and Muslim law, and provides enough flexibility for recognition of other religions and indigenous customary practices under the right to freedom of practice of religious beliefs.²⁶ The legal system exhibits pluralistic characters and is an intersection of different legal orders. The indigenous traditional legal understanding has influenced the cultural, social and legal matrix of contemporary development of the Indian common law and legal system. It is reflected to some degree in the consciousness of the people and reflects also in the attitude of the judges in some instances. The Indian Supreme Court has often echoed the basis for liability under the English common law tradition and the Vedic dharmic philosophy of Hindu law in making environmental decisions.²⁷

3 Ancient Legal Tradition and the Nature of Dharma

In the ancient Indian traditional system, Hindu law itself progressed through four stages. These include the Hindu macrocosmic universal order (Rta, to protect Satya or Truth) of the Vedic²⁸ system (pre-classical, c.1500–500 BC, a pre-existing natural

²⁵RK Agarwala, *Hindu Law* 21st edn (Central Law Agency, 2003) 7; Jeanine Miller, *The Vision of Cosmic Order in the Vedas* (Routledge and Kegan Paul Plc, 1985); M Winternitz, 'Geschichte der indischen Literatur' (vol 1–3, reprint, KF Koehler) in Jan Gonda (ed), *A History of Indian Literature*, vol 1 (Otto Harrassowitz, 1975), cited in Menski, above n 22, 204.

²⁶See Articles 29–30 of the COI.

²⁷See for instance the wordings in *Attakoya Thangal v Union of India* (1990) 1 KLT 580 (SJ Nair '...if Bhagirath brought the Ganges down to Earth...' Bhagirath the mythical god who is said to have brought down the river Ganges from the heavens); See also *FK Hussain v Union of India* AIR 1990 Ker 321.

²⁸'Veda' originates from the Sanskrit word 'vid', to know and understand the 'vidya', the knowledge contained within. This relates to a form of pre-existing knowledge or unknown origins to man, 'eternal truths' collected within the four Vedas, Rig, Yajur, Sam and Athrava Veda. Vedic laws contain natural laws similar to those that Thomas Aquinas propounded.

order); microcosmic conceptualisation of the individual through self-control order (dharma, or ‘what is correct or good’; classical, c. 500–200 BC); among the deterrence-based punishment stage (danda niti, deterrence and coercion technique; late classical, c. 500 BC to c. 1100 AD) and the less formal dispute processing (vyavhara; post-classical, after 1100 AD) stage.²⁹ During these various periods, state law as understood in the Western sense was non-existent or given little importance.³⁰ According to David and Brierley, Asian cultures refused to give importance to state law as ‘law itself’ was understood differently than in the West, or entirely rejected the notion of law and social relations were governed by extra-legal means.³¹

To search for liability or to try and conform to the conventionalist, formalist or positivist legal theories do not help one to determine the nature of concern for the environment within the Hindu culture. Within this kind of a system, state-centered legal liability was simply absent or overshadowed by cultural beliefs and a dharmic way of life. This way of life is reflected not as a rule or laws of the state, but as statements on the conduct of life for a Hindu through written or oral constructs, and followed without any external imposition of sanctions, as they were culturally or traditionally imbibed.³² In a number of studies on legal cultures it has been shown that amalgamation of ‘law’ as understood in the West with moral and religious precepts forms an important and more dominant part of indigenous traditions. However within Asian jurisdictions, ‘law’ was understood as having a wider and varied perspective.³³

4 Purpose and Meaning of ‘Law Ensuing Duty’

²⁹Menski, above n 22, 200–235.

³⁰Menski, above n 22, 193–194.

³¹René David and John EC Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 2nd edn (Stevens and Sons, 1978), quoted in Menski, above n 22, 194.

³²See generally Agarwala, above n 25, 2–5.

³³Agarwala, above n 25, 2–3; PV Kane, above n 33, vol 4; See also JDM Derrett, ‘History of Indian Law (Dharmasastras)’ 8–17 in B Spuler (ed), *Handbuch Der Orientalistik*, vol 2 (EJ Brill, 1973).

The purpose of ‘law’ under the ancient Indian tradition was not as narrow as simply influencing political and social life, but extended to all aspects of life, its conduct, behaviour, etiquette, personal relations, and relations towards animate or inanimate objects and nature.³⁴ The Vedic shrutis or smritis (oral and memorised constructs handed down by word of mouth), written scriptures—dharmaśāstras, dharmasūtras, purāṇas, nibandhs and vyavaharas—only provided briefly the manner in which to conduct oneself in a sustainable manner. The literature and cultural knowledge of behaviour might have reflected divine, moral, social, personal or traditional or legal constructs but was spread and developed over thousands of years and was unlike a general state law, and did not separate official law from local culture.³⁵ Under the Vedic terminology ‘ṛta’ (from the Rig Veda) signified the cosmic order and was the same for nature as well as human beings, hence the righteous knowledge of dharma prevented human beings from indulging in wrongdoing or going against the ṛta, and the dharma of the state or the king was to guide and make people conscious of their ‘swa dharma’, or self-dharma.³⁶ Thus, the Indian indigenous tradition was aimed at sustaining a universal order in all kind of ways and was flexible, receptive and could accommodate changes and be modified according to changed circumstances, and provided situation-specific solutions from abstract cultural constructs.³⁷

5 Dharma

³⁴See generally Jain, above n 21, 105, 116.

³⁵One may perceive dharma and its implications to be religious but it operates in a wider context that is not simply law or religion; See Menski, above n 22, 214; See also Antony N Allott, *The Limits of Law* (Butterworth, 1980) 25. and Rich, Bruce *To uphold the World A Call for new Global Ethic From Ancient India* (Beacon Press, Boston, 2010) 130, 75-78

³⁶DM Datta, ‘Rig Veda IV (Translation)’ in H S Bhatia (ed), *Vedic and Aryan India*, 2nd edn (Deep and Deep Publications, 2001) 35–42.

³⁷Menski, above n 22, 200–230. See also Chapter 2, above, Section C, 23-27,

The ancient Indian tradition conceived a legal order based on dharma dating back to the time of 100 CE.³⁸ Dharma stands for righteousness and includes not merely religious duties but comprises virtues, ethics and philosophy in explaining social problems, practice and directions. Dwivedi states that dharma signified not only the ethical, moral and religious code of behaviour, but also the true and essential nature of any object.³⁹ Explanations and interpretations to the religious moral edicts were then provided by the 'bhramanas' or the priestly scholar class of citizens and applied by the king and his administrators, belonging to the 'kshatriyas' and the 'vaishya' or warriors, and the trader classes, on all classes of citizens including the 'shudra', the lower caste/class. Each person of a certain caste was to follow his dharma. Ancient texts carrying the various writings on dharma include the Dharmaśāstra, the sacred text and scriptures written in Sanskrit setting down a code for 'right behaviour'; the Manusmriti, containing the code for dharmic laws; the Upanishads; various 'śrutis' or ancient standards and rules of behaviour passed down by sages or 'rishis' through word of mouth; the Mahabharata; and the Ramayana, the mythological Indian epics depicting the way of life and dharma through mythical gods who lived their lives on earth.⁴⁰

6 Nature of Dharma and its Understanding

Scholars consider that the Vedic philosophy envisaged and accepted a cyclic generation and degeneration of life and its processes.⁴¹ The Atharva Veda personified the earth as a 'mother goddess' nurturing her children; in fact 'Bhumi'(earth) not only represents the lithosphere but all that is part of the environment, symbolising the three

³⁸Menski, above n 22, 216.

³⁹Dwivedi, above n 20, 169.

⁴⁰A *śāstra* (or shaasthra) is a sacred and authoritative Hindu text or scripture, originally in Sanskrit; *Dharmaśāstra* pertains to the concept of dharma, and dates back to between 600 BCE and 200 CE.

⁴¹Shashi P Kumar and Śaśiprabhā Kumāra, *Facets of Indian Philosophical Thought* (Vidyandhi Prakashan, 1999).

principal components of environment: land, water and air.⁴² Bhumi also symbolises the energy of the fire element in the universe, as it carries within itself ‘the universal fire which is present in the herbs, waters, stones, men and horses’.⁴³ Thus, the Vedic way of life encompassed a reverence for natural resources that were necessary to be preserved, protected and used in a sustainable manner for human sustenance and humanity’s existence. Here, one can probably discern the intricate connection between the web of life according to contemporary scientific explanations.

Similar examples abound within the other Vedas, such as the Rig Veda, Yajur Veda and Sam Veda, which provide numerous instances of an environmentally ethical lifestyle upon which contemporary philosophers wish to rely.⁴⁴ Furthermore, the pre-existing Vedic order, which is understood as the eternal order Dharma, or ‘eternal law’, created the state, unlike Western legal systems where state-made laws are dominant.⁴⁵ The priests, or ‘purohitas’, were considered as authorities on interpreting the Vedic dharma, sastra or niti (translating to law, duty, rules, regulations, standards, codes of behaviour⁴⁶) from the scriptures and even lawmakers, and their judicial authority was highly valued.⁴⁷ This Vedic belief in eternal order was based on a premise ‘that order dwells among men in truth in noblest places’ and this eternal or pre-existing order was the creator of eternal law from which all laws manifested. Dharma, artha, kama and moksha are the ultimate aims of existence and the natural order of things and demand that human beings consider them during their lives.⁴⁸

⁴²Atharva Veda 12/1/1 as cited in Kumar & Kumāra, above n 41.

⁴³Atharva Veda 12/1/19 as cited in Kumar & Kumāra, above n 41.

⁴⁴Atharva Veda 12/1/35.

⁴⁵Radha Krishna Choudhary, ‘Law in Ancient India’ in Bhatia, above n 36.

⁴⁶Robert Lingat, JDM Derrett (translation), *The Classical Law of India* (University of California Press, 1973) xii–xiii, 3–7, Lingat describes the concept of dharma as derived from a more general notion that exceeds the domain of law in many respects without actually comprehending it entirely. The word dharma has been translated as duty and he points out this distinction to express the difference between what Hindus regard as the natural order of things with which law is associated.

⁴⁷Raj Dharmasasana, Para 77 Manu VIII in Choudhary, above n 45, 391–392.

⁴⁸Agarwala, above n 25, 2–3; Kane, above n 33; Rich, above n 25, 130; See also Derrett, above n 33.

This dharmic tradition provides a wider strategy for living life according to the eternal order and beyond state-controlled power or religious orientation. One could argue that the focus centres on how humans should conduct themselves in life, which is different and much wider than modern law's emphasis on regulating human conduct through sanctions.⁴⁹ Thus, the dharmic order relies more on self-control than control imposed by an external authority. Consequently, state law was, and ought to be, subservient to dharma. This explanation provides a better foundation for the indigenous traditional concept of law.⁵⁰ The dharmic tradition also attaches significant importance to ethical and philosophical values in the context of legal development.⁵¹

7 Dharmic Respect for Animate and Inanimate Objects

With respect to environmental jurisprudence, the same dharmic tradition based on the philosophy from the Rig Veda reflects concern and respect for animate and inanimate objects in that, 'If we injure, hate and cheat animals we injure, hate and cheat ourselves; when we begin to love others as to our own self we are truly ethical'.⁵²

This legal and cultural postulate explains the respect for nature and obliges every person to abide by one's dharma to do the right thing. Thus, this duty is for every individual but dharma ties the community together as a social cement, with 'their millennia-old committal [commitment] to living together in competitive co-existence

⁴⁹See Wendy Doniger, 'Introduction' in Manu and Wendy Doinger, *The Laws of Manu* (Penguin Books, 1991) xv–lxxviii, xvi–xix.

⁵⁰Datta, above n 36, 392–94.

⁵¹See generally CA Moore, (ed) *The Indian Mind: Essentials of Indian Philosophy and Culture* (University Press of Hawaii, 1967); See in particular DM Datta, 'Some Philosophical Aspects of Indian Political, Legal and Economic Thought' in Moore, above n 51, 267–298; CP Ramaswami Aiyer, 'The Philosophical Basis of Indian Legal and Social Systems' in Moore, above n 51, 248–266 and Rich above n 25, 72, 75, 130, 131...

⁵²Swami Abhedananda, 'Hindu Philosophy in India' in S Radhakrishnan and JH Muirhead (eds), *Contemporary Indian Philosophy*, revised edn (S Chand and Co Ltd, 1982).

in a multicultural super-society.⁵³ Another source of ancient indigenous law, the Puranas, have been translated to reveal the nature of dharma. Dharma also means to secure 'abhyudaya', i.e., the welfare of the people. It represents the rights, privileges and obligations of individuals. Thus, the object of law was to promote the welfare of man, both individually and collectively.⁵⁴

Derrett reiterates that 'flexibility, diversity, adaptability and the genius for adjustment without changing ones' entity were the hallmark of Hinduism...⁵⁵ According to Singh, the traditional law was focused on how an individual conducted himself during various phases of life and how he ought to seek balance within the wider eternal and universal order. Thus a person's actions, or karma, ought to be in consonance with his or her dharma, or duty to maintain the universal order.⁵⁶ Where one has acted in a manner that is 'adharmic' one imbalances the cosmic order and must therefore conduct oneself in a manner to right it. Thus, a person who lights a reckless fire in the forests, pollutes fresh water resources by washing or defecating, by killing not from necessity for food but needlessly, or cuts down a tree that was worshipped as it provided food and shade to the village community, would either be held to be an outcast and banished from the community, or be liable to pay compensation suitable to absolve him or her of the adharmic action or sin.⁵⁷ However, the non-actions or wrong actions in violation of one's dharma were not state-centric or laid down by the king. According to legal scholars, the king was not a lawmaker but a caretaker of his peoples' dharma within specific situations.⁵⁸ To assess and conceptualise a Western theory to find the instrument of legal liability thus seems difficult or inappropriate within such a traditional culture that was based on values and inculcated and

⁵³Datta, above n 36, 40, 41. See also Menski, above n 22, 201-208.

⁵⁴Ibid, 40.

⁵⁵JDM Derrett, *A Critique of Modern Hindu Law* (NM Tripathi, 1970).

⁵⁶See generally Jain, above n 21, 105, 116.

⁵⁷See *Vashistha Dharmasastra*, Part I, Chap VI, para 11, Chap II, paras 22-27; See also Manu and Doninger, above n 49, 92.

⁵⁸KV Rangaswami Aiyangar, *Rajadharma* (Wellhausen Press, 2007) 11.

promoted values rather than state-centric ‘law’. It is beyond the scope of this work to analyse the nature of traditional legal culture in India in detail, so here the traditions in respect of dealing with the interactions of men with nature and the environment will only be briefly outlined. However, it is correct to assert that this cultural tradition, embodied at times in dharma, rita, niti and vyavharas, including legal rules as they developed through the ages, becomes reflected in the collective consciousness of Indians, and that this has influenced the development of environmental law and justice in modern India.

8 Dharma for the Environment

With respect to the duties of each member of a particular caste towards the environment and his conduct towards other living creatures, Dwivedi provides examples from Manusmriti, Vashishta Dharmasastras and Kautilyaya’s Arthshastra. A person’s duty ranged from the duty of self-restraint and of self-control to regulating conduct through sanctions; for example, the members of the bhramin and kashatriya caste become outcasts if they traded in salt, they became shudras if they traded in milk (for then they become servants), this being a social sanction rather than a criminal one. But where members of any caste made the water of a pond or a river impure by defecating or urinating in it they then acquired a ‘lesser intellect’.⁵⁹ None of the Hindu scriptures approves the killing of animals needlessly, except in sacrifices to the gods in special ceremonies called the yagnas by sages and saints.⁶⁰ However, hunting for game and dangerous animals by the kashatriya kings was not an uncommon practice. Because the killing of animals was prohibited, many Hindus used to be vegetarians and most of the Jains (another branch of religious following which

⁵⁹Dwivedi, above n 20, 169; Rich, above n 25, 130,131..

⁶⁰See Chapple, above n 19; see also Chapple and Tucker, above n 19; Jain, above n 21, 105,116; Rich, above n 25, 130,131...

developed from Hindu law) and the Bhuddists in India still practice vegetariansim.⁶¹ Regardless, violation of one's dharma or a wrong action has consequences, immediate or long term.

Thus, the actual actions and conduct with which a person behaves entails cosmic consequences under dharmic philosophy. A person's karma will create its own chain of reactions so a person who pollutes the river or the air or contaminates land may have to pay later in some form or other as he or she is committing an adharmic action and conducting himself or herself contrary to dharmic duty.⁶² The harmful effects may be visible within a person's life or they may be reincarnated as a lesser life form to pay penance for atoning their sins against their dharmic duty in the previous life. To a certain extent, Hindu belief in reincarnation and karma (action) also influences the view of the environment, the use of natural resources and humanity's place in the world. According to some scholars, these views also encourage a life which is sustainable and in harmony with nature and hence imposes an obligation not to pollute the environment or abuse natural resources. This understanding of the protection of the environment denotes a way of life different from the concept of rights and privileges as understood today in the Western world.

9 Dharmic Duty or Legal Liability in Terms of Rights?

Dharma relates to one's duty rather than a right, but duty as dharma is not equivalent to or a co-relative of right in the Hofeldian sense within the ancient Indian

⁶¹Part of the respect for valuing living creatures under the dharmic understanding is recognised as a fundamental duty under Chapter IV, Directive Principles of the State Policy in Article 51A(g) and Article 52 of the Constitution.. See BB, Pande, "Fundamental Duties as a Strategem for Augmenting Human Rights?" (2011) 10 *Journal of National Human Rights Commission*, 65-88.. Of course not all Hindus are vegetarians.

⁶²Adharmic action is against dharma. It is a wrong against a person or a thing. For example, if one cuts trees mindlessly that is against the forest gods, and unsustainable cutting and indiscriminate felling may hamper regeneration of the forest. The latter is recognised in karmic terms as a sin visited on forest dwellers.

understanding. Legal scholars assert that Indian environmental jurisprudence is quite unique in comparison to that in other common law countries.⁶³ Abraham, in *Environmental Jurisprudence in India*, emphasised that awareness of ‘autochthonous ancient concepts’ relating to nature and environment protection ‘can be and has been put to productive use in the development of a modern regime of environmental regulation and evolution of a neo-dharmic culture that has a uniquely ancient legal traditional characteristic within the modern Indian psyche’.⁶⁴ According to Werner Menski, the conceptual transition from dharma to law was made more explicit from medieval times, but any law remained subject to the overriding concerns of dharma. In abstract terms, Dwivedi holds that dharma ‘can be used as a mechanism to create respect for nature; moreover, it may serve as both a model and an operative strategy for the transformation of human behaviour’⁶⁵ whereby ecospirituality and stewardship can be developed.⁶⁶

10 History of the Evolution of Ancient Legal Tradition and the Common Law Conundrum

⁶³See Meera Nanda, who argues from a Marxist perspective and states that ‘dharmic ecology’ and ‘environmentalism’ are simply a ‘conscious application of a religious attitude toward nature to contemporary environmental concerns’ and that religious environmentalism, or faith-based environmentalism does not espouse the cause of environmental protection as such but is a hybrid advocating a political agenda by people who have lost faith in the traditional left’s cultural ideals of scientific reason, naturalism, humanism and secularism. The secular motivation for environmental action is an untapped resource for secular environmentalism. Rather than drape the cloak of sacredness on nature, environmentalism in India can become a source of secularism and a class-based collective action. See Meera Nanda, ‘Dharmic Ecology and the Neo-Pagan International: The Dangers of Religious Environmentalism in India’ (Paper presented at the 18th European Conference on Modern South Asian Studies, Lunds University, Sweden, 8 July 2004); however Nanda has been severely criticised on her myopic vision, See Elst Koenraad, ‘Hinduism, Environmentalism and the Nazi Boegy: A Preliminary Reply to Meera Nanda’, <<http://koenraadst.bharatvani.org/articles/politics/bogey.html>>.

⁶⁴See Abraham, above n 16, 96-101.

⁶⁵ OP Dwivedi, ‘Global Dharma to the Environment’(1993) 39 *The Indian Journal of Public Administration* 566–576. See also Abraham, above n 16, 97–98.

⁶⁶Dwivedi, above n 20, 169–171.

The Hindu customary law was preserved even during Muslim rule. During medieval times and Muslim domination, Hindu law did not entirely cease to exist, although substantial parts of the Indian sub-continent were unified under a central state in Delhi c. 1100 onwards.⁶⁷ Hindu law then became personal law and part of official law, thus indicating legal pluralism. A secular approach was adopted by the Muslim kings, particularly during Akbar's reign, and Hindu subjects were governed by their own community laws with respect to their personal faiths.⁶⁸ The introduction of a non-indigenous legal framework occurred only after colonisation by the British, French and Portugese invaders. The British administrators, Dhavan suggests, mistook Manusmriti as laying down the 'law' for the Hindus and sought to apply it alongside common law. This gave rise to conflicting situations and more confusion.⁶⁹ It presented a conundrum for the British rulers and a point of contention between the natives. With no consolidating text on the actual law of the land in the Western sense when the British came to India, they transplanted their own laws, but provided for recognition and practice of the customary law that existed in India.⁷⁰ Due to the variety of Sanskrit texts and writings that existed in India, the British administrators adopted the Manusmriti as the legal law and applied it along with the transplanted common law.⁷¹ The application of British law was ill-suited to the citizens, whether Hindus or Muslims, as the administrators applied them without applying the rules of sastric or koranic interpretation and this resulted in conflicts.⁷² Scholars point out that these rules were administered in the 'common law style' and were unjust to the women and 'lower caste shudra' community⁷³ and led to a 'crucial intercultural breakdown' of communication over the meaning of law.⁷⁴

⁶⁷Wink, 1990, as cited in Menski, above n 22, 237-238.

⁶⁸Griffiths, 1986, as cited in Menski, above n 22, 114–118, Hindu law became a part of the official law even under Muslim domination.

⁶⁹See JDM Derrett, *Essays in Classical and Modern Hindu Law: Current Problems and the Legacy of the Past* (EJ Brill, 1977); D Pearl, *A Textbook on Muslim Law* (Croom Helm, 1979) 27.

⁷⁰Menski, above n 22, 243–244.

⁷¹Dhavan R, 'Dharmasastras and Law', xiv.

⁷²Menski, above n 22, 243–244; See also Dhavan, above n 71.

⁷³Fali S Nariman, *Before Memory Fades... An Autobiography* (Hay House India, 2010) 32

In his various works Derrett has depicted the evolution of the administration and application of Hindu law by the British in India, and his work emphasises two significant aspects: (i) the role of sastra, i.e., the changing role of texts as a source of law under the colonial administration, and (ii) the process of administering Hindu law through a combination of English and Hindu principles of adjudication along with precedents and principles of justice, equity and good conscience.⁷⁵ As Menski observes, as an end result the common law-led system demanded specific solutions to what were often complex issues. He states that the confusion and conflicts between common law and ancient Hindu law arose largely due to two reasons: (i) the colonial administrators were unaware of the nature of the Hindu law and the basic principle of situation specificity in Hindu law, and (ii) they were not aware of the cultural and legal pluralism that existed within Hindu law.⁷⁶ The administrators asked the pundits or the maulvis questions about law while the pundits responded in terms of dharma. While the British wanted to know about a general rule of law, the indigenous experts provided situation-specific assessments of the case in question. By end of 1864, the Anglo-Hindu case law became a conglomerate of precedents built on shaky textual authority, now developing its own momentum.⁷⁷

Gradually Anglo-Hindu law became a court-centered law relying on foreign legal concepts, which has given rise to the application of universal law principles. This development was not consciously planned.⁷⁸ Menski remarks that this intercultural mix and the application of different interpretations of specific situations based on different texts led to a breakdown of communication over the meaning of ‘law’, as the indigenous traditional understanding conflicted with the general rule of law that the

⁷⁴JDM Derrett, above n 69.

⁷⁵JDM Derrett (ed), *An Introduction to Legal Systems* (Sweet and Maxwell, 1968) 8–104, 225–230.

⁷⁶Menski, above n 22, 212–216.

⁷⁷Menski, above n 22, 243–244.

⁷⁸Menski, above n 22, 243, 244.

administrators expected.⁷⁹ Hence as the the legal system developed it became a mix that represented neither Hindu law nor English law, but a problematic construct based on precedent and shaky textual interpretations without authority.

Later, after independence, the Constitution provided for an independent state and law for its people. Although the Constituion enumerates secular principles and adopts the common law tradition, one cannot fail to notice that it also still reflects certain of the indigenous traditional customs and practices. Some authors comment that it relates to the Hindu way of life and is influenced heavily by 'Hindu ways of governance'.⁸⁰ Various academic researchers also echo the view that ancient Indian jurisprudence is retained and reflected within the current environmental philosophy and development through public law rationale.⁸¹ However, the scope of application of tort law to address environmental claims where individuals or even the ecology of a community has been harmed is not whittled down. It only indicates an alternate means of resolution.

Instead of detracting from the liability spectrum, dharmic liability has been interpreted to add to the available alternatives for dispute resolution to the liability of polluters. In dharmic terms, this would make polluters adharmic, for which indigenous tradition and legal culture entail a liability, whether civil or penal, and thus pins the issue down

⁷⁹Menski, above n 22, 245–248.

⁸⁰See Menski, above n 22, 259–262, 268–273; Legal decisions by the Supreme Court and various High Courts indirectly reflect the indigenous tradition and understanding of oneness with the environment in solutions for current problems by using the public law rationale. The leading decisions have been analysed in Chapter 5 *infra*.

⁸¹See MR Jois, *Seeds of Modern Public Law in Ancient Indian Jurisprudence* (Eastern Book Company, 1990); Purohit, above n 18; Geeti Sen, above n 18, 25–33, 35–48, 49–52; J Baird Callicott and Roger T Ames (eds), *Nature in Asian Traditions of Thought: Essays in Environmental Philosophy* (Sri Satguru Publications, 1991); OP Dwivedi, 'Satyagraha for Conservation: Awakening the Spirit of Hinduism' in J Ronald Engel and Joan Gibb Engel (eds), *Ethics of Environment and Development: Global Challenge, International Response* (University of Arizona Press, 1990); BV Krishnamurti and Urs Schoettli, 'Environment in India's Religious and Cultural Heritage' in Bandyopadhyay, above n 7, 159–171; EJ Lott, 'India's Religious Resources for a Global Eco-Theology' in Bandyopadhyay, above n 7, 172–187.

to question of morality and fairness. This, it is argued, is serving a similar function to that which tort liability serves, and on which it is based.

11 Contemporary Emphasis on Dharma and the Indigenous Traditions: The Difference in Determining Liability

Dharma indicates not only legal duty but a duty on the person to act in conformity to the universal macrocosmic order. Thus, acting as a result of divine rules, moral rules, social rules, ethical rules, community rules or legal rules are all facets of one's dharma. If one considers the ontological and epistemological dimensions, then one can argue that this traditional understanding stands against legal positivism and natural law theorists, who have failed to consider the nature of law from the point of view of dharma.⁸² 'As dharma looks for substance and justifications of basic laws in the communal mode of human existence and the teleology of its development, it is a third alternative to explore the nature of law and the most promising direction needing critical exploration.'⁸³ Thus, an analysis of legal culture based on the traditional indigenous jurisprudence provides a holistic view of the nature and underpinning of the concept of law in contrast to foundations of the idea of law within positivist or natural law theories.

Additionally, the conceptualisation of legal postulates, as enumerated by Chibba, and the notion of dharma expressed as a third alternative to explain the nature of law, proposed by Singh, is much wider and therefore encompasses broader notions than the positive law and natural law combined. The duty that dharma posits within the traditional legal culture is different from the Hohfeldian jural concept of duty, rights, privileges and power. Hofeldian rights and duty obtain their validity from a sovereign

⁸²Chhatrapati Singh, *Law from Anarchy to Utopia: An Exposition of the Logical, Epistemological, and Ontological Foundations of the Idea of Law, by an Inquiry into the Nature of Legal Propositions and the Basis of Legal Authority* (Oxford University Press, 1986) ix.

⁸³Singh, above n 80.

or higher authority.⁸⁴ However, dharma does not arise from law; it finds its validity in a pre-existing culture, from traditional cultural precepts followed for time immemorial. It encompasses justice, morality and religious precepts but all these facets are applied depending on the specific situation. To positive or natural lawyers it would almost be akin to a society which imparts justice without 'law'.⁸⁵

However, due to the flexibility of Indian culture (Hindu culture), based as it is on the concept of dharma and the universal order, Indian culture has been inclusive and receptive, and can accommodate foreign law and adapt by borrowing international and global concepts. This reflects the ability to imbibe new ideas and modification without changing its substantive quality and illustrates its uniqueness.⁸⁶ Studies by academic scholars including Baxi, Dhavan, Dube, Kurshid, Sudarshan and Gadbois on socio-legal processes in the role of the Indian Supreme Court also assert this uniqueness of the exercise of judicial power.⁸⁷ While applying the current law many

⁸⁴See WN Hohfeld, *Fundamental Legal Conceptions* (Westport, 1978) 64, WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Aldershot, 2001) 12, Section 1. The Hohfeldian correlative table and the stipulatory nature has been criticised by several scholars; for example, see DN MacCormick, 'Rights in Legislation in PMS Hacker and J Raz (eds) *Law, Morality and Society* (Oxford, 1977); MacCormick, 'Legal Right and Social Democracy' *Essays in Legal and Political Philosophy* (London, 1982); NE Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights*, 2nd edn (London, 2002). For a critical comment see MH Kramer, NE Simmonds and H Steiner, *A Debate over Rights: Philosophical Enquiries* (Clarendon Press, 1998); Nikolai, Lazarev, 'Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights' (2005) *Murdoch University Electronic Journal of Law* 9.

⁸⁵See Abraham, above n 16, 86–87.

⁸⁶JDM Derrett, *Religion, Law and the State in India* (Oxford University Press, 1999) 25–26.

⁸⁷See Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company, 1980); Upendra Baxi, *Courage, Craft, and Content: The Indian Supreme Court in the Eighties* (NM Tripathi, 1985); Rajeev Dhavan, *The Supreme Court of India: A Socio-Legal Critique of its Juristic Techniques* (NM Tripathi, 1977); Rajiv Dhavan, *Justice on Trial: The Supreme Court Today* (AH Wheeler Publishing, 1980); MP Dube, *Role of Supreme Court in Indian Constitution* (Deep and Deep Publications, 1987); R Dhavan, R Sudarshan and S Khurshid (eds), *Judges and the Judicial Power: Essays in Honour of Justice VR Krishna Iyer* (NM Tripathi, 1985) quoted in Abraham, above n 16, 89.

judges have also interpreted provisions keeping in mind the dharmic ideology.⁸⁸ These authors have variously shown how judges have become part of the current ongoing political process and consciously or subconsciously made decisions relying upon the dharmic culture and ideology. Baxi states that ‘the pedagogic and persuasive nature of most judicial discourses displays this dharmic culture’.⁸⁹ At times the judiciary has been labeled as overstepping its judicial functioning and to have indulged in ‘lawmaking’.

12 Dharmic Environmentalism in the Court

Despite the criticisms leveled at the judiciary in certain instances, judges are involved in significant economic, social and political questions and have evolved a new legal order by resurrecting the dharmic culture. Thus, it may not be incorrect to conclude that judges, while indulging in lawmaking, are not just interpreting and applying the law but at times make a conscious choice to fulfil their duty—their professional dharma or varnasramadharma—to bring balance to the universal order that may have been wronged, especially within environmental cases. Justice Krishna Iyer reiterates that ‘in order for law to serve life—life of the million masses—the crucifixion of the Indo-Anglo system and the resurrection of the Indian system is an imperative of independence.’⁹⁰ Similarly, the same sentiment of taking lessons from the indigenous

⁸⁸See Singh, above n 80. Dr Singh says the role of the judges was almost similar to that of the sages and rishis of the ancient times in filtering the truth and what was the right path and providing a solution to be adopted by individuals. However, other authors who have applauded the creativity of the Indian Supreme Court during the eighties when human rights and fundamental rights questions were being increasingly decided have also commented on the ability of the judges to have thought ‘out-of-the-box’ and relying upon the dharmic culture with which judges would have internalised; See also Baxi, ‘Judicial discourse: Dialectics of the Face and the Mask’ (1993) 35 *Journal of Indian Law Institute* 1–12; See also Abraham, above n 16, 88–90.

⁸⁹Baxi, above n 87.

⁹⁰VR Krishna Iyer, *Indian Justice, Perspectives and Problems: Sir Asutosh Mookerjee Memorial Lectures* (Vedpal Law House, 1984) 6–7.

legal tradition, the Rig Veda and the Manusmriti, can be seen in the obiter by justice Pasayat in *KM Chinnappa v Union of India and Ors*⁹¹ where it was stated that:

Since time immemorial, natural objects like rivers enjoyed a high position in the life of the society. They were considered as goddesses having not only the purifying capacity but also *self-purifying ability*. Fouling of the water of a river was considered a sin and it attracted punishments of different grades which included, penance, outcasting, fine, *etc...* [E]nvironmental pollution was controlled rigidly in the ancient time. It was not an affair limited to an individual or individuals but the society as a whole accepted its duty to protect the environment. *The dharma of environment* was to sustain and ensure progress and welfare of all. The *inner urge* of the individuals to follow the *set norms* of the society, motivated them to allow the natural objects to remain in the natural state. Apart from this motivation, there was the fear of punishment. There were efforts not just to punish the culprit but to balance the eco-systems... The noteworthy development in this period was that each individual knew his *duty to protect* the environment and he tried to act accordingly' (emphasis added).

D The Revitalisation of Indigenous Tradition and a Mixed Approach Using Multifaceted Instruments of Liability

With respect to the environment, scholars in India have shown that the awareness of the inter-linkages between law, philosophy, religion and nature and the Indian understanding of treating nature and environment is different from natural law tradition based merely on morals and religious beliefs. Hence, the indigenous belief in self regulation, preservation, conservation and protection of the environment

⁹¹(2003) 2 SC 724, Para 25.

embedded in a communal way of life stand in contrast to externally enforced sanctions through positive law. In order that people reorient themselves with an ecological spirit, Dwivedi suggests that revitalisation of the ancient traditions and dharma would be one of the better operating strategies.⁹² For example, within the context of displacement of tribal communities due to the building of dams such as the Sardar Sarovar, had considerations been given to dharmic norms then the government ought to have genuinely taken into account the ‘social ecology’ so as to integrate environmental and development policy with the way of life of the communities living in and around the area. Chapple suggests that the dharma in this situation would have meant acting for the ‘sake of the good of the world’ and maintaining the balance.⁹³ Despite the fact that the Court did not find a violation of Article 21 and prioritised developmental needs over the environment and the ousting of 1,000 villagers, a better resolution ought to have been reached through mediation and consultation with the participation of the affected communities from the very beginning. The government policy objective of providing electric power and harnessing water from the rivers was in tune with welfare objectives, however the dharmic or the traditional and more acceptable way was to have allowed for communities to speak their mind and understand the need for this project instead of proceeding with the construction within a short period of time.

13 The Downside of Dharma and Contemporary Reality

Despite the above emphasis on indigenous traditions which explore the nature of the conceptual foundations as to environmental liability, some contemporary authors also highlight the practices and beliefs within Hindu law that have resulted in the decline of environmental values as highlighted in the sastric texts. For example, there are various gods that the Hindus worship and the goddess of wealth (Lakshmi) takes

⁹²Dwivedi, above n 20, 201–211; OP Dwivedi, ‘Global Dharma to the Environment’(1993) 39 *The Indian Journal of Public Administration* 566–576.

⁹³Chapple, above n 19; see also Chapple and Tucker, above n 19.

precedence over the goddess of earth (Bhumi, Dhara, Dharti, Dharini or Prithvi) and so priorities become different, and in order to gain wealth an individual may sacrifice their interest and reverence for the environment.⁹⁴ Moreover, there are methods that the sastric texts enumerate to overcome the sins that one might have committed by performing certain rituals so as to cleanse oneself of an earlier wrongdoing against another or against nature (prayashchity, penance).

As Hindu belief centers on performing one's dharma, an individual may only worry about himself or herself or their immediate family, to the detriment of the society. Agarwala suggests that because of this focus on the private sphere public life borders on chaos.⁹⁵ Another example which is often cited is the historic pollution of the river Ganges. On one hand, Hindus believe it to be a 'holy river' and perform soul-cleansing rituals and prayer ceremonies during all kinds of religious festivals. An entire city, Varanasi, situated on the banks of the Ganges river and described as the 'holy city' is among the worst polluted. The name itself the 'Holy Ganges' then becomes paradoxical. The river has been used as a dumping ground for household, industrial and agricultural organic waste, domestic effluents, chemicals and toxic contaminants from leather tanning and other chemical producing factories.⁹⁶

The sastric texts enumerating various actions and dharma are full of contradictions, different interpretations and thus open to abuse. These abusive and selfish practices towards the environment, among others areas, also reflect in the contemporary culture which has its roots in the indigenous traditions that the contemporary public law instruments must deal with. To contend with the public environmental issues the tool of public law has been used in India to develop environmental law jurisprudence.

⁹⁴See Jain, above n 21, 105, 116.

⁹⁵RK Agarwala, *Hindu Law*, 21st edn (Central Law Agency, 2003) 7, 23.

⁹⁶There has been a spate of Supreme Court decisions on Ganga pollution filed by Mr MC Mehta, and the efforts by the government to clean up the river while it passes through the northern Gangetic plain through the Ganga Action River Plan have been ongoing for the last 25 years.

However, public law and environmental standards have left many gaps, as illustrated in Chapter One, which can be meaningfully supported by the use of civil liability and an understanding of to what extent and how effectively civil liability can be used as a tool for vindication of environmental claims in India within the dharmic context as well as the wider framework of the current environmental liability regime. Even the dharmic duty can be interpreted as imposing an obligation not to harm either a person, property or the environment, and hence tortious liability can be used as a supplementary tool for reaching environmental objectives.

As mentioned previously, an adharmic action entails repercussions in the form of penance or payment. According to dharma the right thing to do would be to perform a ritual penance, or to remedy the wrong. A wrong to the environment would be a wrong to an individual or the community, and the wrongdoer would be held as an outcast, required pay a fine or to recompense the victim or be banished from the community. This form of interpretation may be stretching the limits of sastric rules; however, the civil liability theories as explained in the Western theories ultimately aim to regulate individual and social conduct.

14 A Mixed Approach: Learning to Use All Instruments of Liability for Achieving Environmental Objectives

Menski maintains that especially for lawyers it is necessary to ‘attempt at understanding how the ancient cultural—and thus predominantly socio-religious—traditions of South Asia still manifest themselves today as centrally important legal “bricks” for the reconstruction of post-modern Hindu law and the definition of post-modern Indian laws’.⁹⁷ The dharmic system and religious values

⁹⁷Werner F Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, 2006), 3,4.

are influential in contemporary India to a certain extent, especially in the field of environmental law and justice as is discernible from case law and in certain judicial pronouncements. However, judges have emphasised strong values in recognising victim's rights and sustenance by natural resources by internalising the ancient traditional beliefs in nature.

Equally, the courts' decisions on environmental matters also reflect a pluralistic approach and judges have not followed any Western legal theory strictly; neither positivist law doctrine, nor natural law teachings. By employing and developing the PIL concept the judiciary in India has stretched the traditional legal structure as understood in the West. Environmental legal liability tools reflect a value-based attitude and judges have devised various tools of liability to help achieve environmental objectives by largely using public law instruments. Yet, in certain decisions the Supreme Court has adopted a stance that reflects not only value-based indigenous beliefs but also the common law-based remedy for compensation by modifying certain tort law principles, especially strict liability. For instance in *MC Mehta v Union of India* (the Oleum gas leak case)⁹⁸ the Court looked for common law liability, especially the rule under *Rylands v Fletcher*⁹⁹ and modified the strict liability principle into an absolute liability one. In this case the court also held that:

[T]he enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of persons working in the factory and residing in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of the hazardous or inherently dangerous nature of the activity which it has undertaken...the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the

⁹⁸AIR 1987 SC 1086.

⁹⁹(1868) LR 2 HL 330.

enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part...The larger and more prosperous the enterprise, the greater must be the amount of compensation payable for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.¹⁰⁰

Similarly, liability for environmental destruction and degradation and violation of the right to the environment under Article 21 and the duty under the Constitution was reiterated in the case of *Rural Litigation and Entitlement Kendra v State of UP*¹⁰¹ when the Court looked for support for environmental protection and ensuing liability within the Indian scriptures. While stopping mining in the forest area in the Doon Valley, the Supreme Court quoted from the Atharva Veda¹⁰² to the following effect: ‘Man’s paradise is on earth; this living world is the beloved place of all; It has the blessings of Nature’s bounties; live in a lovely spirit.’

It was pointed out that it was in these forests in the Himalayas that thousands of years ago, our saints did penance and lived. In ancient times, the trees were worshipped as gods and prayers for the upkeep of forests were offered to the Divine. With the developments in science and the explosion of the population, the degradation of forests began. The earth’s crust was washed away and places like Cherapunji in Assam which used to receive an average rainfall of 500 inches per year began facing the occasional drought. The Court ordered a halt to the illegal operations and declared for the first time that the right to life included within its ambit the right to a healthy environment.¹⁰³

¹⁰⁰MC Mehta v Union of India AIR 1987 SC 1086, per J PN Bhagwati, 1091.

¹⁰¹AIR 1988 SC 2187

¹⁰²Atharva Veda 5.03.6 as quoted in the Doon valley case.

¹⁰³For a comment on consideration of Indian indigenous values within environmental decisions, see generally Shyam Divan and Armin Rosencranz, *Environmental Law And Policy In India: Cases, Materials and Statutes* (Oxford University Press, 2002) Chapters 1 and 2.

From the above two examples, among other cases¹⁰⁴, one can discern a mix of legal tradition and a view of SD found in the West, the modern ecological thinking of international environmental law as well as Hindu concepts, especially from the dharmic tradition. Environmental legal liability within the Indian context displays a multifaceted approach which is not dissimilar to that adopted in common law countries and civil law jurisdictions.

Despite the recognition of the indigenous legal tradition, Indian environmental jurisprudence has its own distinct features. One cannot dissociate how the official law is applied or that which is pervasive through the current Indian legal framework. Even the common law of tort, that has been underdeveloped for solving environmental disputes, has acquired a distinct and characteristic feature of its own in the form that strict liability principles have been changed through the courts' decisions into absolute liability ones. However, this has not progressed as rapidly as the civil liability principles used in England and elsewhere. Thus, the hard law in India in the Austinian sense has evolved in the British common law tradition, including tortious liability, and evidently overshadows the traditional indigenous legal system and exhibits features of the Western legal understanding of the theories of law and its objectives. It has

¹⁰⁴See for example, *Sachidanand Pandey v State of West Bengal*, AIR 1987 SC 1109; *Ratlam Municipality v Vardhichand* AIR 1980 SC 1622; *State of Bihar v Murad Ali Khan*, AIR 1989 SC1; *Tarun Bharat Sangh Alwar v Union of India* AIR 1992 SC 514; *State of Himachal Pradesh v Ganesh Wood Products* (1995) 3 SCC 363 (hereinafter *Ganesh Wood Products*); *Subash Kumar v State of Bihar* (1991) 1 SCC 598 : AIR 1991 SC 420; *Bombay Dyeing and Mfg Co Ltd* AIR 2006 SC 1489; *Ahmadabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11 SCC 121; *State of Himachal Pradesh v Umed Ram Sharma* AIR 1986 SC 847 (the Court includes the right to good roads as a fundamental right under Article 21); *MC Mehta v Union of India and Others* (1997) 2 SCC 411 at 20; *MC Mehta v Kamal Nath and Ors* (1997) 1 SCC 388; *TN Godavarman Thirumulpad v Union of India and Ors* AIR 2005 SC 4256; *Vellore Citizens' Welfare Forum v Union of India and Ors* AIR 1996 SC 2715; *Karnataka Industrial Areas Development Board v Sri C Kenchappa and Others* AIR 2006 SC 2038; *AP Pollution Control Board v Prof MV Nayudu (Retd) and Ors* (1996) 5 SCC 718; *ND Jayal and Anr v Union of India and Ors* (2004) 9 SCC 362; *Research Foundation for Science, Technology and Natural Resources Policy v Union of India and Anr* (2005)13 SCC 186; *Milk Producers Association, Orissa and Others v State of Orissa and Others* AIR 2006 SC 3508; see also *Indian Council for Enviro-Legal Action v Union of* (2011) 8 SCC 161 (*Bichri II*).

evolved as having acquired Western features for the assertion of proprietary and property rights over use of natural resources, land and property. However, the interesting reversal to the right to property after the 44th Amendment provides a unique twist to understanding of tortious principles in respect to right to property.¹⁰⁵ One could argue that the manner in which the pursuit of social justice ideology permeated all public interest issues after 1977, based on a Constitutional rationale, influenced the evolution of interpersonal relations that tort law harnesses. Before the 1980s, engagement with tort liability, particularly in respect of environmental harms, can be said to have been largely ignored as being secondary to the primary aims of a growing and developing nation that prioritised the objective of development while paying lip service to environmental interests.¹⁰⁶ The above discussion illustrated the indigenous theoretical perspectives and its influence and reasons that slowed the progress of tort application and evolution within India. The challenge that the law-makers and the judiciary face is to balance the legal law with dharmic concepts and make it mainstream. Also identification of dharmic duties that permeate the cultural and social practices needs to be recognized through specific law and liability provisions. These duties and values once modified into modern legal and enforceable rights and duties would add weight to upholding of traditional values through a practical approach at resolution of claims. Further under the NGTA an amendment could be introduced where the existing tort liability can be weighed and adjudicated considering the issues pertaining to dharmic duty, especially of compensation for adharmic sins for environmental wrongs. The old concepts and the new attempts to resolve claims ought to be married together. Environmental philosophy in India as the above brief discussion reveals has been influenced by the Indian traditions of thought on Nature and have formed a kind of conceptual resource base foundation that has

¹⁰⁵Sushant Sailan, 'History of the Removal of the Fundamental Right to Property', (2002) *Centre for Civil Society*, 231–255, <<http://www.ccsindia.org/ccindia/interns2002/25.pdf>>.

¹⁰⁶See Chapter 6 for further details.

begun to inspire a rethinking and reorientation of environmental philosophy¹⁰⁷ and new direction for evolution of environmental remedies.

The next section examines the theoretical basis of tort and its application to environmental claims in the contemporary context. It is to be noted that in whatever way the theory is examined whether through the notion of dharmic duty or the notion of enforceability of tort- morality and fairness, ethical and environmental values within each society have influenced justice considerations.. The following sections V-VII highlight the various explanations from a western perspective and explain the mixed liability approach being adopted to resolve environmental claims. Sections VIII-X thereafter provide a comparison and application of these theoretical justifications within Indian context and the manner of its unique evolution. It also highlights the difficulties with application of tort law in India and how features of tort functions have been adopted, modified and influenced by the indigenous cultural tradition. It is argued here that due to the legal pluralism that exists in India, the traditional indigenous cultural concepts have influenced the Indian legal system to a degree that it does not reflect or adopt the western common law concepts in its entirety. It exhibits a mix of religious, moral, customary and modern values that provide a rich matrix of factors that have influenced the higher judiciary while considering solutions for environmental problems. Thus it can be argued that within environmental law area correlative rights as well as dharmic duties co-exist and have found a common ground within the environmental context.

E Western Theoretical Perspectives of Tort Liability

A legal liability regime could have different objectives that may overlap with each other and are relevant in assessing and understanding the trend toward strict liability

¹⁰⁷ See generally Geeti Sen (ed), *Indigenous Vision: Peoples of India Attitudes to the Environment* (Sage Publications, 1992) 49-52.

and fault liability. The following sections deal with the justifications and objectives of liability to examine economic perspectives, compensation, increasing efficiency, deterrence, risk spreading, wealth distribution, corrective justice and a multifaceted mixed approach in assessing civil liability.

15 Economic Perspectives

While examining environmental liability one comes up repeatedly with economic analysis or cost-benefit equations. Apart from the traditional ones, justifications for environmental liability have been sought through the cost internalisation theory via the PPP. In contrast to lawyers, economists urge that the courts should devise solutions that are efficient in economic terms and hence the role of tort is to provide a framework that is market-driven, even for protection of certain rights, including environmental rights.

Hence, with wealth maximisation as one objective, resources are allocated between individuals through voluntary transactions to achieve efficiency. Accordingly, Posner defines wealth maximisation policy as one where ‘the aggregate value of all goods and services is maximised whether economic or non-economic (family, leisure, freedom from pain and suffering).’¹⁰⁸ However, in this system individuals motivated by greed and self-interest end up imposing a cost on non-participants, thus creating ‘externalities’ such as pollution.¹⁰⁹ Along with ‘mismanagement, fraud, [corruption], mistake and monopoly, pollution too reflects a failure of the self-regulatory tools of a market economy and therefore must be controlled through public regulation.’¹¹⁰ Different solutions to this problem have been proposed, for example imposing a

¹⁰⁸RA Posner, ‘Wealth Maximisation and Tort Law: A Philosophical Inquiry’ in D G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1997).

¹⁰⁹See RA Posner, *Economic Analysis of Law*, 3rd edn (Little Brown and Co, 1986) 343.

¹¹⁰Posner, above n 107.

‘Pigouvian tax’¹¹¹ i.e., punishment for those who fail to take into account externalities by imposing a punitive tax or by following the ‘Coasian method’¹¹² with an imposition of social cost by least interference from the law: ‘a world of zero transaction costs’. With the impracticality of its application within the environmental area and in the real world, Coase explained himself by stating that in the real world ‘zero transaction costs’ do not exist; rather, with positive transaction costs ‘the law plays a critical role in determining allocation and use of resources’.¹¹³

As to the functioning of tort law within this sphere, economic scholars point out that tort law should improve the bargaining position of the parties involved. Injunctive relief then becomes useful and thus can be employed to channel transactions between the parties in the market.¹¹⁴ Therefore, the polluter strikes a bargain with the victim and an injunction paves the way for a continuous settlement and not necessarily a halt to the polluter’s activity.¹¹⁵

Yet the courts may award damages in certain cases, and the polluters do end up paying damages and cannot manoeuvre to bargain in case of an injunction. Landes and Posner suggest that such a situation occurs where there are a number of claimants

¹¹¹ Arthur C Pigou, *The Economics of Welfare*, 4th edn (Macmillan, 1932).

¹¹² RH Coase, ‘The Problem of Social Cost’ (1960) 3 *Journal of Law and Economics* 1, Coase’s theorem states that the parties to the transaction will reach their own agreement as to the most efficient allocation of the resource, irrespective of any solution imposed upon them by the court provided there are no transaction or information costs or obstacles to bargaining.

¹¹³ RH Coase, ‘Notes on the problem of social cost’ in RH Coase, *The Firm, the Market, and the Law* (University of Chicago Press, 1990).

¹¹⁴ WM Landes and RA Posner, *The Economic Structure of Tort Law* (Harvard University Press, 1987) 31.

¹¹⁵ See Veljanowski’s analysis in the case of *Bellew v Cement Co Ltd* [1948] I R 62, where the author states that even where the defendant loses a disproportionate amount he can still bargain with the plaintiff, contrary to legal expectations, and the court’s decision of having ordered an injunction contrary to economic consideration and national need; See C Veljanowski, ‘Legal Theory, Economic Analysis and Tort’ in WL Twining (ed), *Legal Theory and Common Law* (Basil Blackwell, 1986) as quoted by Mark Wilde, *Civil Liability for Environmental Damage: A Comparative Analysis of Law and Policy in Europe and the United States* (Kluwer Law International, 2002) 119.

and the damage or harm caused by pollution is diffuse.¹¹⁶ Another situation may be where the plaintiff refuses to settle and does not want to enter into a bargain based on an injunctive relief, or may hold out for a settlement in excess of offers made to other victims.¹¹⁷ Further, there may be no bargain between the parties as one party may refuse to settle at any price at all, which creates a ‘bilateral monopoly’.¹¹⁸

In terms of the practical application of this analysis, the courts have ended up awarding damages¹¹⁹ in cases in the US¹²⁰ based on the fact that the costs to the defendant have far outweighed the costs to the plaintiff. Damages are thus awarded in cases where the polluter or manufacturer of equipment is put to great expense or must close its plant in order to avoid an inefficient result.¹²¹ In order to avoid higher costs and an inefficient result economists suggest that the operator of the plant should obtain compensation to move his plant.¹²² One example where this has been done comes from the US case of *Spur Industries Inc v Del E Webb Development Co.*¹²³ The developer in this case suffered losses as his development had spread to the defendant’s cattle feeding station. However in this case it was the plaintiff that had moved to the nuisance, and as such the developer had a defence according to the US common law, but the Supreme Court of Arizona arrived at a unique solution by granting an injunction to the plaintiff against the defendant in the interest of the local residents who had purchased the properties from the developer even though they were not parties to the suit.

¹¹⁶Landes and Posner, above n 113, 45.

¹¹⁷Landes and Posner, above n 113, 45.

¹¹⁸Landes and Posner, above n 113, 44.

¹¹⁹See R Cooter and T Ulen, *Law and Economics*, 2nd edn (Addison-Wesley, 1997) 45–47.

¹²⁰*Boomer v Atlantic Cement* 26 N.Y. 2d 219, 309 n.Y.S.2d 312, 257 N.E. 2d 870 (Court of Appeals of New York, 1970).

¹²¹Cooter and Ulen, above n 118, 45–47.

¹²²G Calabresi and A Douglas Melamed, ‘Property Rules, Liability Rules and Inalienability: One View of the Cathedral’ (1972) 85 *Harvard Law Review* 1089.

¹²³108 Ariz 178, 494 P 2d 700 (Supreme Court of Arizona, In Banc 1972).

Calabresi and Melamed suggest that to overcome the inefficient result of such an injunction, the Arizona Supreme Court asked the developer plaintiff to compensate the defendant for the costs of relocation.¹²⁴ In this case one can see that the court balanced the interest of the residents, the cattle station owner whose activity led to pollution, and the developer, who according to the court had taken advantage of the lesser land values in a rural area to develop a new city. Also, one can discern that the court prioritised the public interest in a clean environment over the economic benefits of a polluting activity.

16 Economic Rationalisation in India by Judicial Design

A similar theory of balancing the economic interests and the public interest in a clean environment and water can be discerned from the Indian Supreme Court's decision in the Dheradun Quarrying case.¹²⁵ The case concerned the abatement of pollution by limestone quarries by a number of private operators in the Dheradun Valley in the Mussoorie Hills of the Shivalik range in the Himalayas. The incessant and increasing amount of limestone quarrying had caused an imbalance in the ecological system, which was causing a major water shortage during the summer months for the residents in and around the mines. The court required the government of Uttar Pradesh to be party to the litigation as a protector of the environment in the discharge of its statutory and constitutional obligations. It ordered several mines to be closed, but was mindful of the fact it would be impractical to stop all mining activity as it was an essential and necessary economic activity and was required for the defence of the country and safeguarding of the foreign exchange.

¹²⁴Calabresi and Melamed, above n 121.

¹²⁵Rural 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 (Dheradun Quarrying Case amongst the first case where Supreme Court recognized right to a healthy environment under article 21 right to life provision. The Court also referred to India's international commitments for sustainable development and the Directive Principles of State Policy and Fundamental Duty of the State and citizens to protect the environment).

The affected residents who were facing acute water shortages were not granted any damages, for that was not the way the case came to the Court. Rather, a letter was treated as a writ petition under Article 32 of the Constitution seeking an appropriate remedy, which in this case happened to be injunctive relief. However, economic considerations and the private right to trade and business guaranteed under Article 19 of the COI, and the private right to property, has held a lower priority in a number of cases in the Supreme Court¹²⁶ and the various High Courts¹²⁷ in India after the celebrated case of *Ratlam Municipality*.¹²⁸ Abraham¹²⁹ points out that the *Ratlam* and *MC Mehta* cases indicate a distinct evolution of a solution to India's environmental problems through a constitutional mandate and an evolution of a public law of torts similar to that in civil law jurisdictions, especially within French jurisprudence.¹³⁰

Unlike tort cases for violation of a private right due to pollution in the US or the UK, most environmental cases that have come before the Indian Supreme Court have been framed under a writ petition for violation, and vindication of, fundamental rights (such as the right to life under Article 21, among others) and the public interest in the environment. The economic considerations and policy factors that explain tort law decisions, and those which affect the Indian courts' decisions, reflect certain similarities. However, it is apparent that the justifications for the application of tort principles and the rationalisation of cost-benefit analysis is modified within the Indian environmental jurisprudence to suit the nature of the legal action brought to the court.

¹²⁶For example, See *MC Mehta v Union Of India* AIR (1987) 4 SCC 463; *MC Mehta v Union of India* AIR (1987) 1 SCC 395.

¹²⁷*Krishna Gopal v State of Madhaya Pradesh* 1986 CrLJ 396; *PC Cherian v State of Kerala* 1981 KLT 113.

¹²⁸*Municipal Council, Ratlam v Vardichand* AIR 1980 SC 1622; (1980) 4 SCC 162.

¹²⁹Abraham, above n 16, 42.

¹³⁰IP Massey, *Administrative Law*, 2nd edn (Eastern Book Company, 1985) 343.

The significant feature should be noted is that in most environmental cases the Indian courts have granted injunctions in order to cease the polluting activity rather than damages, as is the case elsewhere. This would indicate that merely ‘efficiency within the market is not the sole purpose and objective of law’ and the Indian judiciary has been mindful of a higher purpose; that of ‘fairness and justice.’¹³¹ Law is a human construct designed to accomplish certain goals and solve disputes. Karl Llewellyn explains that law’s main objective is to resolve both actual and potential disputes, settle them and prevent disputes from happening.¹³² Law is human construct¹³³ that serves to restore peace and obtain a resolution which is bearable to all parties. Further, legal requirements must ultimately justify themselves in functional terms.¹³⁴ To achieve either the external or internal goals that are set by a society the instrument of liability is used. Hence liability also has external goals other than those that a liability system seeks to achieve. Environmental liability is therefore justified by the PPP, which in turn is a version of the cost internalisation theory.

17 Cost Internalisation

Another facet of economic rationalisation and market factors is cost internalisation. Cost internalisation provides a mechanism that works by the provision of incentives to prevent environmental damage and violation of environmental rights, and encourages polluters to take preventative measures and develop processes that are less harmful. It

¹³¹Goodhart explains that efficiency is not the sole purpose and objective of law, the operations of a market ought to be restricted in some manner in pursuit of a higher objective—that of fairness and justice, See CAE Goodhart, ‘Economics and the Law: Too Much One Way traffic?’ (1997) 60 *Modern Law Review* 1, 13; There is also evidence to suggest that the economic rationale to grant injunctions rather than damages in certain cases can also be seen in cases from the UK, for example in *Jaggard v Sawyer* [1995] 1 WLR 269, 288E, LJ Miller described the effect of an injunctive relief to be restoring the parties to their original bargaining position before the trespass.

¹³²Karl N Llewellyn, ‘The Bramble Bush: On Our Law and its Study’ (Oceana, 1960) 12 in Lucas Bergkamp, *Environment and Liability* (Kluwer Law International, 2001) 67.

¹³³G Calabresi, ‘Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.’ (1975) 43 *University of Chicago Law Review* 69, 105.

¹³⁴ Ibid, 105.

deters polluters by having the potential to take away their assets if the technology or the processes being used are harmful. Further, cost internalisation allows the polluter to spread the risk,¹³⁵ as with product liability, through insurance, the creation of reserves for potential losses or imposing an increased price on consumers. Hence, the polluter is liable to pay for the environmental harm caused by its activity. Cost internalisation influences the market as demand for the product increases, due to price increases which deters higher activity and therefore results in less damage.¹³⁶ Bergkamp explains that cost internalisation demands strict liability and is significant for three reasons that correlate to three objectives: (i) cost internalisation would create incentives to prevent environmental damage and violations of rights related to the environment by threatening to take away the polluters' assets, cost internalisation is an efficiency-based concept; cost internalisation would encourage polluters to take preventive measures and conduct research into, or develop, methods that are less harmful to the environment. This is the deterrence and incentive function of civil liability rules. (ii) Cost internalisation would be desirable because it furthers risks or loss spreading since the polluter is in a better position to spread losses he should be liable. Risk spreading can be achieved through insurance or self-insurance, for example, by passing the damage on to consumers through price increases and creating reserves for possible losses. Here, the goal is to create insurance coverage for environmental harm. (iii) Cost internalisation would cause the price of activities to increase and the demand to decrease, which would result in a lower activity level.¹³⁷

¹³⁵The risk spreading function is best explained in the field of product liability. In the context of strict manufacturer's liability Schwartz explains that legal liability in this area serves two functions: it creates incentives for manufacturers to produce safe products and provides a private form of social insurance supplied by manufacturing companies. Thus courts should impose the risk of accidents on the manufacturers because consumers and employees do not have sufficient information, insurance or incentives. The function of safety and insurance is thus best served by imposing liability that is strict on the manufacturers for risk spreading; See A Schwartz, 'Proposals for Product Liability Reform: A Theoretical Synthesis' (1988) 97 *Yale Law Journal* 353, 368–369.

¹³⁶Environmental damage is a consequence of human activity and that largely is based on self-interest, profit and maximum utilisation of available resources.

¹³⁷Bergkamp, above n 3, 73.

Posner explains that the one basic assumption of the economic analysis of law is that people ‘are rational maximisers of their satisfactions.’¹³⁸ Accordingly, human behaviour is modeled to maximise utility by choosing steady preferences and optimum information within a variety of markets.¹³⁹ Working on an efficiency-based concept, the theory is explained based on strict liability and maximising utility in the market. This assumption in explaining the economic analysis also applies in the environmental area. Thus, economic analysis provides both the incentives and the deterrents, and influences behaviour within the civil liability rules. The common assumption under the efficiency-based theories of civil liability is that liability rules enhance the efficiency by imposing the cost of damage on the person responsible for it. However, one corollary from this understanding provides a scenario that is problematic. This is so because ‘if liability is justified only on the grounds of enhancing efficiency, there should not be any liability for damage to inefficient activities because efficiency cannot be enhanced by making an efficient person pay to restore an inefficient activity’.¹⁴⁰ Accordingly, the requirement of efficiency should be established to impose liability for the infringement of an environmental regulation.

18 Cost Internalisation as Applicable to Environmental Harm Liability

Cost internalisation theory, as applied to environmental area, requires that ‘externalised’ costs be imposed on the polluter for causing damage. Economists regard pollution as an ‘externality’, or a cost that can be pushed out or unfairly imposed on others.¹⁴¹ When externalities are not internalised this ultimately produces

¹³⁸See RA Posner, *The Problems of Jurisprudence* (Harvard University Press, 1990) 353.

¹³⁹See GS Becker, *The Economic Approach to Human Behaviour* (University of Chicago Press, 1976) 14.

¹⁴⁰Bergkamp, above n 3, 73.

¹⁴¹MR Chertow and DC Esty, ‘Thinking ecologically: an introduction’ in MR Chertow & DC Esty (eds), *Thinking Ecologically: The Next Generation of Environmental Policy* (Yale University Press, 1997) 1–16, 7, in Bergkamp, above n 3, 73.

a poor state of the environment and welfare and leads to market failure. To overcome this situation, government could take the initiative to ‘internalise’ this harm by asking polluters to control their emissions or pay for the harm that they cause,¹⁴² thus internalising the cost as they are in the best position to do so. Thus, where an industrial enterprise is engaged in an activity that impacts the environment while producing a product or performing an activity, by internalising the cost of pollution or other harmful effects the manufacturer will demand a price that is higher, which will in turn decrease the demand for that product and consequently cause less damage to the environment.

Although cost internalisation has some plausible arguments in theory, in practice, especially in India as is the case elsewhere, it is difficult to apply and use in reality. Legal and economic scholars and critics¹⁴³ have argued that the related difficulties with this theory is that it raises questions about the parameters of cost and environmental damage, and the recognition of legal entitlements to natural resources.

19 Environmental Tort Liability and Cost Internalisation Application in India

In one of its more recent decisions, *Span Resorts*, the Indian Supreme Court has applied the principle of cost internalisation on the polluter, albeit in determining the liability of the polluter without clearly stating the economic rationalisation. Here, the court imposed the cost of restoring the damage done to the area next to the Beas River after the development of a resort in violation of environmental regulations. To date, there are over two dozen reported decisions of the Supreme Court under the name *MC Mehta v Union of India and Ors*. Mr Mehta, the petitioner in all these cases, is a practicing advocate and has worked tirelessly for the last quarter of the century for the cause of environment. The first case,¹⁴⁴ decided in 1986, was filed as a writ petition under Article 32 of the Constitution. The petitioner sought orders from the Supreme

¹⁴²Chertow and Esty, above n 140, 7.

¹⁴³Calabresi, above n 132,105,106 and Posner, above n 107.

¹⁴⁴*MC Mehta and Ors v Union of India* (1987) 1 SCC 395=AIR 1987 SC 1086.

Court to restrain the reopening of a chemical industrial plant of a fertilizer corporation in Delhi which was ordered to be closed due a major leak of oleum gas from one of its units. The Constitution Bench of the Supreme Court applied the doctrine of strict liability, but replaced it with the principle of absolute liability to stifle any exceptions to the rule in *Rylands v Fletcher* by the American defendant company, Union Carbide Inc.

In considering the strict liability principle and basing his exposition of tort law theory, Justice PN Bhagwati modified it for this situation stating:

The rule in *Rylands v Fletcher* ... applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority. This rule[,] evolved in the nineteenth century at a time when all these developments of science and technology had not taken place[,] cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the *needs of the present day economy and social structure* ...

[T]he Court need not feel inhibited by this rule ... *Law has to grow* in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country ... The Court cannot allow judicial thinking to be constricted by reference to the law as it prevails in England or in any other foreign country. Although this Court should be prepared to receive light *from whatever source it comes*, but it *has to build up its own jurisprudence*, evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. If it is found that *it is necessary to construct a new*

principle of law to deal with an unusual situation which has arisen and which is likely to arise in future ... (emphasis added).¹⁴⁵

This in turn created a rule ‘without exception’: ‘if any harm results on account of such activity the enterprise must be *absolutely liable to compensate* for such harm *irrespective of* the fact that the enterprise had taken all reasonable care and the harm occurred without any negligence on its part’.¹⁴⁶ In this case, the court gave multiple orders and in a separate application referred the question of compensation to a larger bench of five judges to lay down the law on:

(3) What is the measure of liability of an enterprise which is engaged in an hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or are injured. Does the rule in *Rylands v Fletcher* ... apply or is there any other principle on which the liability can be determined.

It is submitted that here that the court indulged into an exercise of examining liability for industrial accidents from an economic perspective and ended up requiring the polluter to either internalise the cost or pay compensation to restore the damage that had occurred by its activity. In later cases, especially in a related judgment with respect to the Bhopal case J Bhagwati’s exposition was treated to be obiter and the principle of absolute liability and the development of tortious liability took a back seat, as the Supreme Court in other cases began giving more directions to the executive and government, thereby performing the lawmaking function and entrenching these precedents in the domain of the legislature. As legal scholars point out, even in the environmental field, as with human rights and fundamental rights, the Supreme Court took it upon itself to create law where none existed¹⁴⁷ or where the

¹⁴⁵MC Mehta (1987) 1 SCC 395, Para 5, 6(i–ii).

¹⁴⁶MC Mehta (1987) 1 SCC 395, Para 7(i).

¹⁴⁷Baxi, above n 87; Dhavan, above n 87.

legislation had gaps. Rather than clarifying or laying down a coherent theory for liability and its justifications, the Supreme Court adopted an activist role that has had its share of criticism.

However, as Goodhart¹⁴⁸ and Sagoff¹⁴⁹ state, environmental law is not simply about internalising cost and correcting market failures by eliminating externalities; rather it reflects public values and is the product of citizens articulating a vision of desirable society. Neither is it about wealth maximisation¹⁵⁰. This seems to be the higher objective that a liability system ought to achieve, and on one account the Indian Supreme Court, faced with the Herculean task to solve the nation's environmental problems, has not lost sight of the justice requirement of the objective of law as opposed to merely economic efficiency. Objectives of law such as morality and fairness cannot be included in a cost-benefit analysis and this is where economists have had their share of criticism.¹⁵¹ Dworkin argues that individual wealth cannot be equated with a society's well-being, thus any gains that an individual achieves by reallocation of resources in a private transaction may be far less than the amount of damage that has been caused to the society at large.¹⁵²

F Corrective and Distributive Justice

Among other objectives, one of the major objectives of a liability system is to achieve corrective justice. In Aristotelian terms, a person who gains at another person's expense must compensate the loser. Thus, a person who has pursued a personal

¹⁴⁸M Sagoff, *The Economy of the Earth: Philosophy, Law and the Environment* (Cambridge University Press, 1988).

¹⁴⁹Goodhart, above n 130, 12–13.

¹⁵⁰RA Posner, 'Essay on Utilitarianism, Economics and Social Theory' in RA Posner, *The Economics of Justice* (Harvard University Press, 1983) 16–17 & 74–75.

¹⁵¹R Dworkin, 'Is Wealth a Value?' (1980) 9 *Journal of Legal Studies* 191.

¹⁵²Dworkin, above n 148; Posner too accepts despite his earlier assertion that a purely market-oriented approach will be detrimental to the environment, See Posner, above n 105, 99–100.

objective, harming another, should be liable to recompense that other. Corrective justice focuses on the interaction between persons and a moral obligation on the harm doer to compensate the victim in order to restore each person's status quo.¹⁵³ According to Gordley, corrective justice preserves the distribution of wealth and, therefore 'a person who has voluntarily harmed another, even if he has acquired nothing, has gained in the sense that he has pursued his own objectives at another's expense. He must pay for any loss he has caused.'¹⁵⁴ Similarly, according to Wright, as tort cases are based on a defendant's harmful interaction with the plaintiff the claim in tort falls under the domain of corrective justice.¹⁵⁵ However, the definition of justice requires an institutional framework within which it is supposed to function. It is subjective and forms the ideal to be achieved in any society. Further, it is like an ideal commodity that is desired by people within a society, but is subject to the vagaries of the system and to the 'law of diminishing returns'.¹⁵⁶ Coleman explains that corrective justice elements are contained within a civil liability regime if one considers the 'relational and annulment thesis'.¹⁵⁷

The relational element provides the defendant the reasons for action, while the annulment thesis requires that wrongful losses be repaired. Both these combined elements account for corrective justice as it applies to tort. Thus, the duty of the wrongdoers in corrective justice is to repair the wrongful losses for which they are responsible.¹⁵⁸ However, this account of civil liability and corrective justice does not account for all the rules within civil liability, rejects exclusively efficiency-based approaches to liability and presupposes rights that may trigger a claim to compensation after being infringed, rather than providing a definition for a right to

¹⁵³E J Weinrib, 'Understanding Tort Law' 23 *Valparaiso University Law Review* 485; See also EJ Weinrib, 'Law as a Kantian Idea of Reason' (1987) 87 *Columbia Law Review* 472.

¹⁵⁴J Gordley, 'Tort Law in the Aristotelian Tradition' in Owen, above n 107, 157–158.

¹⁵⁵RW Wright, 'Right Justice and Tort Law' in Owen, above n 107, 182.

¹⁵⁶See RA Epstein, *Simple Rules for a Complex World* (Harvard University Press, 1995) 38.

¹⁵⁷Coleman, above n 4, 318–324.

¹⁵⁸Coleman, above n 4, 324.

rectification. Bergkamp views Coleman's approach as providing a place for both justice and economics within civil liability.¹⁵⁹

20 Environmental Liability and Corrective Justice Limited Application

From an environmental perspective corrective justice may not be fully able to solve all environmental problems as it cannot give an account of the public interest objectives of environmental law. These are better addressed through the distributional aspects of public law. So tort law needs to address not merely individual considerations but also the public interest. Strict liability under tort law can be defended on grounds of distributive justice. Scholten's 'risk-and-benefit linkage',¹⁶⁰ theory, Keating with his 'fairness theory for distributive justice and strict liability',¹⁶¹ and Esser, arguing on the Aristotelian distinction between corrective justice and distributive justice, provide a philosophical basis for strict liability and a public interest model of tort.¹⁶² Further, the rapid growth of insurance has also increased the distributive aspect of tort law. As loss allocation plays a significant role then logically the major issue that needs consideration is that liability be imposed on that party which is best placed to bear the loss. In the UK, one can see cases where the courts have placed emphasis on the capacity of the party to bear loss and those who could

¹⁵⁹Bergkamp, above n 3, 113; See also GJ Postema, 'Risks Wrongs and Responsibility: Coleman's Liberal Theory of Commutative Justice' (1993) 103 *Yale Law Journal* 889.

¹⁶⁰P Scholten, *Schadevergoeding buiten overeenkomst en onrechtmatige daad* (UvA, Amsterdam, 1899), cited by Bergkamp, above n 3, 126 as JM van Dunné, 'Environmental Liability: Continental Style' in JM van Dunné (ed) *Environmental Contracts and Covenants: New Instruments for a Realistic Environmental Policy?* (Proceedings of the International Conference of the Institute of Environmental Damages, Erasmus University Rotterdam, 1993) 233–253.

¹⁶¹GC Keating, *Fairness and Two Fundamental Questions in the Tort Law of Accidents: Olin Working Paper No 99–21* (University of Southern California Law School, 1999) 28–61.

¹⁶²J Esser, *Grundlagen und Entwicklung der Gefährdungshaftung: Beiträge zur Reform des Haftpflichtrechts und zu seiner Wiedereinordnung in die Gedanken des allgemeinen Privatrechts* (München, Berlin, 1941) as quoted in Wilde, above n 114, 128.

take out insurance.¹⁶³ However, this consideration of taking insurance may no longer be the deciding factor when solutions to environmental problems are being sought as a merely distributive approach severs the relationship between the parties and violates the moral foundations of personal responsibility.¹⁶⁴ Yet, one can argue that the relationship between insurance and tort does not dispense with all features of corrective justice, in that it retains a degree of individual accountability.¹⁶⁵

G Mixed Objectives, Difficulties with Tort and a Pluralistic Approach

Legal scholars identify various aims and functions that the law of tort performs in a common law system. In *The Aims of the Law of Tort* (1951)¹⁶⁶, Glanville Williams described them as appeasement, justice, deterrence and compensation. Ronald Coase, in the late 1950s in *The Problem of Social Cost* (1960)¹⁶⁷ added one more dimension—that of incentives and deterrence, and identified the aim of tort as being the efficient distribution of risk. In his article Coase submitted that the aim of tort should be to reflect as closely as possible liability where transaction costs should be minimised. Because of the diverse standpoints reflecting various theories of the objectives of law there have been a number of proposals to view the objectives of tort as multi-faceted. Thus, autonomy, moral responsibility and loss allocation are all facets in which tort law functions; neither strict liability nor the insurance aspect can be separated from tort law. Therefore, a more wholistic or pluralistic approach may at

¹⁶³For example see *Nettleship v Weston* [1971] 3 All E.R. 581; *Lamb v Camden LBC* [1981] QB 625; *Spartan Steel v Martin* [1973] QB 27; *RH Willis and Son v British Car Auctions Ltd* [1987] 2 All E.R. 392; cf *Lister v Romford Ice and Cold Storage Ltd* [1957] AC 555; RFV Heuston, R A Buckley and Sir John William Salmond, *Salmond and Heuston on the Law of Torts*, 20th edn (Sweet and Maxwell, 1992) 28.

¹⁶⁴See I Englard, *The Philosophy of Tort Law* (Dartmouth, 1993) 13.

¹⁶⁵Wilde, above n 114, 129.

¹⁶⁶G Williams, 'The Aims of the Law of Tort' (1951) 4 *Current Legal Problems* 137; See also Ronen Perry, 'The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory' (2006) 73 *Tennessee Law Review* 177.

¹⁶⁷Coase, above n 111, reprinted in Coase, above n 112, 95–156.

least encompass all factors and provide a better view of the functioning of tort law over purely Kantian or monistic theories.

Even if the mixed objective or pluralistic explanation lacks the purity of a monistic theory, as Weinrib maintains, the pluralistic or mixed objective explanation at least provides a theory of ‘complementarity’. Thus, conflicting principles that appear non-reconcilable in isolation may upon a collective view provide a unified whole.¹⁶⁸ Englard explains that two or more things may appear opposite but in certain cases the opposing principles may form a harmonious totality and this feature occurs recurrently through philosophy and religion.¹⁶⁹ This approach may also be reflected in the decisions of the courts when one considers the solutions provided comprising competing objectives. This approach is then equally applicable to environmental problems, because here one can view both the overlap between private interests, e.g., a landowner and the public interest of the victims affected by pollution. One can detect the application of both distributive and corrective justice features in some of the common law rules, such as determination of ‘character of neighbourhood’¹⁷⁰ within nuisance, as the threshold of damage can then be interpreted as an example of the pluralistic approach.

In *St Helen’s Smelting*, the court allowed certain activities to continue which would not have been accepted earlier, as it was an industrial town while it also retained the corrective justice principle in that it retained the harm principle in damage that exceeded the threshold limit.¹⁷¹ The pluralistic approach can also be seen to apply for

¹⁶⁸I Englard, ‘The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law’ in DG Owen, above n 107, 185; See also RG Wright, ‘Should the Law Reflect the World? Lessons for Legal Theory from Quantum Mechanics’ (1991) 18 *Florida State University Law Review* 855, Wright derives the view of complementarity from Dr. Neil Bohr’s explanation for the anomalies produced from quantum mechanics which provides that conflicting principles may appear irreconcilable when viewed in isolation, yet when viewed collectively, they may constitute a unified whole.

¹⁶⁹Englard, above n 167, 190.

¹⁷⁰*St Helen’s Smelting v Tipping* (1865) 11 HLC 462.

¹⁷¹Wilde, above n 114, 132.

injunctive relief as there the courts can influence the manner of operation of an industrial plant and order the polluter to take appropriate action. Both these orders, one of stopping the activity and the second to take rehabilitative measures, encompass the corrective and distributional aspects.¹⁷²

Where the polluter is also asked to pay damages and compensation and take remedial measures, injunctions and remedial measures also encourage the operators to adapt to newer and more refined methods of plant operation and internalise the costs for research in the search for cleaner and greener technologies. Here, one can clearly see the corrective and the economic considerations.¹⁷³ In the Shriram gas leak case the Indian Supreme Court adopted a pluralistic approach. The court was of the view that the defendant company could and should bear the costs associated with implementing additional measures for the safety of the workers and nearby residents. Justice PN Bhagwati, in modifying the strict liability principles to absolute liability, held that ‘if any harm results on account of such activity the enterprise must be *absolutely liable to compensate* for such harm *irrespective of* the fact that the enterprise had taken all reasonable care and that the harm occurred without any negligence on its part.’¹⁷⁴

One can discern the application of not only corrective but also distributional aspects of tort law in this case. The PPP as clarified here was not accepted immediately but found application in 1996 in the MC Mehta groundwater case.¹⁷⁵ The rules of liability in the Shriram gas leak case were discussed, but the Court then observed that:

¹⁷²See JPS McLaren, ‘Nuisance Actions and the Environmental Battle’ (1972) 10 (3) *Osgoode Hall Law Journal* 505, 555–557.

¹⁷³In MC Mehta (1987) 1 SCC 395, (Shriram gas leak case) the Supreme Court of India adopted this approach in ordering the plant to stop operations, adopt cleaner technology for the gas operations and provide compensation to the victims in form of funds.

¹⁷⁴AIR 1987 SC 1086 (1987) 1 SCC 395, Paras 5, 6(i–ii), 7(i).

¹⁷⁵The Bichri case (1996) 3 SCC 212 AIR 1996 SC 1446.

[T]he question of liability of the respondents to defray the costs of remedial measures can also be looked into from another angle, which has now come to be accepted universally as a sound principle, *viz.*, the ‘PPP ... Thus, according to this principle, the responsibility for repairing the damage is that of the offending industry.¹⁷⁶

In *Vellore v State of AP*,¹⁷⁷ Justice Kuldip Singh held that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of SD and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.¹⁷⁸

Although the *Bichri* case arose out of escape of toxic substances in the groundwater and concerned tort law, the *Vellore Citizens* case dealt with untreated effluents and was more to do with town planning and municipal government inaction. Still, to provide a solution the court rolled together the PPP with the absolute liability standard, applying a pluralistic approach to resolution of the problem facing it. A similar approach was adopted in the US case by the District Court of Oregon.¹⁷⁹

H Difficulties in Application of Tort Law Within India

Legal scholars such as Ramamoorthy and Galanter point to the difficulties of application and the unsuitability of tort law to Indian conditions in many fields. Although tort law principles have had limited application by way of statute, for example, under the Motor Vehicles Act 1939, the Workmen’s Compensation Act

¹⁷⁶AIR 1988 SC 130.

¹⁷⁷. AIR 1996 SC 1446, 1466.

¹⁷⁸AIR 1996 SC 2715, 2721, Para 11.

¹⁷⁹RL Renken v Harvey Aluminum Inc 226 F Supp 169 (US District Court of Oregon, 1963), damage was caused to orchard owners from the defendant’s aluminum reduction plant that used fluorides.

1933, the Employer's Liability Act 1938, the Indian Railways Act 1890, the Indian Carriage by Air Act 1934 and the Carriage of Goods by Sea Act 1925 earlier, and more recently under the Consumer Protection Act 1986, Public Liability Insurance Act 1991 and the newly enacted NGTA most of the substantive law is uncodified.¹⁸⁰ Most of the case law for civil actions in varied situations, particularly environmental and town planning, has grown in a piecemeal manner overshadowed by public nuisance which is recognised under the IPC as a crime under Sections 268, 277 and 290.

Thus, unlike in Western common law jurisdictions, tort liability has acquired more of a statutory and 'public tort' character (more in the form of public nuisance, crime and constitutional torts) and therefore theoretical and foundational explanations for imposition of tort liability are largely absent in court decisions, legal discussions and academic writing. In a classic nuisance action in 1882, the court did not find the defendants liable for having fouled the only drinking water source of a small village in the state of Madras by damming it upstream and using it for washing bullocks.¹⁸¹ In other instances where plaintiffs have used the criminal law provisions for water and air pollution, judicial pronouncements have undermined the nature of an environmental issue by adhering to the letter of old colonial provisions literally.¹⁸² Judges have held the defendant liable for causing public nuisance in a few cases only; however, no cases have been recorded where an individual plaintiff brought a

¹⁸⁰See S Ramaswamy Iyer, *Ramaswamy Iyer's The Law of Torts*, 7th edn (NM Tripathi, 1975) 22.

¹⁸¹See *Queen v Vitti Chokkan* (1882) ILR 4 Mad 229. The complaint filed by the affected persons was a criminal one under Section 277 IPC as a means to prosecute the offenders who had fouled the 'local river'. However, the High Court quashed the conviction of the accused by considering the literal interpretation of Section 277 of the IPC under which fouling of 'public spring' or 'reservoir' was an offence. Having found that the accused had fouled a local river the court quashed the conviction. Of course, in a criminal case there was no need to expound the nature of tortious liability.

¹⁸²*Emperor v Nama Rama* (1904) 6 Bom LR 52; *Re Umesh Chandra Kar* (1887) ILR 14 Cal 656; *Berkefield v Emperor* (1906) ILR 34 Cal 73; *Phiraya Mal v Emperor* (1904) 1 CrLJ 512.

common law action for damages during the late 1900s for environmental harm in India.¹⁸³

However, after independence, and more specifically after *Ratlam*, private nuisance cases have been filed by individual plaintiffs against errant polluting plant operators for emitting smoke, dust, vibrations and annoyance. In *Krishna Gopal v State of Madhya Pradesh*,¹⁸⁴ a case of private nuisance, the total closure of a mill in a residential area by way of permanent injunctive relief served two purposes; it restored the right of the plaintiff to enjoy his home and surroundings without disturbance that constituted annoyance, and a corrective justice function in stopping the mill's operations entirely.

Abraham states that the criminal statutory provisions did not prove a deterrent and neither did the prevailing judicial attitude of avoiding the use of specific provisions even in clear nuisance cases arising from water and air pollution.¹⁸⁵ This he observes 'stifled the law and reduced its applicability and efficiency'.¹⁸⁶ Further, where colonial legal rules have not been changed and are applicable by virtue of Articles 372 of the Constitution the results indicate a divergence from reality.¹⁸⁷

I Operation of Tort Liability in Theory and Practice

¹⁸³See *Berkefield v Emperor* (1906) ILR 34 Cal 73. The manager of a bone mill was held guilty of committing a public nuisance when he allowed stacks of bone to remain uncovered in the open as a result of which they rotted and produced foul smells; *Phiraya Mal* (1904) 1 CrLJ 512, the owner of a rice husking mill was held to have committed a public nuisance in a residential area throughout the night causing injury and annoyance to the locals; *Achammagari Venkata Reddy v State of Madras* AIR 1953 Mad 242; see *Kurnool Municipality v Civic Association*, Kurnool 1973 CrLJ 1227.

¹⁸⁴1986 CrLJ 396.

¹⁸⁵Abraham, above n 16, 44–45.

¹⁸⁶Abraham, above n 16, 44–45.

¹⁸⁷See Massey, above n 138, 323; See also, eg, the following cases: *Superintendent and Legal Remembrancer, State of West Bengal v Corpn of Calcutta* AIR 1967 SC 997; *Kasturilal v State of UP* AIR 1965 SC 1039.

The pluralistic view provides a workable theoretical basis for the use of tort in an environmental context. Thus, imposing civil liability upon a polluter, at least in some environmental cases, has served to initiate an inquiry to examine further environmental problems and claims of the other affected citizens by the courts in India. Therefore, if the harm principle is recognised through a common law action or through constitutional means, the law has taken account of the distributional issues and efficiency aspects advocated by Western theorists, albeit indirectly. However, in practical terms, the contemporary liability theories, court decisions or statutes are unable to achieve or pursue the objectives of environmental justice, redress social grievances, manage risk or make the private or public institutions accountable for their behaviour to any significant extent. Where these objectives of liability are pursued, they are overshadowed or intermingled with one or more of the other objectives. Thus, for a complete explanation of the concept of a civil wrong, one must take into account not only the main objective of civil law but also the policies and underlying values within a system.

Within this framework of social, cultural and political values, judges need to prioritise other factors such as principles of economic efficiency, ethical considerations of liberal autonomy and moral responsibility in order to provide a solution for environmental disputes.¹⁸⁸ However, as Bergkamp argues, the mixed objective approach or pluralistic approach still has problems because then it makes the system uncertain and vague, as there are numerous objectives and instruments to opt for.¹⁸⁹ In order to avoid this uncertainty one should ascertain a policy employing one tool to achieve multiple objectives if possible, and these objectives ought not to be uncertain or conflicting. The courts may not be able to weigh the often conflicting goals that tort law contains—the gain in utility of an activity against the relative loss in insurance

¹⁸⁸See P Birks, 'The Concept of a Civil Wrong' in Owen, above n 107, 29–51.

¹⁸⁹Bergkamp, above n 3, 118–119.

efficiency. In India, as elsewhere, a practical example of where tort law has been developed is in the area of industrial accidents and workers' compensation, reflecting the distribution of losses in tune with the changing nature of industrial and technological evolution. The rapidly changing economic, social and political considerations within India are such that the focus of tort in an environmental context should be directed to the issue of 'who should bear the loss' and as case law suggests, the courts have in a number of cases rightly ordered the polluter to pay, invoking the elements of loss distribution as well as corrective justice. Yet, despite the fact that in theory tort law accommodates the distributional aspects it does not necessarily replace the statutory and regulatory public law response already in place.

Ideally, where civil remedies are pursued for environmental damage, as in the UK, injunctive relief enables the court to take a proactive stance in requiring the polluter to take abatement measures or rectify damage that has occurred.¹⁹⁰ In one of the very few reported cases for civil action under the *Rylands v Fletcher* rule the court considered the tortious liability of the defendant and granted compensation to the plaintiff. In *Mukesh Textiles Mills (P) Ltd v HR Subramaniam Sastry and Ors*¹⁹¹, the Karnataka High Court granted damages to the plaintiff. The Appeal Bench in the High Court upheld the compensation awarded by the single judge to the plaintiff, who proved that the defendant's negligent action caused injury to his standing crop of rice and sugarcane. The defendant was held liable for both negligence and under the *Rylands* rule. In regard to the quantum of damages the lower court held that the claim, as put forward by the plaintiff for the loss of crops, was only in respect of 4 acres of paddy and 3 acres of sugarcane; in all, Rs. 14,700, however the High Court reduced it to a little over Rs.12,000 as the plaintiff had not taken any steps to reduce the loss. However, for most environmental cases in India, litigants and affected parties have pursued a constitutional and a statutory remedy seeking injunctions and abatement of

¹⁹⁰Wilde, above n 114, 138–139.

¹⁹¹AIR 1987 Kant 87.

pollution.¹⁹² Similarly, in *Dr Ram Baj Singh v Babulal*¹⁹³ the plaintiff, a medical practitioner, brought a nuisance action against the defendant, a brick kiln owner, alleging a nuisance for him and his patients due to which he had suffered injury and was seeking a permanent damage to stop the brick kiln. The High Court allowed the plaintiff's appeal after examining the 'reasonable user' and 'character of locality or neighbourhood' test when considering private nuisance. The Court stated that on perusal of evidence it was clear that the plaintiff had suffered special damage over and above the public nuisance that was caused, and that dust from bricks entered in sufficient quantity into the consulting chamber of the plaintiff-appellant so that a thin red coating was visible on the clothes of the persons sitting there. This case reflects how a tort action resulted in private enforcement of a public interest in having a clean and dust-free environment, conflicting with the corrective justice principles that a plaintiff cannot be viewed as a private enforcer of a public interest. Here the pollution had caused a particular damage to the plaintiff but the general harm caused to public was also dealt with by the court by granting a permanent injunction. Thereafter the state government introduced rules for brick kiln owners under the Air Pollution Act.

21 Procedural and Evidentiary Problems for Tort Actions

Most of these cases do not involve only large industries and environmental agencies, but also politicians pursuing individual goals. Due to the cost of litigation, lack of independent laboratories to collect scientific evidence and provide expert testimony in civil or criminal courts of damage due to pollution, civil actions available under the

¹⁹²For temporary injunction a person may seek an order from the court under Order 1, Rule 39, CPC 1908. For permanent injunction a person who is aggrieved may apply under the Specific Relief Act ss 37-42.

¹⁹³AIR 1982, All 285 (High Court of Allahabad); See also *Ramlal v Mustafabad Oil and Cotton Ginning Factory* AIR 1968 Punj and Har 399, Tek Chand J, after a review of numerous decisions has formulated a number of principles to determine whether an injury complained of amounts to actionable nuisance or not and held that an 'actionable nuisance does not admit of enumeration and any operation which causes injury to health, to property, to comfort, to business or to public moral would be deemed to be a nuisance.'; *Behari Lal v James Maclean* AIR 1924 All 392, advertisements by the defendants were considered to constitute actionable nuisance.

CPC for seeking compensation for environmental injury or private nuisance or negligence are rarely pursued.

Additionally, there appear to be only a handful of private organisations that have the technical and scientific expertise to collect evidence and practicing environmental lawyers who pursue such cases. Although Galanter highlights the many causes of why tort law is unworkable in India¹⁹⁴ and even within environmental damage cases it is submitted that the advantages of a civil action are being increasingly made use of within other areas of law where tort principles are being used, especially motor accidents, consumer protection, medical negligence, sexual harassment and finally in fire and gas explosions.¹⁹⁵

This is trumped by the fact that the government has introduced a new statute, the National Environmental Green Tribunal Act 2010 that gives recognition to environmental torts and allows for compensation upon environmental harm. It also reflect the extent of civil liability being used as a tool to address environmental damage claims and deal with environmental justice.

J Theory and Procedure in Practice for Environmental Claims

As demonstrated in *Dr Ram Baj Singh v Babulal*,¹⁹⁶ the courts, by using substantive tortious liability principles, can address environmental issues that affect the public interest at large. Therefore, it is theoretically possible that the use of tortious

¹⁹⁴M Galanter, 'Law's Elusive Promise: Learning from Bhopal' in M Likosky (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths LexisNexis, 2002) 172–185.

¹⁹⁵Usha Ramanathan, 'Communities at Risk: Industrial Risk in Indian Law', (2004) 39 (41) *Economic and Political Weekly* (Industrial Risk); and 'Tort Law in India' (2002) *Annual Survey of India* 615–628; 'Elusive Justice: A Symposium on the Bhopal Gas Disaster After Twenty Years' (Singh Publishers, 2004) 1–45.

¹⁹⁶AIR 1982, All 285 (High Court of Allahabad); See also Ramlal AIR 1968 Punj and Har 399; Behari Lal AIR 1924 All 392.

principles can provide solutions to public interest issues in the environment and that these are not entirely mutually exclusive or conflicting. As a corollary, one would argue that a private organisation or an individual could undertake a private action for various kinds of environmental damage on behalf of the public. As private tort actions have been few and far between, although not entirely non-existent, such a step by an individual or private organisation in taking up the cause under a civil action for environmental damage was buried after the Bhopal Gas tragedy.¹⁹⁷

Here, although there were a number of organisations ready and willing to take up the fight against Union Carbide, due to the nature of the disaster, a social action or class action was pursued by the Government of India itself.¹⁹⁸ None of the victims in this case, despite being aggrieved, were in a position to initiate a civil action against the American company. Of course the state governmental agencies which allowed the plant to be run without regular inspections or environmental standards for safety for those kinds of hazardous operations were not without blame. The fact that thousands

¹⁹⁷In December 1984, due to negligence in maintaining a chemicals factory and poor safety standards, a toxic gas leaked into the city of Bhopal, killing nearly 20,000 people. Over half a million victims were maimed, disabled or otherwise affected. Compensation of around Rs 12,414 per victim on average was provided (\$470 million) and the government paid an ex gratia payment to the victims and their families. However, the claims even for ex gratia payments and the paltry sum that was paid by the chemical company was made four years after the gas disaster in 1989, and was divided between 574,367 victims. No final settlement was made for over a quarter of a century, and in June 2010 seven of the company's officers were prosecuted but sentenced to two years in prison and fined only \$2,100. Not a single person from the far more responsible parent US company has ever been punished.

¹⁹⁸Extensive literature on Bhopal exists from legal academics, lawyers, judges, social scientists and journalists in India and the US, see especially Ramanathan, above n 192; Upendra Baxi and A Dhandu, *Valiant Victims, and Lethal Litigation: The Bhopal Case* (NM.Tripathi, 1990); TR Chouhan, Indira Jaising and Claude Alphonso Alvares, *Bhopal, the Inside Story: Carbide Workers Speak Out on the World's Worst Industrial Disaster* (Apex Press, 1994); Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (University of Toronto Press, 1993); Ingrid Eckerman, *The Bhopal Saga: Causes and Consequences of the World's Largest Industrial Disaster* (Universities Press (India) Private Ltd, 2005); 'Clouds of Injustice: Bhopal Disaster 20 Years On' in *Amnesty International, Twenty Years After the Bhopal Disaster: Some Facts* (London Amnesty International, 2004); See also Terrorism Watch, 'Bhoposhima' disaster (6 December 2011) <<http://www.terrorismwatch.org/2011/12/bhoposhima-disaster.html>>; Galanter, above n 191, 172, 176.

of people were affected either fatally or were maimed over a period of time lent it more of a public character and individual tort claims were ill-suited in this scenario. Further, individual claims or claims on behalf of victims or purely for enforcing the environmental standards, if any, would have been difficult in nuisance because of the requirement of ‘proprietary interest’ in the land area affected.

22 Private and Public Law Intersection

The cardinal rule for bringing a tort action for nuisance is that the plaintiff needs to prove harm to their person or to their proprietary interest in land against the defendant wrongdoer. It is the aggrieved person alone who can bring a claim to the court and who can sue. So the government and the legal machinery were geared to look for provision of relief under public law. The device of PIL had already evolved through the 1970s for vindication of fundamental rights. It had a unique character; that of judges accepting a petition through a letter written to the Supreme Court by an aggrieved person or even by a public-spirited citizen or organisation espousing the cause of victims. The process of accepting a PIL for environmental harm evolved during the 1980s and more so after Bhopal to put the right to a healthy environment within the rubric of right to life under Article 21 of the Constitution. Petitions were accepted by the Supreme Court and the various High Courts of the state to initiate public inquiries and form expert committees to determine the environmental problems, recommend solutions and grant constitutional remedies both in the form of injunctive relief and ‘discretionary damages’. The reports of the inquiry committees set up by the courts form fact-finding bodies and recommendatory bodies through which the courts arrive at a solution, in most cases doing away with the civil procedure rules of witness examination, expert witness testimony and cross-examination within the court.

23 The Court’s Role in Application of Theory and Procedural Difficulties

Rather than the courts, it is the expert inquiry committees comprising lawyers, government officials, environmental sciences laboratory experts, local NGOs representing the victim groups and retired judges who are tasked with the fact-finding mission. In most cases the Supreme Court, and by example, the High Courts of the states grant injunctive relief, highlight the statutory gaps and make suggestions for the legislature to make new laws or amend the existing ones.¹⁹⁹ These unusual steps have gained the Indian judiciary the epithet of being an ‘activist judiciary’.²⁰⁰ This development forms the point of departure in the similarities between a class action in the US and a PIL in India, and also on the point of legal standing or locus standi. It also marks the development in India, of the use of public law instruments, especially constitutional remedies for the vindication of environmental harm and victims of development and modification of the locus standi doctrine.

Despite the opportunity which presented itself after Bhopal for the Parliament to introduce new rules and procedures for bringing a civil claim in the courts, the handling of a large amount of complex technical evidence under the CPC 1908 or for introducing legal provisions for doing away with standing requirements for a nuisance case by an organisation with sufficient public interest, nothing was done. It was a missed opportunity, and even now the CPC currently does not contain such provisions. As most environmental cases involve a number of issues, for example, town planning, licence renewals from the Department of Environment and Forests, permits under the Forest Act or the Mines Act, environmental lawyers have settled into the practice of dealing with such cases piecemeal and more effectively through public and statutory law. Although a remedy is recognised for individual claims under Section 91 of the CPC for an injunction and damages, it is pursued only where the

¹⁹⁹Geetnjoy Sahu, ‘Implementation of Environmental Judgments in Context: A Comparative Analysis of Dahanu Thermal Power Plant Pollution Case in Maharashtra and Vellore Leather Industrial Pollution Case in Tamil Nadu’ (2010) 6/3 *Law, Environment and Development Journal* 335–353.

²⁰⁰*Ibid.*

victims of the defendant's polluting activity or fault are wealthy and influential individuals.

Moreover, because of the proprietary requirement for a nuisance action, NGOs fighting for the cause of environment can only file cases in the courts where the victims with a proprietary interest are willing to become party to the case. Because of the public interest or interest of the local community these claims are filed as criminal ones in the local courts, or as PILs under Article 226 of the Constitution to the state High Courts. Hence the scope for individual plaintiff filing a nuisance claim is reduced further.

24 Application of Tort Liability for Enforcement of Public Interest: Learning from Other Common Law Jurisdictions Applications

As compared to this unique legal and social scenario in India, a successful example of using tort law for the enforcement of public interest in the environment can be seen from the US. Here, tort actions have resulted in private enforcement of environmental standards. One example is provided by Bates²⁰¹ with respect to water pollution in the case of Anglers Cooperative Association, a private body banded to fight pollution comprising various angling clubs. It provides legal and financial support to member clubs. The method that is followed to bring a nuisance action by one or more member is by applying for a lease from the riparian owner in order to have sufficient proprietary interest in the area where a polluting activity exceeds the acceptable levels or breaches environmental standards. Bates provides examples of various successful cases that have been supported by the Anglers Cooperative Association and won by angling clubs.²⁰² Thus, by conceptualising a stake for the people and organisations in the environment it was possible to use tort as a means of private enforcement to avoid

²⁰¹R Bates, 'Water Pollution Prevention: A Nuisance Approach' (1994) 14(3) *Economic Affairs* 13.

²⁰²*Ibid*, 13, 14.

the standing requirement within the legal system in the US. A similar point has been used in the UK in *League Against Cruel Sports v Scott*,²⁰³ where the plaintiff was able to initiate a tort action as it was the owner of the land where the hunting hounds trespassed.

If legal recognition in the environment is accorded to the community, thereby creating a proprietary interest, then it becomes easier to bring tort actions against injurers and consequently it stands to reason that in order to meet the objectives of the liability system the courts will follow a path with the help of tort law instruments along with public law instruments. Some decisions then will reflect the corrective, economic or distributive functions of law clearly.

25 Moving Towards Environmental Rights

In respect to the above reasoning, translatable interest in the environment has been recognised through the emergence of ‘environmental rights’ after the adoption of the UN Conference on the Human Environment, Stockholm, in 1972 and SD under the UN Conference on Environment and Development, Rio, 1992. The ideal of, inter alia, right to ‘the environment of quality that permits a life of dignity and well-being’, and the duty which rests on human beings ‘to protect and improve the environment for present and future generations’ has been absorbed by constitutions all over the world. In India it finds recognition under the Duties of the State in Directive Principles of State Policy Articles 48–51 and interpretations by the Supreme Court of India under the Fundamental Rights Chapter to the right to life provision under Article 21. The European Court of justice has also indirectly dealt with the concept of ‘environmental rights’, albeit the fact that the Convention does not spell out a right to the environment but deals with under Article 8, inter alia, of the right to respect for one’s private and

²⁰³[1986] QB 240.

home life and protection of health or morals. In *Lopez Ostra v Spain*²⁰⁴ the plaintiff was contesting an issue in the nature of tort of nuisance because of the gas fumes, obnoxious smells and contaminants that were released by a waste treatment plant. The issue was taken to the European Court of Human Rights against the State for its omissions and breach of Article 8 among other things. Reich²⁰⁵ and Macpherson²⁰⁶ argue that it may be possible in theory to use the law of tort as a means of protecting the interests of an individual against the state, where notion of proprietary interest has been expanded and there is a community interest in the environment. In this scenario, the community ought to have a recognisable interest in the environment and the the notion of property needs expansion. Macpherson, like Singh, argues that property should vest in rights and duties associated with use of resources rather than the resource itself.

26 Alternative Use of Dharmic Duty

Singh highlights that on study of the Dharmasastras of ancient India one can discern that customary laws, as compared to contemporary laws, are better suited for environmental protection as the customary traditional laws recognised the community interest in the environment and natural resources.²⁰⁷ He states that there was a close relationship that existed between the communal way of life all over rural and tribal India, where customary laws recognised community property rights over natural resources such as the right to use forest produce, graze lands or irrigation. He argues that the contemporary statutory laws, like the Panchayat Act 1996, the Forest Rights

²⁰⁴Case Number 41/1993/436/515, DOJ 23 June and 24 November 1994, European Court of Human Rights.

²⁰⁵CA Reich, 'The New Property' (1964) 73(5) *Yale Law Journal* 733.

²⁰⁶CB Macpherson, 'Human Rights as Property Rights' (1977) 24 *Dissent* 72.

²⁰⁷Singh, above n 15 (*Common Property*), 186–187; Singh, above n 15 (*Dharmashastras*), 179–188; C Singh, 'Legal Policy for Environmental Protection' in P Leelakrishnan, NS Chandrasekharan and D Rajeev (eds), *Law and Environment* (Eastern Book Company, 1992) 26–50; C Singh, 'Emerging Principles of Environmental Laws for Development' in Bandyopadhyay, above n 7, 247–275.

Act 2006 (comprising Forest Act 1927 and Wild Life Protection Act 1972) and the Irrigation and Land Acquisition Pre-Settlement Rehabilitation 2011 Act have been superimposed over the customary laws, which have moved away from recognition of community property rights over the use of resources and narrowed them as rights of the state over all natural resources, thereby breaking down the traditional community resource management systems. According to Singh, declaring forests as sacred groves or ‘devabans’, considering trees as guardians of the forest and therefore god’s home or naming them ‘deodhars’—‘divine trust property’, were essentially democratic methods for the peoples’ participation in the preservation and utilisation of common goods and resources that were considered community property. Hence people had an interest in the environment and the use of resources, for which civil penalties existed during ancient times.²⁰⁸ Injury or harm to the environment was a harm to the proprietary interest of the person in the environmental resources and their use, and hence actionable within the village or community setting.²⁰⁹ Following this argument one needs to relearn the whole concept of property and juridical areas of public property management.²¹⁰

Similar thoughts are echoed by scholars in the US when they suggest the concept of people acting in the capacity of guardian *ad litem* for natural objects such as trees and wildlife²¹¹ or the recognition of an equitable proprietary interest in quasi public places, such as malls and parks, which despite being privately owned recognise that the public have a right not to be excluded from such places.²¹² Sax illustrates the

²⁰⁸Singh, above n 15, *Common Property*, 186, 187.

²⁰⁹Informal discussion with Dr. Singh while he was Director of the World Wildlife Fund Center for Environmental Law, August 1992, and over a period of nine months when the researcher worked with him as Deputy Legal Officer.

²¹⁰Singh, above n 15 (*Common Property*) 188–189.

²¹¹C Stone, ‘Should Trees have Standing? Towards Legal Rights for Natural Objects’ (1972) 45 *Southern California Law Review* 450.

²¹²See J, Sax, *Playing Darts with a Rembrandt*; University of Michigan Press, 1999, 9,10; K Gray, ‘Equitable Property’ (1994) 47(2) *Current Legal Problems* 157, 172–181; K Gray and SF Gray, ‘Civil Rights, Civil Wrongs and Quasi Public Space’ (1999) 4 *European Human Rights Law Review*

treatment of traditional property rights and ownership law of certain objects such as ancient treasure, the *Dead Sea Scrolls*, as conflicting with the traditional notions of ownership. By analogy one can argue that in respect of public interest in the environment and the conjunction of legitimate private interest in natural resources cannot be satisfied through ordinary unqualified notions of ownership while Gray shows how in the US private law has developed to recognise the equitable proprietary interest that the public has in the environment, and how property institutions have been used as a means of protecting fundamental rights.²¹³ He also observes that there is ‘no unbridgeable gulf’ between public and private law, in that it is conceptually possible to harness private law for securing environmental protection. Rich elaborating on the works and edicts of the ancient emperor Ashoka and scholar and administrator Kautilyaya emphasises that reconsideration from the ancient texts and adoption of the ‘dharmic duty’ would provide new global ethic for resolving environmental disputes amongst others.²¹⁴ Slightly indirect but similar recognition has evolved within Europe, where the court has made inroads on developing a concept of environmental rights enforceable by individual plaintiffs using the instrument of civil liability by arguing for a kind of equitable property in the environment.

K Summary and Conclusion

It is conceptually possible to harness private law in the pursuit of public objectives. The mixed objective theory, or the pluralistic view of tort, shows that the complementarity theory can provide a philosophical background for the use of tort in

46; See also CA Reich, ‘Commentary’ (1991) 100 *Yale Law Journal* 1465, 1467; see M Voyce, ‘Shopping Malls in Australia: The End of Public Space and Rise of Consumerist Citizenship’ (2006) 42(3) *Journal of Sociology* 269.

²¹³ See the argument in *Sierra Club v Morton* 405 U.S. 727 (1972); *Robins v Prune Yard Shipping Center* 447 U.S. 74 (1980); *Friends of the Earth v Laidlaw Environmental Services* 528 U.S. 167 (2000); *Lujan v Defenders of wildlife* 504 U.S. 555 (1992); See also Stone, above n 210.

²¹⁴ See B Rich, *To Uphold the World : A Call for New Global Ethic from Ancient India* (Beacon Pres, 2010), 30-31, 71-75, 130, 131.

the environmental context. The evolution of environmental remedies through use of a mixed approach shows that it is no longer possible to separate private and public law arguments when the question pertains to environmental harm. The distributional objectives cannot be determined in totality by wealth maximisation but must include a wider criterion of moral and political philosophy that includes the desirability of environmental protection. Tort law has a capacity to augment regulatory responses as it allows each individual member to be able to participate in policy making and caring for the environment. If proprietary interests in the environment are recognised as equitable or, as they were within the indigenous and cultural practices in India, then the whole definition of standing and property is changed and it becomes easier to adopt environmental protection actions by representatives of the victims or the environment per se.

In explaining the role of tort in the environmental context many Western theorists have put forward explanations that include distributional, corrective objectives as stand-alone or complementary and the pluralist objective that encompasses more than one explanation and one objective, which to a certain extent provides a better philosophical basis for the use of tort in environmental context. However, tort has its limitations, despite accommodating the distributional objectives, its corrective justice functions must also be considered as individual accountability provides for incentives for risk management. For instance, the role of tort and insurance in this context need not be mingled with historic pollution as then costs will not be internalised by the polluter and the system will become inefficient.

Furthermore, as illustrated in the section above on Hindu law and traditional philosophy, the Asian and the Indian traditions and the concept of dharma have become a field of rediscovery within the environmental context. The ancient indigenous cultural tradition is exhibited in the legal pluralism that exists in Asian jurisdictions and has influenced the development of the legal culture within the environmental context in India. The concept of law as posited by the natural law

theorists and legal positivists is still explicable within Indian laws to a certain extent, but it acquires a different characteristic.²¹⁵ This chapter has outlined the elusive concept of the 'dharmic tradition' and the cultural characteristics that underpin, or have in some way impacted upon, the development of environmental law in India. It reflects upon the important aspects of Indian legal culture that characterise traditional legal systems, especially within the Asian jurisdictions, and examines how these indigenous cultural concepts have influenced a rethinking in environmental law among legal academics and the judiciary, as is evident in certain cases. This different cultural paradigm provides for a unique setting for the development of environmental law in India. It is argued here that due to this legal pluralism and the influence of the traditional indigenous cultural concepts, the Indian legal system exhibits a mix of religious, moral, customary and modern values. These 'legal postulates', as described by Chiba, are therefore reflected within environmental decisions so far by use of public law instruments. However, recent decisions by the Supreme Court of India indicate that judges have not wholly desisted from the application of tortious principles to achieve environmental objectives and justice for the victims of environmental wrongs.

Recent literature reveals that environmental philosophy in India has been influenced by the Indian traditions of thought on nature and formed a kind of conceptual resource base foundation that has begun to inspire a rethinking and reorientation of environmental philosophy.²¹⁶ The Indian judiciary is considered to have internalised this conceptual indigenous tradition and has stretched the legal framework of regulatory environmental law and constitutional remedies to provide justice to environmental victims in order to achieve environmental objectives. On the one hand,

²¹⁵See Abraham, above n 16, 77–82.

²¹⁶See generally Sen, *Indigenous Vision: Peoples of India Attitude to Environment* (Sage Publications and India International Center, 1992) 49 and particularly Marta Vanucci, 'Tradition and Change' 25–33 *ibid*, Chaitanya Krishna, 'The Earth as Sacred Environs' 35–48 *ibid*, Maurice F Strong, 'Only One Earth' 49–52.

scholars assert that the underlying postulates of the Indian legal culture are being recognised and in the process of manifesting themselves more clearly within environmental decisions; on the other hand, with the way that Indian environmental jurisprudence is being built there is also room for not only the instruments of public law that reflect traditional indigenous understanding, but also the common law principles of civil liability that the courts have begun relying upon in certain cases.²¹⁷

Having examined the nature and function of tort liability and how indigenous cultural tradition in India has informed the imposition of liability under public law and its parallel objectives of corrective justice, similar to those found under civil liability, the next chapter examines legal liability under the public law domain by examination of the Constitutional rationale and its interconnectedness with tort liability. The next chapter explores the public law aspect of environmental liability which has overshadowed the development of tort law for environmental damage. However, it will be seen that within the public law domain, the recognition of constitutional torts and the award of compensation indicate a trend that the courts are increasingly overcoming the public and the private law divide in the environmental field. This delineation is more characteristic of a postmodern legal development, albeit with a traditional conceptualisation of law, flexible enough to change with the changing circumstances of the legal, cultural, social, economic and political scenarios in India. This indicates the development of an environmental jurisprudence with a public law rationale mixed with private law characteristics.

²¹⁷See Abraham, above n 16, 78.

V CHAPTER FIVE: CONSTITUTIONAL TOOLS, JUDICIAL ACTIVISM AND THE ROLE OF TORT FOR ENVIRONMENTAL CLAIMS

A Introduction

Law as an instrument of liability and as a social engineering tool under the public law regime as well as criminal law has been used to protect, prevent and remedy environmental harms to the public and the environment, largely with an anthropocentric focus. As indicated in Chapters One and Two, public law instruments in the form of constitutional remedies, as well as command and control regulatory tools in the form of statutes have been used to deal with environmental damage, liability and environmental justice in India so far. As mentioned in Chapter two the validity and justification for environmental protection, liability and justice have been sought from within the Constitutional paradigm to cement a strong public law regime for governing environmental problems.

This constitutional paradigm has provided a rationale to strengthen the foundations for the development of a strong public legal liability regime for victims of environmental and developmental excesses. The use of the constitutional rationale has been the most significant factor that has contributed to establishment of the contemporary environmental law regime dominated by public law. This chapter critically analyses how the evolution and interpretation of the Constitution has shaped and influenced the foundations and the broad framework of environmental jurisprudence in India over the last three decades as indicated in Chapter two earlier. The chapter is divided into two parts: Part One starts with examining the preamble to the Constitution to determine the aims and ideals within which the Constitution was cast to provide a

democratic rule of law to independent India. Judicial review has been a significant public law tool in evolution of India's constitutional rationale. Part Two then critically analyses the doctrines that have been used by the Court to provide constitutional remedies to the victims. This section traces the evolution and significance of PIL to reflect the judicial design and strategy to evolve remedial measures for human rights and fundamental rights violations, including the right to a healthy environment. This indicates reliance on a legal philosophy that has focused not only on the ideals of the Constitution, but draws support from the ancient indigenous legal and cultural pluralistic traditions, tort liability and alternative approaches for resolution of disputes that has started to remerge in India.

This chapter argues that the adoption of public law liability tools and the remodelling of standing doctrine in the early 1980s that have supplied fresh blood to the development of environmental jurisprudence in India have, however, once again reached a plateau. This includes but is not limited to inadequacies in the regulatory laws, non implementation or poor implementation of existing standards and most of all in effective implementation of the orders, directions and decisions of the Supreme Court in respect of environmental cases.²¹⁸ The resultant problem is now being examined with a multipronged strategy. The government and the courts have started to re-examine and reorient strategies for environmental dispute resolution. It also indicates the overlap of public and private law within this contested area. With the recent introduction of the NGTA 2010, compensation for environmental harm has been statutorily recognised. This chapter concludes with the emphasis that despite the change in procedural liability laws, the expansion of fundamental rights and the circumstances that arose, especially out of the Bhopal tragedy, has in parallel also provided for the modification of common law and the strict liability principle. However, the development of tort law liability in India, especially in the context of

²¹⁸See MC Mehta *In the Public Interest: Landmark Judgements and Orders of the Supreme Court of India on Environment and Human Rights*, vol 1 (Prakriti Publications, LexisNexis, 2009) Chapter 1.

environmental claims, has been overshadowed due to various reasons, the foremost amongst them is the manner in which public law has developed. It is therefore important to determine the function and nature of the legal liability tools that can help the victims of environmental injustice under the environmental liability framework and identify the areas where tort law overlaps and can be best utilised to vindicate environmental injustice. Civil liability including tort law may fill certain gaps that public law is unable to fulfil and vice versa. Tort law functions become handy where public law does not provide for adequate remedies and regulatory law has design defaults and the an individual victim may be unable to pursue a legal strategy for vindicating her claims.

B The Preamble to the Constitution and the Emphasis on the Directive Principles of State Policy and Fundamental Duties

The Constitution of India (COI) was enacted by the Constituent Assembly on 26 November 1949, and came into effect on 26 January 1950, declaring the Union of India to be an independent, sovereign, socialist²¹⁹, secular, democratic republic, assuring its citizens of justice, equality, and liberty, and endeavours to promote fraternity among them. The nascent Constitution did not specifically mention the protection of the environment under any category, nor did it accord any derivative rights or duties to this effect.²²⁰ Despite this, it has been argued that ‘caring for the

²¹⁹ The words ‘socialist’, ‘secular’, and ‘integrity’ were added to the definition in 1976 by Constitutional Amendment. HM Seervai, *Constitutional Law Of India*, 4th ed, vol 1 (Universal Law Publishing Co, 2005); MP Jain, *Indian Constitutional Law* 4th edn (Tripathi, 1987); JN Pandey, *Constitutional Law of India* 20th edn (Central Law Agency, 1989); Durga Das Basu, *Constitutional Law of India*, 6th edn (Prentice Hall, 1991); MV Pylee, *India’s Constitution* (Chand and Co, 1997) 3; The Constitution is the longest written constitution of any sovereign country in the world, containing 450 articles in 22 parts, 12 schedules and 94 amendments. With amendments to the COI, as of March 2011, the number of articles currently stands at 448. The new articles added during amendments are denoted with a letter, i.e., alphanumerically, such as Articles 48A, 51A, 21A pertaining to the Directive Principles, Fundamental Duties or the Right to Education inserted by the 22nd and the 86th Amendment Act.

²²⁰ See Sharma Charu, ‘Human Rights and Environmental Wrongs—Integrating the Right to Environment and Developmental Justice in the Indian Constitution’ in C Raj Kumar and K

environment was within the Indian ethos but that was then when population levels did not pose such a threat to natural resources and communities and civilisations were short sighted and did not look beyond their own anthropocentric goals²²¹.

The Preamble to the COI both embodies and spells out the objectives, aims and ideals of the Republic of free and independent India. The makers of the Constitution²²² envisaged the objectives of freedom, liberty, dignity and respect for the individual and property to the highest order. The COI was based on the Constitution of India Act 1935²²³ and derived its ideals, aims and objectives from various sources worldwide, where fundamental freedoms and substantive rights of the individual have been held to the highest order, both logically and normatively. It includes in its portfolio features of federalism, the US Bill of Rights (such as the fundamental rights provisions), Irish principles in the Directive Principles of State Policy, fundamental duties, similar to those reflected in the Constitutions of Japan and China and ²²⁴ also reflects ideals from the Constitution of France, Canada and Australia.

Yet, with its own history of subjugation and having developed an indigenous and an Indian common law tradition, the Constitution makers emphasised the framework of a legal system envisaging a free and independent nation which harboured a process of decolonisation and the major structuring of a poor nation through socialistic ideals. The Preamble, Parts Three and Four, of the Constitution lay down the framework

Chockalingam (eds), *Human Rights, Criminal Justice and Constitutional Empowerment* (Oxford University Press, 2010) 321–347, 321.

²²¹Ibid.

²²²BN Rau, *India's Constitution In The Making* (Orient Longmans, 1960); B Shiva Rao et al, *The Framing of India's Constitution* (The Indian Institute of Public Administration, 1966–1968); Baldev Raj Nayar, *India's Mixed Economy: The Role of Ideology and Interest In Its Development* (Popular Prakashan, 1989).

²²³See generally CL Anand, *Constitutional Law And History of Government of India*, 6th edn (The University Book Agency, 1990). For the process of the making of the Constitution, see also Austin Granville, *The Indian Constitution: Cornerstone of a Nation* (Clarendon Press, 1966); Rao et al, above n 6; MP Jain, above n 2 referring to the Constitutional Assembly Debates, vol 7, 35–36 as cited in CM Abraham, *Environmental Jurisprudence In India* (Kluwer Law International, 1999) 14.

²²⁴See Basu, above n 2, 134. See also MP Jain, 'Federalism in India' (1965) 6 *Journal of Indian Law Institute* 355–379.

defining the Fundamental Rights (FR), Directive Principles (DP) and the Fundamental Duties (FD) of the citizens; the latter, introduced by the 42nd Amendment in 1976 brought a veritable shift of focus in the ideology and the rationale of Indian constitutional development. It is the interpretation put to the Preamble, the expansion of the FR, DP and FD that has cemented the foundations for the development of the public law regime in India.

The growth and development of the constitutional jurisprudence and consequently environmental law jurisprudence has occurred through a process of gradual evolution. It has seen phases, of both expansive and liberal interpretation as well as equally narrow application of the articles of the Constitution for individual freedoms and rights and property rights guaranteed under the Constitution through the instrument of judicial review in the public law domain.

1 Economic and Social Order and the Incorporation of Fundamental Duties

Incorporation of FD in 1976 based on the Universal Declaration of Human Rights adds further to the eclectic character of the Indian legal tradition.²²⁵ The Constitutional framework created for India provided for a new path towards an economic and social order, and concomitantly a legal one, that was premised on the potential to grow organically through a democratic process. In fact, the process of building the Indian Constitution set down the grounds for the evolution of an indigenous legal system that reflects the Indian understanding of its cultural, indigenous and earlier social and economic system.²²⁶ The original aim of the Constitution was to establish a democratic rule based on the ideals of justice, liberty, equality and fraternity. Thus, a new constitution forming a basic law of the land for the realisation of these ideals was paramount at that time.²²⁷ The aims were to be

²²⁵See CM Abraham, above n 7, 12, 13.

²²⁶See JN Pandey, above n 2, 239–240.

²²⁷MV Pylee, *Constitutional Government in India*, 3rd revised edn (Asia Publishing House, 1977) 24.

achieved with foresight to provide for unknown situations and the only way forward was to provide for expansion, modification and change.

For new situations that emerged after independence, inter alia, environmental pollution, conflict between environment, development and people, the framers of the Constitution armed themselves with inclusive provisions of the ideals of justice, liberty and fraternity in the form of DP, FD and judicial review and flexible instruments for implementing the Constitutional ideals and earlier laws that were in operation. However, the potentially all-encompassing ideals did not by themselves bring about any significant legal change for several decades, because they had to operate under the earlier legal tradition and remained incompatible with the actual realities and the legal culture prevalent in India at the time.²²⁸ Environmental considerations and remedies for environmental harms did not figure in the list of priorities for the new government that was driven with the need to develop and provide basic amenities and growth to its people. Most environmental cases which involved personal injury and property damage for environmental harm were dealt with under an action for nuisance, negligence, strict liability or public nuisance provisions under the Indian Penal Code as has been mentioned earlier in chapter three.²²⁹ The period from 1950s to the mid 1980s saw a minimal development of tort law and civil liability for environmental harm in India. The Constitutional interpretation by the Court through the late 1970s and beyond marks a significant period of the development of environmental law through public law.

C Gradual Evolution of a Constitutional Law Rationale

²²⁸ See CM Abraham, above n 7, 13–14.

²²⁹ See above Chapter 3, 77–83.

The constitutional rationale and the developing constitutional framework and jurisprudence evolved slowly through a gradual process.²³⁰ Abraham states that the new constitutional order gave way to a new legal order through a process of democratisation that reflected the features of an indigenous order harbouring a traditional understanding and was partially ‘anti-modernistic’, in that it did not entirely accept or reject the ‘understandings of the socialists or capitalistic order.’²³¹ The inclusion of DP was deliberate, as in the DP lay the ideal of economic democracy and an enlightening path.²³²

The significance and the importance of the Preamble was also highlighted later and came through after 26 years with the 42nd amendment to the Constitution, as earlier the Supreme Court did not accord much importance to it. The political alliance with Russia (then the USSR) influenced the leading ruling Congress Party at the Centre. This was one of the reasons that resulted in the introduction of the word ‘socialist’ into the Preamble.²³³

2 Background for the 42nd Amendment to the Constitution

²³⁰See JN Pandey, above n 2, 239–240. See also Abraham, who reiterates that the development of the constitutional rationale inclusive of the indigenous tradition only evolved slowly through a process of modification and accommodation rather than a revolution, CM Abraham, above n 7, 14–16.

²³¹CM Abraham, above n 7, 15

²³²See JN Pandey, above n 2, 239–240, quoting the significance Dr BR Ambedkar attached to the DP. In fact, earlier drafts of the Constitution included the DP under Part III, with the enforceable FR. This was not adopted and the DP were put in Part IV as ideals that the State ought to strive for, thus making it non-justiciable, but only for a while.

²³³The Preamble now reads: ‘WE the People of India, having solemnly resolved to constitute India into a ‘SOVEREIGN *SOCIALIST*’ (included after the 42nd amendment) SECULAR DEMOCRATIC REPUBLIC and to secure to its citizens:

JUSTICE—social , economic and political;

LIBERTY of thought, expression , belief, faith and worship;

EQUALITY of status and opportunity;

and to promote among them all FRATERNITY assuring 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’. See also the *Indian Constituent Assembly Debates*, Vol VII, 494–495.

The ruling Congress Party, led by Mr JL Nehru (the first Prime Minister)²³⁴ and the subsequent second Prime Minister, Mr Lal Bahdur Shastri, steered the political, social and indirect legal evolution in synchrony with the ‘Gandhian Way’ of life and provided for more socialist-type features including legal development away from private property and a purely capitalistic approach.²³⁵ With the emphasis on ameliorating the status of the poor and the initial functions of a social welfare state the focus on the development of common law characteristics of capitalism was less on individual interest and more on common public interest and improving the conditions and growth of a nation by considering the majority agrarian population and the basic needs of the people for food, living space and shelter. The national budget and policy²³⁶ placed a greater emphasis on meeting basic needs, developing the agrarian economy and building basic infrastructure for the provision of goods and services.²³⁷ Development and growth were essential requirements, and environmental concerns were not a priority.

More pressing issues than the environment occupied the courts, the fundamental right to property was interpreted as being subject to state restrictions, and many private estates, properties and banks were nationalised. Environmental disputes centered more on public nuisance type issues of sewage, water fouling, smoke, but were not argued based on the violation of private interests or rights entailing civil liability; rather, polluters or offenders were dealt with under criminal law. Meanwhile forests were cut, river courses dammed, towns and cities grew around new industries, the use of

²³⁴See the *Indian Parliamentary Debates Part II*, Vols XII and XIII, 8820 (15 May to 9 June 1951).

²³⁵Pandit Nehru’s speech in the *Parliamentary Debates Part II*, Vols XII and XIII, 8820 (15 May to 9 June 1951) as quoted in CM Abraham, above n 7, 16.

²³⁶National Budget Speeches by the Finance Ministers and the National Policy for Economic Growth and Development from 1947–1971 does not indicate any amount of the budget or concrete policy for the protection of natural resources or management of conflict between environment and development. On a perusal of the National Budget Speeches from 1947 to July 1971, concern for the environment had no pertinent mention. Budget speeches were perused from the Government of India website, Ministry of Finance (available on file with the author).

²³⁷National Budget Speech 1947–1951, Ministry of Finance, Government of India website (on file with the author).

natural resources for iron ore, bauxite, steel, oil, cement and limestone, and the timber industries mushroomed and the courts dealt with issues other than tortious liability.

Additionally, the Solicitor General of India, Tripathi, noted the ‘hands off’ approach by the Supreme Court in matters of economic development, the downgrading of the fundamental right to property, and parliamentary legislation with respect to the Lands Act during the first two decades, until the ruling government declared a state of emergency in 1976.²³⁸ This action of the executive was upheld by the Supreme Court in the infamous case of *ADM Jabalpur v Shiv Kant Shukla* in 1976.²³⁹ Up until then, except for a few cases where judicial lawmaking²⁴⁰ was evident, the role that the Supreme Court played was a modest one.²⁴¹ Despite this judicial lawmaking in the interpretation of legislation and ruling in cases where there were legislative gaps, the

²³⁸Parag Tripathi, Additional Solicitor General of India, ‘Indian Constitutionalism and the Province of Judiciary’, in Deva Swati (ed) *Law and (In)Equalities: Contemporary Perspectives, Essays in Honour of MP Singh* (Eastern Book Company, 2010) 219–229, 220.

²³⁹Sathe, along with other scholars, criticised the role that the Supreme Court played during the 1976 Emergency in upholding the executive decision with respect to the emergency as correct in the case of *ADM Jabalpur v Shiv Kant Shukla* AIR 1976 SC 1207, see SP Sathe, ‘Supreme Court and NBA’, (2000) 35:46 *Economic and Political Weekly* 3990–3994, 3994.

²⁴⁰Bandhopadhyaya observes that the decision in *Rylands v Fletcher* (1868) LR 3 HL 330 qualified, and to a certain extent, altered the standard of negligence in tort and introduced the ‘strict liability’ standard. Almost 100 years later in the case *MC Mehta v Union of India and Ors* AIR 1987 SC 1086 the Supreme Court looked at ‘strict liability’ in the situation of hazardous industries and created ‘absolute liability’, restricting the exceptions allowed under *Rylands v Fletcher*. The Court also developed the ‘deep pocket’ theory with respect to environmental pollution and injury to public health; see Saptarishi Bandopadhyay, ‘Because the Cart Situates the Horse: Unrecognised Movements Underlying the Indian Supreme Court’s Internationalisation of International Environmental Law’ <http://works.bepress.com/saptarishi_bandopadhyay/2>; See also EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* 3–4 (Cambridge University Press, 2005), here the author clarifies that whether or not the rule arising from a given decision is positive (expansive) or negative (restrictive) or is stated creatively (or not so), is irrelevant to the fact that a rule has been created in the course of judicial decision-making. For a limited acceptance of judicial lawmaking when judges make law to fill gaps see Ronald Dworkin, *Law’s Empire* 148 (Harvard University Press, 1986) 6.

²⁴¹See the decision of the Supreme Court after the first amendment to the Constitution was challenged in *Shankari Prasad v Union of India* AIR 1951 SC 455, *Sajjan Singh v State of Rajasthan* AIR 1965 SC 845 (challenge to the 17th Amendment) in respect of the right to property and finally *Golaknath v State of Punjab* AIR 1967 SC 1647 challenging the validity of the 1st, 4th and 17th Amendments. In *Golaknath* the Supreme Court ruled that the Parliament has no power to amend the Constitution so as to take away or abridge the fundamental rights of the people. However, the Court held on the application of the doctrine of prospective overruling that all the Amendments made by the Parliament up to the date of the judgment were and would continue to be valid.

Supreme Court went about its business in an ‘indifferent manner’.²⁴² Baxi observes that even in this role one could see evidence of judicial lawmaking as an organ of authority in a ‘rule of law’ democracy, the Supreme Court, constantly ‘reiterated a variety of preconditions of legitimate democracy in support of its authority.’²⁴³

Consequently, in order to be seen as an upholder of ‘a legitimate source and guardian of municipal law’ the court’s decisions were premised on restrictions imposed by way of judicial restraint.²⁴⁴ As mentioned above, judicial deference to the legislature in introducing the IXth Schedule and enactment of significant socio-economic statutes such as the Land Reforms Act and Zamindari Abolition Act²⁴⁵, all pertinent to the right to property, can be seen in decisions by the Supreme Court in the first decade and a half of its existence.

This deference is clearly discernible in the case of *Shankari Prasad v Union of India*²⁴⁶ where the Court had upheld the validity of the Zamindari Abolition Act. Similarly, in *Sajjan Singh v State of Rajasthan*²⁴⁷ the Court rejected the challenge to the validity of the Constitutional 17th Amendment by which several laws were included under the IXth Schedule. However, in this case there was a shift as judges were divided on the critical question of the inviolability of FR provisions and the difference between an ordinary legislation and a constitutional amendment by the legislature to the FR chapter.²⁴⁸

²⁴²See Upendra Baxi, ‘A Known but an Indifferent Judge’: Situating Ronald Dworkin in Contemporary Indian Jurisprudence’ (2003) 1(4) *I.CON* 557–589, 565, n. 54, 581–582.

²⁴³See Saptarishi Bandhopadhyaya, above n 25.

²⁴⁴Baxi explains that the Court ‘must be seen’ to exist and operate under certain restrictions deemed to ensure ‘judicial restraint,’ See Upendra Baxi, above n 27, see also D Kennedy, *A Critique Of Adjudication {fin de siècle}* 13 (Harvard University Press, 1997) where the author states that ‘That judges understand themselves to be bound by a norm of interpretive fidelity to the body of legal materials that are relevant to whatever dispute is before them.’

²⁴⁵See *Sripat Narian Rai v Board of Revenue, UP and Ors* AIR 1960 All 93.

²⁴⁶AIR 1951 SC 458.

²⁴⁷AIR 1965 SC 845.

²⁴⁸Parag Tripathi, above n 23, 222.

3 Independence of the Judiciary and Deference to the Constitutional Amendments

Tripathi observes that similar to the Indian Supreme Court's turf war between the independence of the judiciary and deference to the legislature, one can discern the tension evident in the constitutional history of other jurisdictions.²⁴⁹ For example, this occurred in the US during the Great Depression with the promulgation of the 'New Deal Legislation', which allegedly transgressed the right to property by the American Congress.²⁵⁰ With opposition from President Roosevelt, the American Supreme Court adopted a non-interventionist approach towards the economic policy.²⁵¹ However, in cases dealing with the right to free speech and due process, the Supreme Court adopted a stance that was both interventionist and independent, such as in *United States v Carolene Products Co*, *Marbury v Madison*, *Brown v Board of Education* and *Roe v Wade*.²⁵²

The institutional evolution of the Indian Supreme Court has been similarly marked with periods of a non-interventionist approach (1950–1975), a strong interventionist approach (1977–1979) and an activist approach in the development and expansion of fundamental right provisions during the 1980s and 1990s. While the Supreme Court was faced with difficult challenges in making decisions that affected executive decisions and national policy it was also trying to establish itself as an independent state authority to be seen as legitimate and exercising discretion and restraint to resolve the contradictions that were prevalent in society. Commenting on the visionary policies of Dr Ambedkar that were as yet unrealised and incompatible with the actual realities of existing inequality, legal scholars like Dhavan questioned

²⁴⁹Ibid, 220.

²⁵⁰Ibid, citing Cushman Barry, *Rethinking The New Deal: The Structure Of Constitutional Revolution* (Oxford University Press, 1998) 3.

²⁵¹See Ron Ringer, *Excel HSC Modern History* (Pascal Press, 2002) 171.

²⁵²82 L Ed 1234:304 US 144(1938), 2 L Ed 60: 5 US 137 (1803), 98 L Ed 873:347 US 483 (1954).

whether the Constitution could secure a ‘rule of law society’, by realising the aims and the ideals contained in the Constitution and translating them into society.²⁵³

4 Prioritisation of Developmental Needs under the 42nd Amendment

The 42nd Amendment to the Constitution in 1976 provided for the Indian republic not only a structure that was based on rule of law, being a sovereign, democratic and secular republic, but also included the word ‘socialist’.²⁵⁴ The Preamble so modified reiterated the belief in providing equality and the amelioration of disparity, and hence tended to focus on development for all people. This is a significant development as it emphasised socialist ideals in contrast to capitalisation of private property. One of the most celebrated cases where the Supreme Court emphasised the importance of the Preamble was that of *Keshavananda Bharati v State of Kerala*.²⁵⁵ In this case the Court held that the Preamble provided the ambit of the FR and DP and the goals of political society of the nation. It was one of the most important tools that guide the reading and interpretation of the Constitution as it envisages ‘the ideals of the Constitution and what is good and noble’.²⁵⁶

Hence the Preamble, the FR and the DP form a trinity of tools that provide a beacon of light and guide the Court to realise the aims and ideals in order to achieve social, political and economic justice.²⁵⁷ The decision in *Keshavananda Bharati*, which emphasised that the basic structure of the Constitution cannot be changed by the Parliament aided by the Preamble, the FR and the DP, marks an ideological shift in the interpretation and evolution of Constitutional development in India. Later cases,

²⁵³Dhavan Rajeev, ‘Ambedkar’s Prophecy: Poverty of Human Rights in India’ (1994) 36 *Journal of Indian Law Institute* 8–36; see also CM Abraham, above n 7, 16.

²⁵⁴See the 42nd Amendment to the COI Act, 1976. This amendment added Articles 48A and 51(g) among others, introducing to Chapter IV the FD upon the state and to the people the duty to protect the environment and the forests.

²⁵⁵AIR 1973 SC 1506.

²⁵⁶At 1579–80; The same was reiterated in *Excel Wear v Union of India* AIR 1979 SC 25; see Ref. by the President of India under Article 143(1) in re *Beruberi Union and exchange of enclaves* AIR 1960 SC 845, the Court did not use the Preamble while interpreting constitutional issues.

²⁵⁷See the Preamble, COI, 1950.

especially, those on the environment, among others, confirm this interventionist and proactive stance taken by the Supreme Court and have provided the activist path that has brought forth real change in the philosophy of handling environmental disputes and dispensing environmental justice in India. The cases, as dealt with by the Supreme Court, demonstrate its role in the recognition of a virtual right to the environment and the recognition of constitutional torts largely through use of public law instruments. It further shows the evolution of Indian environmental jurisprudence, which has progressed through interpretation of the Constitution and the use of public law liability.

The next section examines and analyses the direction that directive principles of state policy have provided to changing non-justiciable principles into positive policies read with FR in India, and how public law permeates all environmental litigation in India.

D The Directive Principles of State Policy and Fundamental Duties

The DPs connote and carry the ideals of socio-economic and political advancement and development of the Indian citizens and reflect the cultural and social values of the people. The DPs are contained in Part IV of the Constitution and by virtue of Article 37 are not enforceable by the court. On the other hand, the FRs are included within Chapter III of the Constitution and contain the provisions that are justiciable and enforceable against the State. Chapter III contains the basic rights to freedom, liberty, equality, dignity, anti-discrimination, life and livelihood, education and religious freedom, among others.²⁵⁸ Within reasonable limits, and subject to the provisions provided within Chapter III, all FRs are enforceable by the courts. The DPs provided under Chapter IV enshrine the public policy provided for the path towards betterment, development and advancement of the socio-economic and political ideals and values

²⁵⁸See Articles 12–30 Chapter III; for example, Article 14 on the right to equality and equal treatment, Article 15 on discrimination and Article 21 on the right to life.

of the people. Rao et al, commenting on the inclusion of the DPs within Chapter IV, state that although the initial draft of the Constitution included the DPs along with the FR in chapter III, the Constituent Assembly debated and rejected the inclusion of the DPs under Chapter III.²⁵⁹

Among one of the beliefs that prevailed until the late 1970s, the logic to include the DPs under Chapter IV was to separate the ideals from the part of the Constitution containing FRs that were enforceable.²⁶⁰ Although much debate centered around the enforceability and justiciability of the DPs, increasing the tension between the judiciary and the legislature, the Supreme Court, in its interventionist and activist phase, clearly lay emphasis upon the importance and significance of the DPs in the scheme of achieving the ideals and aims of the Constitution. In the case of *Minerva Mills v Union of India*²⁶¹ one of the activist judges in the Supreme Court, J Bhagwati, highlighted the crucial role of the DPs, commenting that although the DP appear in Part IV they are expressly made by Article 37:

[C]arry the impression that they are not enforceable by the court ... and are just pious hopes not deserving immediate attention, I emphasise 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 rests.²⁶²

Earlier, the Supreme Court in *State of Madras v Chamakan Dorairajan* had invalidated a government order which fixed quotas for admission to medical and engineering colleges for different communities including ‘Harijans’ (a special community deserving affirmative action due to their historically underprivileged

²⁵⁹Rao et al, above n 6, 326.

²⁶⁰See HM Seervai, above n 2, 1585–1586.

²⁶¹AIR 1980 SC 1789.

²⁶²Ibid, per Bhagwati J at 1848.

status in society), justifying its policy and order under Article 46 chapter IV.²⁶³ The Court held that the ‘the DPs have to conform to and run as subsidiary to the Chapter of FRs because the latter are enforceable while the former are not.’²⁶⁴

5 Shift in Judicial Strategy Emphasising the Balance Within the Constitution

The emphasis by the Supreme Court in *Minerva Mills* marks a paradigm shift in drawing the balance between FRs and DPs. The fact that many academics held and still hold the DPs and FRs on the same spectrum²⁶⁵ as balancing aspects of the Indian Constitution is evident from the writings of academic scholars like Seervai, Tripathi, Hegde, Narain, Baxi, Singh and Pande²⁶⁶ and even in the opinion of judges in various decisions in the early 1980s, such as Bhagwati J, Chandrachud J²⁶⁷, Das J, Krishan Iyer J, among others.

The DPs envisaged under Chapter IV Articles 37–52 and Chapter IVA (Articles 48A, 51A and 51(A)g FDs) oblige the state to strive towards the constitutional goals and introduce and advance meaningful policies to achieve the ideals of socio-economic and political justice for the citizens and the public interest. However, as Seervai

²⁶³ AIR 1951 SC 226.

²⁶⁴ AIR 1951 SC 226.

²⁶⁵ Before *Minerva Mills* other decisions such as *Mohd Hanif Qureshi v State of Bihar* AIR 1958 SC 731; *Kerala Education Re Bill 1957* AIR 1958 SC 956; *CB Boarding and Lodging v State of Mysore* AIR 1970 SC 2042; the court had held variously that it did not see any conflict between Part III and Part IV of the Constitution and that both chapters are complementary and supplementary to each other.

²⁶⁶ See particularly Seervai, above n 2, Chapter XVII, 1396; PK Tripathi, ‘Directive Principles of State Policy’ (1954) 17 *Supreme Court Journal* 7; KS Hegde, ‘Directive Principles of State Policy in the Constitution of India’; Jagat Narain, ‘Judicial Lawmaking and the Place of Directive Principles in the Indian Constitution’ (1985) 27 *Journal of Indian Law Institute* 198; Upendra Baxi, ‘The Little Done: Vast Undone—Some Reflections on Reading Granville Austin’s *The Indian Constitution*’ (1967) 9 *Journal of Indian Law Institute* 322, 362, fn 110, and ‘Directive Principles and Sociology of Indian Law: A Reply to Dr Jagat Narain’ (1969) 11 *Journal of Indian Law Institute* 245; MP Singh, ‘The Statics and the Dynamics of the Fundamental Rights and Directive Principles: A Human Rights Perspective’ in SP Sathe and Sathya Narayan (eds) *Liberty, Equality and Justice* (Eastern Book Company, 2003) 45–48.; BB Pande “Fundamental Duties as a Strategem for Augmenting Human Rights?” (2011) 10 *Journal of National Human Rights Commission*, 65–88.

²⁶⁷ *Minerva Mills v Union of India* AIR 1980 SC 1789 at 1806 (per Chandrachud J). The harmony between the DPs and the FRs is the bedrock of the Constitution and the basic structure of the Constitution that cannot be touched by amendment.

rightly points out, ideals contained in the DPs are one thing while FRs that are enforceable against the State are another; and the framers of the Constitution did not give much importance or primacy to the DPs over FRs, with the former receiving importance only gradually through the activist stance by the Supreme Court in the 1980s.²⁶⁸

6 Superiority of the Directive Principles

To establish the superiority of the DPs in the *Keshavananda Bharati* fundamental rights case Justice Matthews supported the insertion of Article 31C by way of the 25th Amendment of the Constitution in 1971 to state that:

[M]oral rights embodied in Part IV of the Constitution are equally an essential feature of it ... they are fundamental in the governance of the country and all organs of the State, including the judiciary are bound to enforce those directives ... The fundamental rights themselves have no content ... their claim to supremacy or priority is liable to be overcome at particular stages in the history of the nation by moral claims embodied in Part IV.²⁶⁹

In *Sachidanand Pandey v State of West Bengal*, the Supreme Court, relying upon the Constitutional directives concerning protection of environment did not hesitate to delve into a policy making declaration and observed:

[W]henever a problem of ecology is brought before the court, the court is bound to bear in mind Article 48A and Article 51A(g). When the court is called upon to give effect to the Directive Principles and the Fundamental

²⁶⁸See HM Seervai, above n 2; See also MP Singh, *V.N. Shukla's Constitution Of India*, 11th edn (Eastern Book Company, 2008) 343.

²⁶⁹See *Keshavananda Bharati v State of Kerala* AIR (1973) 4 SCC 225 at 880–881 (SCC) para1714.

Duties, the court is not to shrug its shoulder and say that priorities are a matter of policy and so it is a matter of the policy making authority.

7 Inconsistency in the Application of the Directive Principles

The application of the DPs has not always been consistent. In two recent cases one finds the interpretation and application of the DP by the Supreme Court irreconcilable.²⁷⁰ In *Minerva Mills v Union of India* the Supreme Court struck down the provision of the 42nd Amendment, which under Article 31C gave pre-eminence to all DPs over the FRs.²⁷¹ The tug of war between enforcing FRs that are primarily aimed at providing and ensuring political freedom against excessive State action and the DPs, which are aimed at securing social and economic justice through appropriate State action, has helped shape environmental jurisprudence within the Constitutional framework in India. The interpretation of the FRs in the light of the moral and legal code contained in the DPs has established the evolutionary process in the area of rights, which has also resulted in the evolution of Indian environmental jurisprudence. It can be also stated that this evolution of constitutional rights has been often coloured and influenced by international rights principles of economic, social and environmental justice.

If the evolution of rights within the Constitutional framework has provided a path for development of environmental and human rights jurisprudence in India, according to some academics it has also weakened the notion that the kinds of rights that are

²⁷⁰PA Inamdar v State of Maharashtra (2005) 6 SCC 537, in the application of Article 46 requiring protection of the educational interest of weaker sections of society as well as under Article 15(4), the Court held that unaided private educational institutions could not be required to reserve any seats for those sections of society, as such reservation would be an unreasonable restriction of their business rights under the fundamental right to trade under Article 19 (1) (g); contra State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat (2005) 8 SCC 534 9 where the Court upheld the total ban on the slaughter of cows and their progeny drawing support from the directive principle in Article 48 irrespective of the fundamental rights of the defendant company to carry on trade and business. See the clarification provided by the Court for Article 48 in Akhil Bharat Goseva Sangh(3) v State of Andhra Pradesh (2006) 4 SCC 162.

²⁷¹AIR 1980 SC 1789; (1980) 2 SCC 591.

incorporated among the DPs are not fit for judicial enforcement.²⁷² Singh states that this evolution and development indicates that their ‘impact on the interpretation of non-justiciability of DPs in Article 37 in so far as the courts are enforcing them either through the route of FRs or by including themselves within the definition of ‘State’ sharing the responsibility along with the executive and the legislature.’²⁷³

8 Incorporation and Interpretation of Fundamental Duty for the Environment

Article 48A embodies the duty on the state to protect and improve the environment and safeguard wildlife and forests. In line with this obligation the central government passed the EPA and various other new laws and amendments to the existing forest, wildlife, air and water pollution laws. In conjunction with the Article 21 FR provision of right to life and the DP under Articles 51A(g), 30(e) and 47 the Supreme Court played a vital role in recognition of a virtual right to the environment and recognition of constitutional torts and has developed several principles of environmental law that have been largely responsible for the current jurisprudence in India. Pande provides a critical view of the strategies adopted by the Supreme Court in recognition, interpretation and realignment of the fundamental duties under the Indian Constitution to create the right ethos and respect for the environment and a right to a healthy environment.²⁷⁴

However, this development of environmental jurisprudence through public law instruments has occurred in fits and starts and has been among the positive reasons for the non-application and minimal pursuit of tort law for environmental infractions and environmental wrongs in India. The development of environmental jurisprudence reflects periods of intense activity where the Court has interpreted, expanded and

²⁷² Singh above n 53, 347, 348.

²⁷³ Ibid.

²⁷⁴ See BB Pande, “Fundamental Duties as a Strategem for Augmenting Human Rights?” (2011) 10 *Journal of National Human Rights Commission*, 65-88.

created applicable principles of environmental law to specific situations through the public law tools, especially the Constitutional rights and duties for public interest. However it has been through the use and expansion of tort law principles and functions to tide over the imbalance between development, protection of environment and protection of private rights of an individual that the Court has been able to fashion remedies for environmental justice and plug the gaps within public law that provides a shift in paradigm. . The next section critically examines the development of environmental jurisprudence through interpretation of the Article 21 FR right to life provision under the Constitution and the expansive scope of judicial review that has helped to evolve environmental jurisprudence in India. It bespeaks of a new paradigm shift within the environmental law regime that reflects the best use of tort law functions and its potential as a supplementary tool within the public environmental law liability regime.

E Evolution of the Public Law Regime Through Judicial Review

The scope of judicial review under Article 13 has been interpreted expansively and has been made possible by the liberal interpretation given to the meaning of ‘state’ under Article 12 to include not only governmental and administrative authorities but also commercial and non-commercial private bodies that performed or are performing state authority-like functions.²⁷⁵ Under Article 13 there is a mandate upon the ‘state’ not to make any laws that take away or abridge the rights conferred under Part III. If any law contravenes any of the provisions under Part III then the judiciary may strike it down as being invalid and declare that law as void.

9 Expansion of the Meaning of State under Article 12

²⁷⁵Sukhdev v Bahgatram Sardar Singh Raghuvanshi AIR 1975 SC 1331 (1975) 1 SCC 421, (Oil and Natural Gas Commission (ONGC), Life Insurance Corporation of India (LIC). Statutory corporations performing state functions were covered under Article 12. Similarly, in Ajay Hasia v Khalit Mujib Serhavari AIR 1987 SC487 a society registered under the Societies Registration Act running a regional engineering college was held to be covered under Article 12 as ‘State’.

Article 12 under the COI defines ‘state’ for the purposes of Part III and Part IV of the Constitution to include the Government and the Parliament; the government and the legislature of each state and all local or other authorities within the territory of India are under the control of the Government of India. Post-emergency, a number of decisions rendered by the Supreme Court brought private institutions and enterprises and their activities within the meaning of the word ‘state’, against which victims could vindicate their fundamental rights. This brought into focus a number of human rights violations and environmental issues.²⁷⁶ In *Sukhdev Singh v Bhagatram Sardar Singh Raghuvanshi*²⁷⁷ the Supreme Court interpreted the definition of ‘state’ to include a number of statutory governmental and administrative bodies and provided a wider range of institutions that could be covered under Article 12.

10 Other Authorities Considered as State-Like Entities?

Following a number of decisions and expanding definition of the ambit of the terms ‘state’ and ‘other authorities’ the Supreme Court, in *MC Mehta v Shri Ram Fertilisers Ltd*²⁷⁸ in 1987, held that a private company such as the defendant could come within the ambit of State under Article 12 due to the ‘social consequences of the corporate structure’. Thus, one could proceed against such a private company to seek remedies where ones’ fundamental rights were violated. In 2005, in action by *Zee Telefilms Ltd v Union of India*,²⁷⁹ the Court conceded that one could seek a remedy under Article 226 against the Board of Cricket Control India although it shall not be included under the definition of ‘state’ under Article 12.

²⁷⁶See M Ramesh, ‘Need For Expansion of the Definition of State Under Article 12 of the Constitution of India in the Era of LPG’ <<http://www.airwebworld.com/articles/index.php?article=1082>>. For this section see also Durga Das Basu, *Commentary on the Constitutional Law Of India*, 8th edn (LexisNexis Butterworths and Wadhwa and Co, 2008); MP Jain, above n 2; MP Singh, above n 53, 346–347.

²⁷⁷AIR 1975 SC 1331 (1975) 1 SCC 421.

²⁷⁸(1987) SCR 819.

²⁷⁹2005 (4) SCC 649.

The expansion of the range of institutions against which people could proceed to vindicate their rights thus lessened the difference between the public and private institutions. The expansion of the state functions and decreasing gap between private entities performing state-like functions and under the control of the government thus put most of the environmental issues in the public domain and hence added significantly to growth and development of environmental jurisprudence in India under the public law domain. While reviewing the working of the COI (Constitution of India)in 2002, the National Commission has suggested that Article 12 to the COI should have an explanation to define the phrase ‘other authorities’ to include a person or a private institution who performs functions of a ‘public nature’.²⁸⁰ This reasoning by the Court has of course followed a rational logic in respect of the increasing erosion of the traditional welfare state functions being subsumed by private enterprises as a result of increasing globalisation, and the trend towards privatisation in contemporary India. The organs of the government against whom relief was being sought made the Union of India a necessary party in almost all environmental disputes since then. Thus the liberal interpretation under Article 12 has enabled the judiciary to expand its domain for judicial review and this change has sought to establish a strong public law domain under the aegis of which environmental jurisprudence in India has grown considerably. Some commentators emphasise that the Supreme Court is no longer an interpreter of laws but also a regulator and creator when it comes to human rights, and particularly the environmental concerns of the people.²⁸¹

²⁸⁰See the Report of the National Commission to Review the Working of Constitution, March 2002, Chapter 3, Recommendation 3.5 <<http://lawmin.nic.in/ncrwc/finalreport/v1ch3.htm>>.

²⁸¹See Upendra Baxi, ‘The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice’, in SK Verma (ed), *Fifty Years of Supreme Court of India: Its Grasp and Reach* (Oxford University Press, 2000) 156–210. See also Kuldeep Mathur, ‘Battling for Clean Environment: Supreme Court, Technocrats and Popular Politics in India’, *Working Paper/03-01* (Centre for the Study of Law and Governance, 2001) and Armin Rosencranz and Michael Jackson, ‘The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power’, <http://www.cleanairnet.org/caiasia/1412/articles-69423_delhi_case.pdf>.

F Expansion and Flexible Interpretation of Fundamental Rights:

Articles 14 and 21 in the Context of Environmental Law

The above examples reiterate the changing nature of a welfare state and the erosion between the domains of public law and private law in areas that are cross-disciplinary, including the environment, and highlights the blurring of the boundaries between private and public law in India, which furthers environmental justice.

11 Expansion of the Right to Equality under Article 14

Consequently, the interpretation accorded to the right to equality provision under Article 14 has helped not only to check administrative discretion but also such interpretations on the touchstone of equality, antithetical to arbitrary state action, under a rule of law that has further enhanced and developed the environmental jurisprudence features in India. The Court has used the provisions of Article 14 to extend the scope of judicial review and strike at administrative discretion in various instances. Article 14 provides that the State shall not deny to any person equality before law or equal protection of laws within the territory of India. The decisions in *Ajay Hasia v Khalid Mujib*, *Maneka Gandhi v Union of India*, *RD Shetty v International Airport Authority* established that arbitrariness was antithetical to the equality clause under Article 14.²⁸²

12 Arbitrary Action Unconstitutional

The string of decisions after 1976 established that administrative discretion would be constantly pitted against the rule of law and justice requirements and the Court would balance out arbitrary actions through proper restraint by striking down a law and declaring it as unconstitutional by its power to judicially review a decision. The extent

²⁸² AIR 1981 SC 487, (1978) 1 SCC 248, (1979) 3 SCC 489.

and scope of judicial review against administrative discretion in public law matters such as under-trials, atrocities against women in protected homes, juvenile delinquents, child labourers, bonded labourers and journalists also spilled over into the field of environmental and developmental decision, making a natural corollary. Thus, judicial guidelines against administrative discretion have become very significant in the growth of environmental jurisprudence in India.²⁸³

G Right to Life under Article 21

The most significant development in public law for environmental jurisprudence has been through the interpretation of Article 21, which provides that no person shall be deprived of his life and personal liberty except according to procedures established by law. The Court has seized upon the right to life guarantee and expanded the protection of this provision following an ideological interpretation through procedural law that infringes on the quality of life.

13 A New Dimension and Innovative Facets of 'Right to Life' under Article 21

The interpretation given to Article 21 has added a new dimension to the quality of life under the right to life provision to include the right to a healthy environment.²⁸⁴ In *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh* (the RLEK/Dheradoon Quarrying case) in 1985, the Supreme Court expanded the meaning of right to life under Article 21 and in conjunction with the DP added more depth to the meaning of right to life, which according to the Court included environmental rights.²⁸⁵ In *Subash Kumar v State of Bihar*²⁸⁶ the Court stated that:

²⁸³CM Abraham, above n 6.

²⁸⁴Among the significant cases where the Court has interpreted and reiterated that Article 21 includes a right to a healthy environment are *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh*, AIR 1985 SC 652, *Subhash Kumar v State of Bihar* AIR 1991 SC 420, *Bombay Dyeing and Mfg Co Ltd* AIR 2006 SC 1489 it was laid down clearly that Article 21 included environmental rights.

²⁸⁵AIR 1985 SC 652.

The right to live is a fundamental right under Article 21 of the Constitution, and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution.

In a recent decision in *Bombay Dyeing and Mfg Co Ltd*²⁸⁷ the Supreme Court reiterated that:

Expansive meaning of such [constitutional and fundamental] rights had all along been given by the Courts by taking recourse to creative interpretation which led to creation of new rights. By way of example, we may point out that by interpreting Article 21, this Court has created new rights including right to environmental protection.

The Supreme Court has developed a reputation for being an activist court²⁸⁸ and is seen as a guardian of not only human rights and basic rights, but as also a protector of

²⁸⁶ AIR 1991 SC 420.

²⁸⁷ AIR 2006 SC 1489, para 93.

²⁸⁸ See Upendra Baxi, above n 65, 156–210; CL Heures-Dubé, 'Human Rights: A Worldwide Dialogue' in BN Kirpal et al (eds) *Supreme But Not Infallible* (Oxford University Press, 2000) 223; NRM Menon, *Legal Aspects of Environmental Protection* (text of Professor SK Bose Memorial Lecture at the Centre for Mining Environment, Indian School of Mines, Dhanbad, India, 11 January 2002) <<http://ismenvis.nic.in/lecture2002.pdf>>; SP Sathe, *Judicial Activism: The Indian Experience* (2001) *Washington University Journal of Law and Policy* 29, 40; GL Peiris, 'Public Interest Litigation in the Indian Subcontinent: Current Dimensions', (1991) 40(1) *International and Comparative Law Quarterly* 66; MR Anderson, 'Individual Rights to Environmental Protection in India' in AE Boyle and MR Anderson (eds) *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1998) 1; Shyam Divan and Armin Rosencranz, *Environmental Law and Policy In India* (Oxford University Press, 2001) 148; Shiv Visvanathan, *Supreme Court Constructs a Dam*, (2000) 35(48) *Economic and Political Weekly* 4176–4180; Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?', (1989) 37(3) *The American Journal of Comparative Law* 495; Atiyah Curmally, 'Environmental Governance and Regulation in India' 96 (Indian Infrastructure Report, 2002), Jona Razzaqhue, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Law International, 2004) and Geetonjoy Sahu, *Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence* (2008) 4(1) *Law, Environment And Development Journal* 1, 11.

the environment. In effect, the Court has put the right to environment on the spectrum of fundamental rights and constitutionally enshrined duties.²⁸⁹ The Court has decided upon significant and highly relevant matters, often having conflicting and competing interests, and has achieved a reputation that has set an example within Asia and even internationally.²⁹⁰ The activist Indian judiciary has earned its share of praise and comparative environmental literature evidences that well.²⁹¹ Such pronouncements make it clear that the evolution of Indian environmental jurisprudence has progressed through the interpretation of the Constitution, and while doing so, the role played by the Supreme Court in recognition of a virtual right to the environment and recognition of constitutional torts is the significant factor in its development.

14 A Critical Examination of the Judicial Strategy

However, according to some academics,²⁹² a critical look at these decisions reveals that the Supreme Court has taken more than its share of judicial functioning, and in adopting norms of international law and expanding the right to life provision under Article 21 to protect the environment and people's environmental rights, has gone about this in a circumlocutory manner. It has been suggested that this approach does not find a strong justification of the method or the legal norm upon which the court has relied, especially while internalising international law norms.²⁹³

The following analyses the development of the right to clean air, a healthy environment, development and clean water—all environmental-related rights that have been recognised under the right to life and liberty provision providing for environmental justice utilising public law liability tools.

²⁸⁹ See C Sharma, above n 4, 321–347 at 322; Pande above n 49. .

²⁹⁰ See CL Heures-Dubé, above n 70, 221; NRM Menon, above n 72; SP Sathe, above n 72, 29, 40; Jamie Cassels, above n 72, Atiyah Curmally, above n 72; Jona Razzaqhue, above n 72.

²⁹¹ Geetanjoy Sahu, *Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence*, (2008) 4(1) *Law, Environment and Development Journal* 1, 11.

²⁹² See SS Prakash and PVN Sarma, 'Environment Protection Vis-a-Vis Judicial Activism', (1998) *Supreme Court Journal* 56, Bandhopadhaya Saptarishi, in Upendra Baxi, above n 65.

²⁹³ Bandhopadhyay, cited in Baxi, above n 65.

15 The Court's Design and Strategy in Expanding the Scope and Width of Article 21 in Providing Environmental Justice

Post emergency, the FRs were viewed as enshrining the basic values held by the people of India. In interpreting the right to life provision in *Maneka Gandhi v Union of India*²⁹⁴, FRs were held to represent the 'basic values of the people of this country' and they were 'calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent'. Justice Bhagwati's statement in the judgment reflects an internalisation of the ancient indigenous and traditional knowledge of the Vedic life: of the respect accorded to each individual's life, to individual dignity and the duty under dharma. The progression from the right to life and liberty to the right to life and liberty that included human dignity, was against arbitrariness and was fair, just and reasonable when there was a curtailment of liberty of any sort by the state, as cemented the expansion of Article 21. The Court established a further foundational pillar when it linked FRs to the duties and ideals reflected in the DP in *Bandhu Mukti Morcha v Union of India* (the bonded labourers case)²⁹⁵ stating that Article 21:

[D]erives its breath from the Directive Principles of State Policy and ... These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State—neither Central Government or State Government—has the right to take any action which would deprive a person of the enjoyment of these basic essentials.²⁹⁶

Similarly, in *Bacchan Singh v State of Punjab* the word 'procedure' under Article 21 was held to include not only 'adjectival but also substantive law thus must meet the

²⁹⁴ 1978 SC 597, at 619.

²⁹⁵ (1984) 3 SCC 161.

²⁹⁶ At 183.

test provided under Article 21 before the State could lawfully infringe a person's FR to life'. It was held that the entire process by which a person is deprived of his life and personal liberty needs to pass the test of reasonableness, fairness and justness in order to be outside the inhibition of Article 21. The expansion of the scope of Article 21 can also be seen in the cases which provided more depth to the right to life provisions, such as *Mohini Jain v State of Karnataka*,²⁹⁷ *Union of India v Hindustan Development Corporation*²⁹⁸ and *Francis Coralie Mullin v Administrator, Union Territory of Delhi*.²⁹⁹ In the latter case the Court held that:

[R]ight to life includes the right to live with human dignity and decency ... all components that go along with it ... of course the magnitude and the content of the components of this right depend upon the economic development of the country but it must in any view 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.³⁰⁰

In T Damodar Rao's following the direction provided by the Supreme Court, the Andhra Pradesh High Court ordered the State Government departments (Life Insurance Corporation and the Income Tax Department) to cease building a residential facility in a recreational zone as the act was in violation of Article 21. The High Court held:

[I]t would be reasonable to hold that the enjoyment of life and its attainment and fulfillment guaranteed by Article 21 of the Constitution embraces the protection and preservation of nature's gifts without which life cannot be enjoyed ... The slow poisoning by the polluted atmosphere caused by

²⁹⁷(1992) 2 SCC 666 (the right to life includes the right to education and any law that takes away the right to education is violating the right to life enshrined under Article 21). See also *Unnikrishanan JP v State of Andhra Pradesh and others* (1993) 1 SCC 645.

²⁹⁸AIR 1994 SC 988.

²⁹⁹(1981) 1 SCC 608.

³⁰⁰(1981) 1 SCC 608 at 618–619.

environmental pollution and spoliation should be regarded as amounting to violation of Article 21 of the Constitution.

Similarly, in Mohini Jain's case the Court interpreted and expanded the right to life provision to include the right to education for the dignity of an individual could not be ensured without being accompanied by right to education. The Courts were required to enforce the right to life and the concomitant expressions of right to life as these were basic to the enjoyment of life.³⁰¹

The significance of including environmental provisions in the constitution is very aptly illustrated in the following paragraph by Okidi, quoting Brandl and Bungert:

Constitutional implementation enables environmental protection to achieve the highest rank among legal norms, a level at which a given value trumps every statute, administrative rule or court decisions. For instance, environmental protection might be considered a fundamental right retained by the individual and thus might enjoy the protected status accorded to other fundamental rights. In addition, addressing environmental concerns at the constitutional level means that environmental protection need not depend on narrow majorities in the legislative bodies. Rather, environmental protection is more firmly rooted in the legal order because constitutional provisions ordinarily may be altered only pursuant to elaborate procedures by a special majority, if at all.³⁰²

16 Consequences of the Expansion of Article 21

³⁰¹ Mohini Jain v State of Karnataka (1992) 2 SCC 666 at p 680.

³⁰² See CO Okidi, *International Perspectives on the Environment and the Constitution* <<http://www.kenyaconstitution.org/html/fsig5.htm>>.

The expansion of Article 21 has enriched and had a significant impact on the growth and development of human rights jurisprudence in India as well; so much so that one can succinctly state that this has happened due to judicial awakening, creativity and interventionist activism. From the position of judicial restraint that could be discerned from the decision of the Court in *AK Gopalan*, to a neutral approach in *ADM Jabalpur* and an activist approach in *Maneka Gandhi*; *Francis Coralie, RLEK*, *Shriram Gas Leak*, the judiciary in India has worked within the public law domain to realise the aims and ideals of the Constitution. In providing Article 21 with a multidimensional adventitious root system the Court has used the Constitution, again by taking assistance from Article 32. Through the power granted to the Court under Article 32 the Court has given orders, directions and guidelines and set up committees whose recommendations have been adopted by the Parliament and acted upon by the Executive. This gradual shift in the legal ideology with the new legal rationale lies in the active judicial interpretation of FRs that has cemented the growth of public law domain in India.

17 Shift in Legal Ideology and Public Liability Tools Suitable for the Protection of Public Interest in the Environment

Of course this shift in legal ideology is reflected in the environmental jurisprudence that evidences the philosophy of the Constitution and the internalisation of the Indian indigenous legal tradition among the judiciary. Due to this development, the role of tort has been confined only to a handful of public nuisance cases and only a few private nuisance issues have been documented through case law in India.³⁰³ Not that common law principles were not used in environmental harm cases or that fouling of river waters, pollution and other environmental harms were entirely replaced with legislation in all fields; most were dealt under the IPC that provided for punishment (Sections 268–290 IPC) and in other areas of accident injury law, product liability and

³⁰³See above, Chapter 3, n167 at 77 .

consumer protection statute law provided remedies in the form of injunction orders, fines and compensation.

H The Role of Tort in Common Law and Understanding the Right to Life

Traditionally under common law, tort has been described as a blunt instrument for remedying environmental harms.³⁰⁴ To examine the intersection and overlap of the different objectives one must comprehend the theoretical underpinnings of tort liability so as to identify the role, nature and operation of tort law within the wider framework of the environmental law regime that operates in India. As environmental harm involves not only substantive but also legal and constitutional standing³⁰⁵, tort law cannot provide that link without the plaintiff having to prove direct injury and the evidentiary burden of proof of fault³⁰⁶ that provides a challenge. As common law could not provide the tools to tide over environmental interests and provide an efficient solution or remedy, actions for environmental damage in India were brought under statutory law (e.g., violation of Section 268 of the IPC, public nuisance and punishment under Section 290) earlier, or combined with individual interests that are seen as infractions of fundamental right to life under Article 21 since its expansion in the 1980s. Additionally, where tort remedy could have been used, especially in public nuisance cases such as in the *Ratlam* case, the court stressed a remedy through ‘activated torts’ but on a Constitutional rationale based on a social justice orientation. Abraham states that the *Ratlam* judgment reflected the judicial realisation of the inefficacy of the penal strategy towards a new legal dimension of tort consciousness based on a public law rationale.³⁰⁷ This new direction provided by the *Ratlam*

³⁰⁴See JB Plater Zygmunt et al, *Environmental Law And Policy: Nature, Law and Society*, 3rd edn (Aspen Publishers, 2004) 283.

³⁰⁵See Gearty Conor, ‘The Place of Private Nuisance in Modern Law of Torts’ (1989) 48 *Cambridge Law Journal* 214–242, 216.

³⁰⁶See CM Abraham, above n 6, 41–42.

³⁰⁷*Ibid*, 55

judgment set a trend towards India's environmental jurisprudence, away from purely common law considerations and towards the domination by public law.³⁰⁸

However, the corrective justice functional features that tort law contains have been reflected in recent cases, especially in *MC Mehta v Union of India*³⁰⁹ where the Court held that a victim should be compensated for the injury caused by the polluter and that the compensation 'must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The more prosperous the enterprise, the greater must be the amount of compensation payable by it'.³¹⁰

The next section analyses the mechanisms for judicial activism as provided by the Constitution that have led to the growth of PIL under Article 32. This new direction set by the Court has been made possible by the revolutionary change in the legal standing rule under the Constitution and under the CPC (1908) in India.

I Judicial Activism: Article 32 and the Modification of Locus Standi

Judicial creativity in making use of the DPs and the assumption of an activist role for upholding the FRs and the human rights of the people against state institutions has made the Supreme Court acquire and adopt a more 'political' role.³¹¹ This section investigates how the scope of the remedies available under the Constitution has been modified to overcome technical requirements of locus standi. The focus of this section is to illustrate the evolving tools used by the judiciary to provide solution to

³⁰⁸Ibid.

³⁰⁹(1987) 1 SCC 395.

³¹⁰Ibid, 421.

³¹¹See George Gadbois, 'The Supreme Court of India as a Political Institution' in Rajeev Dhavan et al (eds) *Judges And The Judicial Power*, (Tripathi, 1985) 250–267; Abraham, above n 6, 28; GS Sharma, 'Concept of Leadership Implicit in the Directive Principles of State Policy in the Indian Constitution' (1965) 7 *Journal of Indian Law Institute* 173–188; BB Pande, "Fundamental Duties as a Strategem for Augmenting Human Rights?" (2011) 10 *Journal of National Human Rights Commission*, 65–88. See also J Pandey and RK Dubey, *Civil Liberty Under the Indian Constitution* (Deep and Deep Publishers, 1992) 28–80.

environmental issues where conflicting priorities of development and harm to people's environment have eroded or infringed upon the fundamental rights of the people. The enforcement of fundamental rights through extraordinary constitutional remedies is indeed regarded as one of the most significant characteristics that has aided the development of constitutional law and consequently environmental jurisprudence.

Most of the cases recognising the right to a 'wholesome environment'³¹² have been accepted by the Supreme Court and various High Courts as a writ petition under Articles 32 and 226 of the Constitution.³¹³ Article 32 of the Constitution provides a right to constitutional remedies. It guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution. Under this article the Supreme Court can issue directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *quo warranto*, prohibition and *certiorari* for any of the rights conferred by Part III. Similarly, under Article 226, the High Court of a State has power to issue writs concurrently to any person, authority or government for the enforcement of any of the rights conferred by Part III and for any other purpose.

18 Remedial Action Available Under the Constitution

Remedial action in the form of the writ of *mandamus* may be issued by the Court against any administrative, quasi-judicial or judicial authority.³¹⁴ The *mandamus* lies in the court order to direct the public authority that has wrongfully refused to exercise its statutory power to do or undo what has been done in contravention of a statute.

³¹²See eg, *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh* AIR 1988 SC 2187; *Subash Kumar v State of Bihar* AIR 1991 SC 420, *MC Mehta v Union of India* AIR 1992 (3) SCC 256.

³¹³*Calcutta Gas Co Ltd v State of West Bengal* AIR 1962 SC 1044.

³¹⁴AT Markose, 'Judicial Control Of Administrative Action In India' (1956) *Madras Law Journal Office*, 308–315; MP Jain and SN Jain, *Principles Of Administrative Law*, 3rd edn (Tripathi Publications, 1979) 376–472, SP Sathe, *Administrative Law*, 4th edn (Tripathi Publications, 1984) 445–458; P Massey, *Administrative Law*, 2nd edn (Eastern Book Co, 1990) 203–240.

Similarly, the court may order or direct a public authority or a lower judicial authority under the writs of *certiorari* and prohibition to restrain them from acting in excess of their authority.³¹⁵

The main distinction between *certiorari* and prohibition is that they are issued at different stages of the proceedings.³¹⁶ For instance, where a buildings department grants a permit and allows a builder to proceed with a development in violation of the building laws in an area reserved for a garden, the Court may order a restraining order. A *certiorari* would also lie against the pollution control board that considers the application of an industry and wrongly permits it to discharge effluents beyond prescribed levels. Articles 32 and 226 come into play only when a fundamental right, including the right to a wholesome environment, has been violated. Where no fundamental right is involved the High Court will decline to exercise its jurisdiction if an equally effective remedy is available and has not been used.³¹⁷ The High Court's jurisdiction under Article 226 is wider than that of Article 32 although it does not guarantee a right to move the High Court. However, Article 226 not only empowers the High Court to enforce the fundamental rights but gives a discretion to take appropriate action for 'any other purposes'.

The statutory scheme under Section 28 of the Water Act and Section 31 of the Air Act provides for an alternative remedy: that of administrative appeals to polluters who are dissatisfied with the pollution control board decisions.³¹⁸ Thus, a High Court will not intervene and a writ petition does not work where statutory alternatives have not already been explored. Additionally, where the victim alleges injury to health due to

³¹⁵Certiorari is an order to an inferior court or quasi-judicial body to transmit the record of pending proceedings to superior court for review. The writ of prohibition prevents a lower court or tribunal from assuming a jurisdiction which it does not possess. The writ of prohibition is issued when the matter is pending before an authority to prohibit the concerned authority from proceeding any further with the matter whereas certiorari is issued only after the concerned authority has decided a question before it.

³¹⁶AT Markose, above n 96; MP Jain and SN Jain, above n 96; SP, above n 98; P Massey, above n 98.

³¹⁷For details see MP Jain, above n 2, 703–704.

³¹⁸See Chapter 6 for discussion of the Water Act, Air Act and Environment (Protection) Act.

pollution, a suit for damages is appropriate because evidence to establish causation needs to be adduced and also because traditionally damages are not normally awarded under Articles 32 and 226.³¹⁹ Although the courts have wide latitude to grant relief to the aggrieved persons, there are certain limits on their power.³²⁰ Primary among these is the issue of ‘locus standi’ or the petitioner’s standing to institute proceedings before the court. Previously only a person who was injured or aggrieved could move the court by appropriate proceedings for any remedy.³²¹

19 Role of the Court in Providing Legal Standing and Access to Justice

From the late 1970s and beginning of 1980s the Supreme Court embarked upon the modification process of the common law rules on locus standi to achieve the new constitutional rationale. The common law rule that only a person whose right had been infringed could seek relief from the courts was a prime obstacle in seeking relief under the writs of *habeus corpus*, *quo warranto*, *mandamus* and *certiorari* while challenging, inter alia, the right to life and liberty or administrative actions.

This difficulty was first observed in illegal detention cases, particularly for under trials prisoners who had been languishing in a state prison without trial for years when the Court extended the procedures under the writ of *habeus corpus*.³²² Taking their cue from the various movements that had shaped the law for PIL and its underlying ideology in the US, particularly the historical roots in the Gideon³²³ case when the

³¹⁹See *State of Himachal Pradesh v Parent of Student of Medical College, Simla* AIR 1985 SC 910 and *PV Kapoor v Union of India* 1992 Cri Law J 128. In the latter two cases, advocates filed a PIL against the government and sought compensation when two college students were shot dead by the police in the anti-Mandal Commission demonstration in 1990. The Court allowed compensation and observed that in PIL normal rules of procedure and evidence would not be applicable where there was a grave miscarriage of justice.

³²⁰SP Sathe, above n 98, 447–448.

³²¹*Calcutta Gas Co Ltd v State of West Bengal* AIR 1962 SC 1044 at 1047.

³²²*Hussainara Khatoon v State of Bihar (Hussainara I)* (1980) 1 SCC 81.

³²³*Gideon v Wainwright* 372 NS 335 (1876), USA. See also Lance Liebman, ‘Public Interest Law in India and the US’, (1984) 21 *Law Quarterly* 1, 3 and Tobias Carl, ‘Public Law Litigation and Federal Rules of Civil Procedure’ (1989) 74 *Cornell Law Review* 270–282.

US Supreme Court accepted a handwritten scrawl from the litigant who was unrepresented in a state trial court and pleaded violation of the American Constitution³²⁴, the US Supreme Court allowed the claimant a standing and changed the procedural rule. In a similar action, the Indian Supreme Court accepted letters and petitions from people who represented the downtrodden, the weak and the poor masses who could not for whatever reasons (including illiteracy, incarceration, poverty, or backward economic and social status) bring a petition to the Court to seek justice. In the first of these cases, the Court allowed for any concerned person to file a petition to secure the release of a person in illegal detention.

Subsequently, the Court expanded the rule of locus standi in *mandamus* and *certiorari* writ proceedings, challenging administrative actions and matters involving public interest. In two significant cases³²⁵ the Court indicated that the rule of locus standi must be moulded to have a wider ambit when questions of public interest were involved and although a ‘meddlesome interpoler’ or an ‘officious busybody picking up a stray dispute’³²⁶ may have no standing, a stranger ought to be allowed to act in a matter involving grave miscarriage of justice.³²⁷ In *Fertilizer Corporation Kamgar Union v Union of India*³²⁸ the Court held that:

Locus standi must be liberalised to meet the challenges of the time. *Ubi jus ibi remedium* must be enlarged to embrace all interests of public-minded citizens or organisations with serious concern for conservation of public

³²⁴See Sengar, above n 4, 130–132.

³²⁵*Bar Council of Maharashtra v MV Dabolkar* (1975) 2 SCC 702; *JM Desai v Roshan Kumar* (1976) 1 SCC 671.

³²⁶*JM Desai v Roshan Kumar* (1976) 1 SCC 671.

³²⁷*Bar Council of Maharashtra v MV Dabolkar* (1975) 2 SCC 702 (appeal to the Supreme Court was made by the State Bar Council for alleged ‘professional misconduct’ and the insensitivity of the disciplinary authority to aberrant professional conduct of lawyers. Among others, one question was as to the standing of the State Bar Council to appeal to the Court, under Section 38 of the Advocates Act 1961 against the appellate decision of the Disciplinary Tribunal appointed by the Bar Council of India. The Supreme Court, through Judge Krishna Iyer, upheld the competence to appeal and the expansion of the locus standi rule to challenge administrative decisions.

³²⁸AIR 1981 SC 344.

resources and the direction and correction of public power so as to promote justice in its triune facets.³²⁹

20 Judicial Innovation and Public Interest Litigation

PIL received significant recognition with judicial innovation, notably of Justice Bhagwati Prasad Banerjee and Justice VR Krishna Iyer after 1976. The constitutional remedy was modified and was used creatively to ameliorate the conditions of those whose fundamental rights had been affected due to various actors, including state agencies,³³⁰ through the device of PIL. In *Fertilizer Corporation Kamgar Union v Union of India*³³¹ J Krishna Iyer applied the reasoning to ignore the strict locus standi rule from the Dabholkar case³³² and accepted the Fertilizer Corporation's standing necessary to challenge the administrative action. The court held that:

The maintainability of a writ petition which is correlated to the existence and violation of a fundamental right is not always to be confused with the locus to bring a proceeding under Article 32. These two matters often mingle and coalesce with the result that it becomes difficult to consider them in water-tight compartments. The question whether a person has the locus to file a proceedings depends mostly and often on whether he possesses a legal right and that right is violated. But, in an appropriate case, it may become necessary in the changing awareness of legal rights and social obligations to take a broader view of the question of locus to initiate a proceeding, be it under Article 226 or under Article 32 of the Constitution.³³³

³²⁹Para 71D–E.

³³⁰See eg, *People's Union for Democratic Rights v Union of India* (AIR 1982 SC 1473); *Bandhua Mukti Morcha v Union of India* (AIR 1984 SC 802); *Hussainara Khatoon v Home Secretary, State of Bihar* AIR 1979 SC1360; *DrUpendra Baxi v State of UP* (1983) 2 SCC 308.

³³¹AIR 1981 SC 344.

³³²AIR (1975) SCC 702.

³³³Para 65 E–G.

The judicial policy of allowing expanded standing to concerned people espousing a public cause was stated clearly by the Court in the *ABSK Sangh (Railways) v Union of India*³³⁴ and *SP Gupta v Union of India*³³⁵ cases where the Court not only recognised the locus of an unrecognised association to bring a public interest case before the Court, but also recognised that a member of the public could bring a case to the Court on behalf of those persons or determinate class of persons who were in a socially and economically disadvantaged position and were unable to approach to Court for relief. Thus, the Court followed a philosophy that reflected the provision of means for access to justice through ‘class actions, ‘PIL’ and representative proceedings instead of adhering steadfastly to the rule of locus and being driven to an expensive plurality of litigation.

In *ABSK Sangh* the Court held that the legal rules of ‘cause of action and person aggrieved and individual litigation’ were obsolescent when matters involved public interest, and the Court was looking towards envisioning a means of access to justice in a more people-oriented manner and hoping to achieve participative justice.³³⁶

21 Expansion of the Scope and Meaning of Public Interest Litigation

Similarly, the continued expansion of remedial powers led to the evolution of a new type of litigation to meet the constantly evolving new situations and demands for justice. In *Peoples’ Union for democratic Rights v Union of India*³³⁷ the Court allowed a civil rights organisation to maintain a petition alleging violations of the fundamental rights of labourers employed in construction work for the Asiad village in Delhi. In *Bandhua Mukti Morcha v Union of India*³³⁸ the Court accepted a letter from a social organisation highlighting the plight of quarry workers who were being

³³⁴ AIR 1981 SC 298.

³³⁵ (1981) Supp SCC 87.

³³⁶ See *ABSK Sangh (Railways) v Union of India* AIR 1981 SC 298, per J Krishna Iyer at 317.

³³⁷ (1982) 3 SCC 235.

³³⁸ AIR 1984 SC 802.

treated as bonded workers and made to work under inhuman conditions. The Court treated the letter as a writ petition and appointed an advocate as Commissioner to investigate the matter and issued notice to the government and the quarry owners. The government's objections on the maintainability of the petition were rejected and the Court held that Article 32 ought to be interpreted widely when it was a question of enforcement of the fundamental rights of the people, and that the Court would and could adopt the procedure of doing away with technical requirements. This case and the Court's action was a remarkably significant one, and cemented its activist role in establishing the Court as a bastion of social conscience and an upholder of the Constitutional values and ideals which it had actually started realising in the two decades from the 1970s and into the 1980s.

In 1993, in the case of *Janta Dal v SS Choudhary*³³⁹ the Supreme Court clarified the scope and meaning of PIL in India as a tool or a device whereby a person could initiate 'a legal action including all proceedings, therein, in a court of law for enforcement of a public interest or a general public interest where the public or a class of community have a pecuniary interest or some interest by which their legal rights or liabilities were affected.' Recently in *Guruvayur Devaswom Managing Committee v CK Rajan*³⁴⁰ the principles in regard to the nature and scope of the PIL under Article 32 and Article 226 of the COI were summarised.

22 The Effect of Public Interest Litigation

The cases highlighted above reflect the expanding scope of standing which illustrated a new judicial trend of social action litigation in India and the dawn of human rights jurisprudence through public law tools. This movement has been widely commented upon as a unique feature in of the new constitutional rationale and awakening among

³³⁹ AIR 1993 SC 893.

³⁴⁰ AIR 2004 SC 561, see also *Indian Banks' Association v Devkala Consultancy Services* AIR 2004 SC 2615.

the higher judiciary. Scholars including Baxi³⁴¹, Singh³⁴², Menon³⁴³, Dhavan³⁴⁴ and Sathe³⁴⁵ and judges including Bhagwati³⁴⁶, Krishna Iyer³⁴⁷, Sachar³⁴⁸, Singh³⁴⁹ and Anand³⁵⁰ all attest to the fact that the device of PIL, which is also used interchangeably as social action litigation, recognised the keenness among the Supreme Court judges to realise the aims and ideals of the Constitution. The path set out by the decisions and the approach of the Court towards the amelioration of injustice and violation of the fundamental rights of individuals or a determinate class of people cemented the role of the judiciary as an activist one rather than a passive umpire in the justice delivery process.³⁵¹

23 Critique of Public Interest Litigation

Although there has been overzealousness among public-spirited individuals to bring PILs to the court that has many a time thwarted the process of the Court, the Supreme Court has entertained caution in recent years³⁵² but has largely rejected the criticism

³⁴¹Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1978–79) 8 & 9 *Delhi Law Review* 91, 94; and Baxi, 'Taking Suffering Seriously', in Dhavan et al, above n 93, 289–315.

³⁴²Parmanand Singh, 'Public Interest Litigation' (1991) 27 *Annual Survey of Indian Law*, 35–55.

³⁴³Madhava NR Menon, 'The Dawn of Human Rights Jurisprudence' (1987) 1 *Supreme Court Cases* 1–12.

³⁴⁴Rajeev Dhavan, 'Law as Struggle: Public Interest Law in India' 36 *Journal of Indian Law Institute* 302.

³⁴⁵SP Sathe, 'Judicial Process: Creativity and Accountability' in KL Bhatia, (ed) *Judicial Activism and Social Change* (Deep and Deep, 1990) 90–105.

³⁴⁶PN Bhagwati, 'Judicial Activism and Public Interest Litigation', (1985) 23 *Columbia Journal of Transnational Law* 561–567.

³⁴⁷ABSK Sangh (Railways) v Union of India AIR 1981 SC 298.

³⁴⁸Sachar Rajindra, 'Social Action Litigation: Activist and Traditional Judges' (1987) 1 *Supreme Court Cases* 13–16.

³⁴⁹See Justice Kuldip Singh in Vellore Citizens Forum v Union of India 1996 5 SCC 647 : AIR 1996 SC 2715. See also Justice BN Kirpal, 'Environmental Justice in India' (2002) 7 SCC 1; Sands Philippe, *Principles of International Law* (Cambridge University Press, 2003) 279; Vijay Pal, 'Environmental Justice in India', *Pratiyogita Darpan*, PD/October/ 2006/610.

³⁵⁰AS Anand, 'Public Interest Litigation as Aid to Protection of Human Rights', MC Bhandari Memorial Lecture, delivered at Jodhpur on 25 August 2001, (2001) 7 SCC 1.

³⁵¹CM Abraham, above n 6, p 31.

³⁵²See Kalyaneshwari v Union of India. The Court held that, 'The parameters within which PILs can be entertained have been laid down. The credentials, the motive and the objective of the petitioner have to be apparently and patently aboveboard. Otherwise the petition is liable to be dismissed at the threshold.' Reasoning as to why it continues to be sceptical about a large number of PILs, the Bench speaks for the Supreme Court when it says that 'judiciary has to be extremely careful to see that behind

of judicial activism. It has been generally accepted that the judiciary has stepped up to give orders and directions and carved out remedies that are non-traditional only because of executive inaction and abuse, misuse or violation of the laws enacted by Parliament and the State Legislatures in the last 64 years since independence. However, in the last decade and half the Court has equally rejected PIL petitions on the grounds that some have been brought with vested interests and failed to indicate any public interest rather than publicity. In *B Singh v Union of India* in 2004³⁵³, the Court dismissed the petition with exemplary costs where the petitioner failed to show any motive to protect public interest other than publicity.³⁵⁴

It was after the Bhopal Gas disaster that the Court was swamped with petitions relating to environmental harms³⁵⁵ and the consequent deprivation of fundamental rights of an individual. This was due to the fact that the tool of PIL could be easily used after the precedent set by PIL cases involving the human rights of the poor and the powerless were decided, especially those relating to police brutality and administrative abuse, where action under PIL took care of the interest of the common public who had no access to judiciary and were largely unrepresented. According to Divan and Rosencranz the path for multiple number of petitioners affected by any environmental disaster was open and the Court began addressing environmental problems by looking at community rights instead of individual rights, and most of the time the approach adopted by the Court was proactive and pro-environment³⁵⁶. Secondly 'this type of litigation in the Supreme Court was characterised by being non-adversarial, pro bono and in the public spirit'.³⁵⁷ Further, apart from PIL and locus standi relaxation the Supreme Court also used its power under Article 142 to

the beautiful veil of public interest an ugly private malice, vested interest and/or publicity-seeking is not lurking.' Para 71 D–E.

³⁵³ AIR 2004 SC 1923.

³⁵⁴ Dattaraj Nathuji Thaware v State of Maharashtra, AIR 2005 SC 540.

³⁵⁵ Early cases involving environmental problems which were brought as PILs include *Janki Nathbhai Chhas v Sardarnaga Municipality* AIR 1986 GUJ 49; *Citizens Action Committee v Civil Surgeon, Mayo General Hospital* AIR 1986 BOM 136.

³⁵⁶ See Divan and Rosencranz, above n 72, 133–141.

³⁵⁷ Ibid.

mould its decisions in order to do complete justice. In the last two decades, PIL has become one of the most important tools of legal aid and has served to bring justice in many cases involving social and environmental concerns.

J Public Interest Litigation and Access to Environmental Justice

The tool of PIL has been used by many social activists and crusaders, including Mr Sunder Lal Bahugana, Medha Patekar, Almitra Patel and MC Mehta for social and environmental matters in which they have had some success.³⁵⁸ The strategy of social action litigation, or PIL, has been extended very naturally to environmental issues and has been a significant factor that has contributed to the development of environmental jurisprudence in India. In addition to the civil actions that are available to redress public grievances before the Magistrate's Court or the Civil Court under Section 91 and Order 1 Rule 8 of the CPC PIL provides a unique human rights approach to solving environmental and developmental issues through the provision of practical remedies and recognition of enforceable rights. Sathe observes that the new approach adopted under the PIL petitions changed the common law rules of locus standi and *stare decisis*, both common law features that have been uniquely modified under the public law rationale.³⁵⁹

Thus, by allowing such actions the Court has taken into consideration the public cause rather than looking at issues brought only as a matter between parties involved in the litigation,³⁶⁰ and that by providing remedies the Court is in effect showing the need to

³⁵⁸See 'Examining the Roles of MC Mehta, SunderLal Bahuguna, Almitra Patel and Medha Patekar as Environmental Activists' <<http://legalsutra.org/1425/examining-the-roles-of-mc-mehta-sundarlal-bahuguna-almitra-patel-and-medha-patkar-as-environmental-activists>>.

³⁵⁹See SP Sathe, above n 127; See also CM Abraham, above n 6.

³⁶⁰CM Abraham, above n 6, 32

depart from the principles of the common law system to develop a process of creative legislation.³⁶¹

24 Employing Public Interest Litigation for Environmental Justice

The PIL technique to provide access to justice and remedies has been variously used for the eradication of the child prostitution, the devadasi system and ‘jogin’ tradition³⁶² and for the rescue and rehabilitation, through various welfare measures, of prostitutes and their children.³⁶³ The Court has used the instrument of PIL for seeking relief against protection of the environment and the people’s right to natural resources,³⁶⁴ directing the Central Bureau of Investigation (CBI) to conduct investigation in allegations of corruption against public officials³⁶⁵, and also for the protection of independence of the judiciary.³⁶⁶ From the range of cases that the judiciary have decided it is clear that judicial activism has been the mainstay of liberalising the narrower constraints of common law rules and the flexible interpretation of public law tools has added to the development of environmental jurisprudence.

Thus, PIL has been used as a means to strengthen and provide access to justice to those citizens who were overwhelmed by their destitute status or burdened under the requirements of evidence. This creativity and innovation in the use of public law instruments by judges has allowed the petitioner to seek judicial action to remedy in

³⁶¹Clark D Cunningham, ‘Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience’ (1987) 29 *Journal of Indian Law Institute* 514–515.

³⁶²Vishal Jeet v Union of India AIR 1990 SC 1412.

³⁶³Gaurav Jain v Union of India AIR 1997 SC 3021; and Gaurav Jain v Union of India AIR 1990 SC 292.

³⁶⁴Subhash Kumar v State of Bihar AIR 1991 SC 420; ND Jayal v Union of India AIR 2004 SC 867; MC Mehta v Union of India AIR 1988 SC 1115; Rural Litigation and Entitlement Kendra v State of Uttar Pradesh AIR 1988 SC 2187; and Rural Litigation and Entitlement Kendra v State of Uttar Pradesh, AIR 1989 SC 594.

³⁶⁵MC Mehta (Taj Corridor Scam) v Union of India and Others 2007 AIR SCW 1025 and Vishwanath Chaturvedi v Union of India AIR 2007 SC (Supp) 163.

³⁶⁶SP Gupta v President of India AIR 1982 SC 149.

justice. This also reflects a pragmatic approach to delivering environmental justice to the people by the judiciary.

Desai and Murlidhar reiterate this point when they observe that the legal process had intimidated the litigant from coming to the court and until the 1970s had traumatised and alienated the people. However, through this mechanism it has provided an increased means for public participation in questioning the decisions of the government through the judicial process.³⁶⁷

From one point of view the traditional legal common law rules were always at variance with the Indian traditional culture, because of the belief that recourse to the courts was a last resort strategy after customary settlement through village elders, negotiations and other methods of dispute settlement had failed.³⁶⁸ The legal common law rules with British features thrust upon the Indian masses delineated that the courts play a passive role in public law matters.³⁶⁹ The courts were not supposed to intervene in policy matters or transgress upon the other organs of the government. In the changed scenario, with the liberalisation of standing requirements alteration in the traditional common law rules was necessary. Thus, under PIL the Court adopted a more inquisitorial role compared to its traditional adversarial role, and on occasion, the Court may choose an activist role; so much so that the Court may *sou moto* look into ‘complaints of human right rights violations, subversion of rule of law, disregard of environment and be proactive’.³⁷⁰

25 The Court’s Proactive Actions for Environmental Claims

³⁶⁷Desai Ashok and S Murlidhar in BN Kirpal et al (eds) *Supreme But Not Infallible* (Oxford University Press, 2000) 159.

³⁶⁸See W Menski, above n 22, 128.

³⁶⁹See Sathe, above n 98, 195.

³⁷⁰*Ibid*, 207.

In the proactive and green role the Court has adopted it has ordered the establishment of various commissions and expert committees to investigate complaints and obtain scientific data from government sources and NGOs in many environmental cases. For instance, in most of the MC Mehta cases, the Court has set up an expert committee to determine the veracity and extent of environmental degradation and fundamental rights violations.³⁷¹ The establishment of a commission to investigate these matters and collect scientific data has helped the petitioners where the petitioner and the affected persons have limited access to data. This procedural gathering of data and required information as ordered by the Court in the majority of environmental cases has helped to provide grounds on which the Court may proceed to make a determination.

This requirement changes the burden of proof requirements and is in stark contrast to the evidence required to prove injury to be present by the plaintiff in civil suits. Organisations like the National Environmental and Engineering Research Institute (NEERI), Council for Industrial and Scientific Research (CSIR), State University Science Departments, Forest Research Institute (FRI), Dheradoon, SPCB and independent NGOs like the World Wildlife Fund, Center for Science and Environment (CSE), Tata Energy Research Institute (TERI) among others have requested and been commissioned to provide scientific data in specific cases.³⁷²

However, one should note that despite the benign intention of the Court and a flexible approach to providing access to justice and the equally impressive cognisance that the Court has adopted, the enforcement of Court orders depend upon the language the Court has employed to have the wrongs righted. In other words, mere recognition of

³⁷¹The Court has utilised the provisions under the Constitution Article 142(2) read with Article 32 and Order XXVI CPC (1908) for the establishment of investigative commissions or committees. See also Desai and Murlidhar above n 149, 159.; J Razzaque, above n 70, 186; Sathe above n 98,207. See also MC Mehta *In the Public Interest: Landmark Judgements and Orders of the Supreme Court of India on Environment and Human Rights*, vol 1 (Prakriti Publications, LexisNexis, 2009) Chapter 1. .

³⁷²Geetanjoy Sahu, above n 73.

rights, acceptance of PIL petitions and establishment of expert bodies does not move the state machinery to actually right the wrongs or provide remedy.

The Court's language must provide a mandate in the order that gives directions to the administrative or private organisations to take swift action. For instance, a declaration and a mandate by Justice Kuldeep Singh in a vehicular pollution case in Delhi³⁷³ actually had the effect on the traffic and police departments to enforce the order directing all vehicles in Delhi to conform to compressed natural gas and unleaded petrol requirements.³⁷⁴ Consequently, as the Court had set a deadline to comply with its orders at the latest by autumn 2002, many people were inconvenienced due to the limited compressed natural gas supplies. However, in the long term the measure succeeded in reducing air pollution levels. The enforcement was actually monitored by the Court daily, and had the desired effect as since 2002 air pollution levels have decreased in parts of Delhi.³⁷⁵ Earlier directions in PIL and environmental cases by the Court had earned it the title of a 'political institution'.³⁷⁶ With extreme monitoring by holding everyday hearings in its Green Bench, the Court and the judges played a very significant and intimate role in the lives of the people of Delhi. Close monitoring of the relevant departments involved with vehicular traffic and air pollution control as well as political leaders reflected the serious attitude adopted by the Court. However, these actions by the Court have also earned criticism, both positive and negative,³⁷⁷ in

³⁷³See *MC Mehta v Union of India* 1998 8 SCC 206; *M.C. Mehta v Union of India* (1999) 6 SCC 12. Orders were given for the phasing out of old vehicles, permitting only those vehicles which conformed to Euro II norms at the time well into the year 2001.

³⁷⁴For the effects of the stringent attitude adopted by the Court in controlling air pollution in Delhi, see Preeti Saxena, 'Combating Pollution: Concern for All to Create Environmental Awareness', 2002 *AIR* (Journal) 75; Gill Geetanjali, 'Unheard Screams: Vehicular Pollution in Delhi' 2000 (22) *Delhi Law Review* 131.

³⁷⁵See the Report of the Delhi Transport Department <<http://delhigovt.nic.in/newdelhi/dept/transport/tr2.asp>>, See also the Ministry of Environment and Forest State of the Environment Report 2001 <http://moef.nic.in/soer/2001/ind_air.pdf> 97–113, Chapter 10.

³⁷⁶See generally George Gadbois, above n 93; Gerald Beller, 'Benevolent Illusions in Developing Society: The Assertion of Supreme Court Authority in Democratic India' (1983) 36(4) *Political Research Quarterly* 513–514; MP Dube, above n 85, 57–58, 81, Upendra Baxi, *Courage, Craft And Contention: The Indian Supreme Court In The Eighties* (NM Tripathi publications, 1985) 7–20.

³⁷⁷See generally Rosencranz and Jackson, above n 63. See also Chief Justice Balakrishnan speaking on the occasion of the DP Shrivastava Memorial Lectures in March 2010 on the role of the Supreme Court

that people feared that it would be too costly for both the Delhi Transport Corporation and private operators to buy compressed natural gas vehicles, thereby affecting the large number of people who depend on public transport.

The inconvenience and the hardship faced by the people did not go unnoticed by the higher judiciary. In fact, speaking on an occasion, ex-Chief Justice Balakrishnan commented on the role of the Court in environmental cases and remarked that sometimes judges must make unpopular decisions in order to pursue the long term objective of protecting the right to a clean environment.

26 Compensation Awards in Environmental Public Interest Litigations: Resorting to Tortious Remedy?

Under PIL cases the Court has also awarded monetary compensation in appropriate cases of violations of the right to life and personal liberties.³⁷⁸ It is argued that the change in procedural laws, the expansion of fundamental rights and the circumstances that arose out of the Bhopal tragedy have in parallel also provided for the modification of the common law and strict liability principle, especially in recognition of the parallel concept of constitutional tort.³⁷⁹ The award of compensation in PIL cases arises from judicial creativity and one can trace the underlying rationale similar to the award of damages under tort—mainly compensation justifying corrective and distribution justice explanations for the imposition of liability under common law. Such judicial directions for the payment of compensation and rehabilitation have often been the antidote for governmental apathy.³⁸⁰ However, the provision of

in environmental cases <http://supremecourtofindia.nic.in/speeches/speeches_2010/dp_shrivastava_memorial_lecture_20-3-10.pdf>.

³⁷⁸For instance, see *MC Mehta v Union of India*, AIR 1987 SC 1086; *AS Mittal v State of Uttar Pradesh* AIR 1989 SC 1570; *Consumer Education and Research Centre v Union of India* AIR 1995 SC 922; and *DK Basu v State of West Bengal* AIR 1997 SC 610.

³⁷⁹See PM Bakshi, 'Liability of the State in Tort', Final Report on Consultation Paper of the National Commission to Review the Working of the Constitution, Government of India, 2001, <<http://lawmin.nic.in/ncrwc/finalreport/v2b1-13.htm>>.

³⁸⁰See Chief Justice Balakrishnan, above n 161.

compensation for constitutional torts is to be treated differently than that of traditional tort litigation.³⁸¹ This is a development that is parallel to the evolution of the law applicable to actions in tort against the government.³⁸² Bakshi argues that this compensatory remedy under Article 32 is different from a traditional tort and ought to be viewed differently. He provides two main reasons for this distinction: first, the wrong complained of is not a tort in the traditional sense but a breach of the Constitution, hence the substantive law is different. Second, the forum is a different one as the victims approach the Court through writ jurisdiction that is confined to the higher judiciary and the CPC does not automatically apply to the writ jurisdiction. So although the violations are civil wrongs in seeking compensation they are civil wrongs under the Constitution.³⁸³ Consequently, in looking at the liability functions and objectives that tort liability deals with, even Constitutional torts for the violation of the virtual right to the environment adopts the corrective justice and reparative justice argument. Consequently, tort liability and public liability interconnect and overlap within the context of environmental rights violation.

Nevertheless, it is argued that the creation of a right to a healthy environment, whether by strategy or by design, has also seen a revival of traditional indigenous cultural beliefs and a combination of international environmental principles and instruments being adopted by the Court as part of domestic law even before they were legally ratified by the Parliament. This development is unprecedented, with this emerging trend providing a new twist to the public law rationale and marking the beginning of yet another trend being explored by the Court to do complete justice by exploring tortious compensation under a Constitutional mandate, including in cases involving environmental claims.

³⁸¹See PM Bakshi, 'Liability of the State in Tort' Final Report on Consultation Paper of the National Commission to Review the Working of the Constitution, Government of India, 2001 <<http://lawmin.nic.in/ncrwc/finalreport/v2b1-13.htm>>.

³⁸²Ibid.

³⁸³Ibid.

K Summary and Conclusion: The Court's Role in Making a Difference

The role played by the Court in developing a public law rationale for constitutional development and human rights jurisprudence is definitely instrumental in the evolution of India's environmental jurisprudence. This is despite criticisms of PIL and the overstepping of boundaries by the Court and its judicial lawmaking function. The role played by the Supreme Court in the recognition of a virtual right to the environment and recognition of constitutional torts is evident from the stages of evolution of such rights. Several academics and commentators have argued that 'frequent judicial interventions in this area have reduced the incentive for executive agencies to improve their functioning.'³⁸⁴ Environmental scholars also point to the fact that reliance on writ jurisdiction reduces the importance of ordinary remedies such as those of filing 'representative suits' (under the Code of Civil Procedure) and claiming damages for torts such as 'public nuisance'.³⁸⁵ The tool of PIL has been often used to settle personal scores and thwart planning and decisions by filing frivolous petitions. Divan and Rosencranz point out that environmentally sensitive decisions are made only by eco-sensitive judges and that there may be danger of earlier judgments being undone.³⁸⁶ Although there has been some theoretical criticism of the growing environmental jurisprudence through the techniques adopted by the Court, the recent decisions have resolved many controversies and provided relief to those whose rights, whether human, developmental or environmental had been unjustly entrenched.³⁸⁷ The Court has used the public law liability instruments to strike a balance between competing and conflicting interests and policies within

³⁸⁴ See for example, ex-Chief Justice Balakrishnan, above n 161.

³⁸⁵ See Rajamani Lavanya, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19 *Journal of Environmental Law* (2007) 293–321.

³⁸⁶ Divan and Rosencranz illustrate Justice Kuldip Nayyar's observation when he states that after Justice Kuldip Singh retired many of his progressive judgments have been questioned and undone; for instance, see the decision of the Court in *Jagannath v Union of India* (1997) 2 SCC 87 AIR 1997 SC 811, which was stayed by a Supreme Court bench as soon as Justice Singh had retired, see Divan and Rosencranz, above n 70, 495.

³⁸⁷ AIR 1985 SC 652. See also *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2417, *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC212; AIR 1996 SC 1446.

society. In deciding environmental cases the Court has reviewed extremely complex technical reports and sociological materials and provided guidelines and directions.

While all of these criticisms merit a meaningful debate, one must not fail to read how the judiciary has responded to the environmental crisis in India. Also, one cannot help but notice that the notion of legal rights in the common law tradition was primarily oriented around the idea of private property, which proved to be a limitation in solving environmental and development conflicts through private law mechanisms. An individual's concern under common law was more to protect his property rights through litigation, a method that was already too cumbersome and alienated litigants.³⁸⁸ Drawing an analogy from Sax one could argue that although the public and the community have a larger interest in the 'environment' with a legitimate stake at 'owning' the environment (as harm to the constituents of the environment for instance air, water, forests, destructive development impinges on the community interest) no one can practically appropriate it for her ownself, except perhaps for the state as an institution and in a limited manner.³⁸⁹ Sax posits that the unqualified overlap of private and public interests suggests that ordinary unqualified notions of ownership are not satisfactory for many objects (say for example, art, ethical and cultural interest) . Similarly one can argue that if an individual owns a forest or discovers a natural resource on her property and destroys that because she owns it and has absolute ownership that would cause an unrest in the larger community and have immediate repercussions from nearby residents dependent upon the forest but with no any legal recourse against such an individual or no reaction as the it was a private action. Laws of various countries recognizes this legitimate public private conjunction for protection of the environmental resources, when state as the sovereign owner of natural resources steps in. Consequently there is a general bar of absolute ownership and against destruction. Hence traditional notions of private property

³⁸⁸Sathe, above n 98, 205

³⁸⁹ See J Sax, *Playing Darts with a Rembrandt*, University of Michigan Press, 1999,9,10.

ownership can conflict with the conjunction of legitimate private and public interests. Hence for environmental considerations, since the 'right to a healthy and clean environment' is considered a public good and as private individuals are or have been less inclined to mobilise themselves to protect such public goods, it fell upon the either the Parliament or the judicial state organs within India too, to take appropriate action when public interest was at stake.

The judiciary took up cudgels to ameliorate the rights of not one individual, but of the masses, through the device of PIL and flexible interpretation of remedies under Article 32. This is precisely the turning point where the Court, when called on to weigh individual interests on the scales of social justice, chose to realise the aims and ideals through the tool of public law and moulded common law legal rules and, by design, ignored the limited remedy under tort and private law domain was restricted. Thus, in certain areas even within cases of vindication of environmental rights and harm to person and his or her property the overlap of civil liability and environmental has been narrow.

27 Recognition of Environmental Rights

Accordingly, as a person's right to a clean environment, air and water, conservation of forests and wildlife, as well as the reduction of pollution levels are vital components of public interest and social justice, the Court has adopted a pragmatic and multi-faceted approach to solving environmental problems and providing access to justice in the domain of environmental protection where civil suits and even statutory regulations has failed.³⁹⁰ Nevertheless, contrary to the criticism levied against

³⁹⁰For instance, in *Indian Council for Enviro-Legal Action v Union of India* AIR 1996 SC 1446 (toxic chemical sludge from factories leached into the ground and mixed with groundwater through the aquifers and caused injury not only human beings, but to water sources, cattle and the whole economy of the village) the Court held that the regulatory authority had not fulfilled their tasks of mitigating the environmental damage and were lacking in proper enforcement of the environmental law (both under the Environmental Protection Act 1986, s 5 and the Air Pollution Control Act 1981, Hazardous Waste Management Rules (1989) under the EPA).

common law remedies, the strict liability doctrine under *Rylands v Fletcher*, which had been modified in the Oleum gas leak case, has been rejuvenated in recent cases. As a turning pointing, resorting to the remedy under tort law in the *Bichri* case the Rajasthan High Court held that:

[I]f an enterprise which is engaged in a hazardous or inherent(ly dangerous) industry which posses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas, it is an absolute and non-delegable duty to the community to ensure that no harm to any one on account of hazardous or inherently dangerous nature of activity which it has undertaken. ...the enterprise is strictly and absolutely liable to compensate all those who are effected by the accident and such liability is not subject to any of the exceptions as laid down in tortious principles of strict liability under the rule laid down in *Rylands v Fletcher*. The law laid down in the case of Oleum Gas leak case (MC Mehta v Union of India and Others) is also applicable in the present case ... and the industries (Respondent No. 4–8) are absolutely liable to compensate for the harm.³⁹¹

The Court agreed with the decision of the High Court in respect to paying compensation to the villagers, compensation for the damaged land and in imposing costs for remedying the polluted area and legal costs against the NGO which had petitioned the Court under Article 32.³⁹²

28 A Liberalised Public Law Process for Environmental Claims

From the above discussion one concludes that through the use of public law instruments and the activist judiciary environmental law jurisprudence in India has evolved a new paradigm reflecting a liberalised public law process and mixed liability

³⁹¹Para 4.

³⁹²The Council was awarded 50,000 INR as costs for fighting the case on behalf of the villagers of Bichri, see AIR 1996 SC 1446.

approach for vindication of environmental claims. However, there have been only a few groundbreaking environmental decisions after the 1990s. In this new impasse that the Court faces in enforcing environmental laws and providing access to justice and making the citizens privy to better public participation through use of public law instruments the Court has started exploring whatever advantage it can obtain from tort law remedies. The Court has attempted to explore and rejuvenate the tortious remedies and this aspect is discussed further in the next chapter. The Court has not only kept in mind the economic incentive theory, corrective justice functions but also taken into account distributive and punitive features by exploring and adopting international environmental principles such as PPP, SD, PCP and PTD. At first implicitly, and then directly, the Court has internalised international principles into domestic municipal law to provide justice. This aspect is explored in the next chapter by examining significant environmental cases and analysis of judicial reasoning and a critique of the existing theoretical gaps.

29 Conclusion

The development of environmental law under the public law instruments has overlooked a very important function that tort law can perform within the contemporary and rapidly growing social and economic scenario in India. Along with the population, economic growth, standards of living, poverty indicators, workforce, industrial and economic activities have all increased significantly compared to the period of the 1950s to the 1970s and post-emergency 1976. The current economic policy has provided the nation with a gross domestic product of 8–9 per cent annually (2010–2011) and established India as a competitor and one of the leading developing nations.

According to the latest figures, India is forecasted to be among the world-leading economies in terms of gross domestic product by the year 2025.³⁹³ Yet in the prevailing scenario, constitutional development, interpretation of fundamental rights and duties and regulatory control have reached a plateau with respect to environmental issues. If one examines the judicial approach in cases involving environmental disputes one can conceptualise three categories and phases of judicial approach adopted by the Court during the course of development of the new Constitutional rationale. In the first phase, the Court has adopted a positive stance, which was 'pro-developmental projects'.³⁹⁴ In this phase, the Court stressed the importance, need and potential benefits of an industrial enterprise or activity and the need for development. In the second phase, the Court has shown restraint and chosen to defer to the determinations made by executive agencies and experts with regard to the environmental feasibility of a project. In the third phase, the Court has subjected administrative decisions to a rigorous judicial review, wherein judges have scrutinised the environmental impact of particular activities. Apart from the Constitutional developments that provided legal standing and the modified principles of *stare decisis*, the judicial interventions in the establishment of expert committees, *amicus curiae* services and providing standing to public-spirited NGOs have proven to be a valuable asset.

The judicial activism in procedural law and substantive law has significantly influenced the environmental liability framework, and evolved one that reflects a multifaceted approach. It can be argued that the Court has adopted and utilised certain corrective justice and reparative justice functions of tort liability that overlap with the compensatory and deterrent objectives of environmental law in order to provide remedies to environmental claimants and vindicate environmental rights. It is also

³⁹³See Prime Minister Manmohan Singh's statement, 'India Can Potentially Have the Third Largest GDP by 2025' *Economic Times* 22 August 2011 (online) <<http://economictimes.indiatimes.com/news/economy/indicators/india-can-have-third-largest-gdp-by-2025-pm-manmohan-singh/articleshow/9695441.cms>>.

³⁹⁴Ex-Chief Justice Balakrishnan on the role of the Supreme Court in environmental cases, above n 159.

demonstrated that tort law liability can be used as an effective tool for vindication of environmental claims in India within the wider framework of the current environmental liability regime. Yet one cannot fail to observe that the manner in which environmental jurisprudence has evolved through public law has been piecemeal. It reflects gaps that are now being supplemented by use of tort law functions. It works in a manner that is not efficiently equipped to deal with numerous environmental issues- whether class or on individual levels. The judicial review mechanism and the constitutional interpretations have only been done on case to case basis and as and when the need arose. Consequently this development has given rise to a limitation within the public law liability regime which does not provide to an individual victim of environmental damage any clear path or strategy to pursue or invoking her legal rights and claiming for redressal of injury. In such a situation if tort law procedure under the civil liability regime is clearly defined then it can positively fill the gaps in public law liability while addressing environmental justice claims at all levels. It is argued that the new trend by the judiciary of invoking tort law functions reflects the utility of how tort law can provide a supplementary role in certain situations within the overall environmental law framework.

Thus the overall contemporary approach within the wider environmental law framework for redressing claims for environmental injustice is indicative of an interconnectedness of various legal liability regimes. This overlap, interconnection and separation of functions and objectives is also evident in specific environmental regulations. The next chapter examines the public law tools under significant specific environmental regulations and cases that have extended the liability domain by the domestication of international environmental norms and provided a narrow, but specific, niche for the application of corrective and reparative justice functions under tort liability.

VI CHAPTER SIX: REGULATORY TOOLS FOR ENVIRONMENTAL LIABILITY AND THE ROLE OF TORT

A Introduction

The last chapter explored the public law tools and the constitutional rationale that has been applied by the Supreme Court to cement the progression of environmental justice in India through the device of PIL. It also reflected how the public law rationale, based on the Constitution, has modified the common law approach. This chapter further explores the nature of the regulatory mechanisms employed to abate environmental pollution and provide access to environmental justice. It critically analyses specific legislation that has been introduced within the last three decades in the major environmental media where pollution needed to be regulated, such as water, the air and the environment generally.¹ It also explores the features of the newly introduced NGTA 2010 that recognises environmental harm and damage and provides a right to claim compensation for harm to the person and to a person's property. The NGTA also provides statutory recognition to the principle of Sustainable Development(SD), the Precautionary Principle(PCP) and the Polluter Pays Principle (PPP), which had earlier been internalised by the Supreme Court as law of the land. The second part of this chapter critiques the significant environmental cases in two phases: the domestication of international law principles, and lessons learnt from the Bhopal litigation. The third part of this chapter explores the re-emergence of tort law principles in recent Court judgments to fill the supplemental gaps in public law and regulatory laws while dealing with environmental cases. This

¹See generally Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials, and Statutes*, 2nd edn (Oxford University Press, 2001) Chapters 1 and 2; CM Jariwala, 'Changing Dimensions of Indian Environmental Law' in P Leelakrishnan, NS Chandrasekharan and D Rajeev (eds) *Law and Environment* (Eastern Book Co, 1992) 1–25.

study reflects how the evolution of Indian environmental jurisprudence has progressed through the interpretation of the Constitution, the role played by the Supreme Court in recognition of a virtual right to the environment and recognition of constitutional torts. This chapter reflects on the extent of utilisation of tort liability as a tool to address environmental damage claims and deal with environmental justice.

B Environmental Regulation in India

As mentioned in the earlier chapters, in accordance with the recognition accorded to SD and environmental protection at the international level, various ruling parties² in India also took steps to initiate piecemeal legislation through the 1970s and 1980s for regulating pollution in media such as water, air, forests, wildlife and the environment.³ However, the regulatory laws were found to be inadequate⁴ and with developmental pressures and poor implementation of the minimal sanctions under the statutes, the pollution laws provided little direction for environmental protection or protection of the people. Laws controlling water and air pollution, and the earlier laws with respect to the utilisation of forests and wildlife resources, reflected exactly that; utilisation, through licencing control for developmental purposes, and lacked specific

²Concern for environment was included within the major political parties' manifestos, see *Report of the Committee for Recommending of Legislative Measures and Administrative Machinery for Ensuring Environmental Protection* (Tiwari Committee Report) (Department of Science and Technology, Government of India, 1980) 2 and Annexure I-1, 51.

³Areti Krishna Kumari, 'Evolution of Environmental Legislation in India' (January 2007) <<http://ssrn.com/abstract=956228>>.

⁴See *Indian Council for Enviro-Legal Action v Union of India* (2011) 8 SCC 161, per J Dalveer Bhandari, commenting upon the utter disregard of the process of law and the systemic defects that can be seen in the regulatory mechanisms and its enforcement, paragraphs 1 and 3. This case is a most unusual one. The litigation began in 1989 and was kept alive until 2011, even when the Supreme Court passed final judgment in 1996 holding that the chemical industry that had led to pollution of groundwater leaving the surrounding village in a state of extreme toxicity, damaging the environment, cattle and human health, and ought to pay damages for restoration of the village environment and violation of the provisions of the Water (Prevention and Control of Pollution) Act 1974 [Water Act] and Air (Prevention and Control of Pollution) Act, 1981 [Air Act]; See also *MC Mehta v Union of India* 1987 1 SCC 395 (Shriram gas leak case) where the Court, finding no appropriate law for handling of victim claims against hazardous material, resorted to application of the common law rule of strict liability under *Rylands v Fletcher* (1868) LR 3 HL 330; Similar observations on the lack of appropriate laws and dismal enforcement of regulatory laws can be discerned from the judgment in *RLEK v State of Uttar Pradesh* AIR 1985 SC 651 (Doon Valley litigation) and Ganga pollution cases and the various orders made by the Supreme Court under it.

policy objectives⁵ for the protection of the environment or the people within it. These laws also lacked procedures for reviewing their efficacy and were devoid of clear social aims that ought to have been reviewed and changed after independence.

Singh observes that most of the legislation with respect to natural resources in India was a command and control of utilisation of resources, at variance with traditional indigenous and cultural beliefs and without taking into account the interests of the people who had actually originally owned those resources, such as the forest communities or the indigenous people who were dependent upon these resources for their life or livelihoods.⁶ The colonial laws did not reflect the indigenous culture and the knowledge of nature and utilisation of resources that respected the integrity of nature, as pointed out by Krishnamurti and Schoettli.⁷

Environmental activists such as Shiva observed that the laws remained largely, 'ethically, economically and epistemologically incongruent'.⁸ By the 1980s there were over 200 laws relating to some aspect of environmental protection⁹ and the major political parties incorporated developmental planning and environmental issues within their manifestos; however, as the Tiwari Report (Report of the Committee for Recommending Legislative Measures and Administrative Machinery for Ensuring Environmental Protection (Tiwari Committee) 1980 reveals, statutory environmental protection in India had no clear social objectives and most of the laws were versions

⁵See the *Tiwari Committee Report*, above n 2, 27–28.

⁶See generally Chhatrapati Singh, *Law From Anarchy to Utopia: An Exposition of the Logical, Epistemological, and Ontological Foundations of the Idea of Law, by an Inquiry into the Nature of Legal Propositions and the Basis of Legal Authority* (Oxford University Press, 1986) 95–117; C Singh, *India's Forest Policy and Forest Laws* (Natraj Publishers, 2000) i–v, iv; See also C Singh, *Common Property and Common Poverty: India's forests, Forest Dwellers and the Law* (Oxford University press, 1986).

⁷BV Krishnamurti and Urs Schoettli, 'Environment in India's Religious and Cultural Heritage' in J Bandyopadhyay, *India's Environment: Crises and Responses* (Natraj Publishers, 1985) 159–171.

⁸Vandana Shiva, 'Decolonising the North' in María Mies and Vandana Shiva, *Ecofeminism* 4th edn (Fernwood Publications, 1993).

⁹For a commentary on regulation of environmental laws in India, see Divan and Rosencranz, above n 1.

of earlier existing laws that promoted development and resource utilisation rather than conservation, preservation and protection of the environment through SD.¹⁰

This section briefly examines the framework of the three major environmental pollution laws: the Water (Prevention and Control of Pollution) Act 1974, the Air (Prevention and Control of Pollution) Act 1981 and the Environmental Protection Act 1986 and their amendments after 1986 to determine the scope and rationale on which these laws were enacted and the premise on which they operate. It is of course important to consider their overall objectives within the scheme of public law control and legal liability objectives within the area of environmental jurisprudence.

C Nature of Regulatory Environmental Protection Instruments:

Ideology and Rationale

Literature on the scope, functioning and objectives of the environmental protection laws illustrates that the regulatory mechanisms for environmental protection and natural resources utilisation in India are based on outdated colonial laws for the use and extraction of natural resources, mirroring the earlier Anglo-American approach of command and control laws, including penal sanctions.¹¹ Vogel and Dwyer argue that most of the environmental protection regulations failed to achieve their objectives as these laws were applied with a narrow focus backed with criminal sanctions.¹² The earlier Western-type regulations for the control and utilisation of resources did not envisage a wholesome strategy based on SD and integrity of nature argument as

¹⁰*Tiwari Committee Report*, above n 2; See OP Dwivedi and B Kishore, 'Protecting the Environment from Pollution: A Review of India's Legal and Institutional Mechanisms' (1982) 22(9) *Asian Survey* 894.

¹¹See CM Abraham and Armin Rosencranz, 'An Evaluation of Pollution Control Legislation in India' (1986) 11 *Columbia Journal of Environmental Law* 101; Sheila Jasanoff, 'Managing India's Environment' (1986) 26 *Environment*, 12; See also P Leelakrishnan, *Environmental Law in India*, 3rd ed (Lexis Nexis Butterworths, 2008) Chapters 6 and 7.

¹²See generally David Vogel, *National Styles of Regulation: Environmental Policy in Great Britain and the United States* (Cornell University Press, 1986). See also John P Dwyer, 'Contentiousness and Cooperation in Environmental Regulation' (1987) 35 *The American Journal of Comparative Law* 809.

envisaged within the ancient indigenous cultures. The period of 1960 to the 1970s in the common law world saw a spate of regulations and has been described variously as a regulatory legal culture in most common law jurisdictions.¹³ The command and control type of environmental regulation provides a compliance system for socio-legal control.¹⁴ It provides a conciliatory style of enforcement but is backed with criminal sanctions.¹⁵

To evaluate these issues correctly one must examine the application of tort law by drawing examples from common law jurisdictions such as the UK and the US for comparison to determine the boundaries within which tort liability operates. In England, in contrast to the earlier state-imposed sanctions, the new regulatory paradigm for the environment operates based on a conciliatory style that is different from the traditional penal sanctions in its techniques and operational philosophy.¹⁶ In this newer form of environmental regulations in England, the emphasis has been to achieve functional efficiency for social and economic purposes rather than punishment for offenders.¹⁷ The laws provide a wide discretion to the enforcement authorities to use constitutional and moral values in making decisions with respect to environmental matters.¹⁸ Similarly, with the enactment of the Comprehensive Environmental Response, Compensation and Liability Act in 1980 in the US, the laws

¹³CM Abraham, *Environmental Jurisprudence in India* (Kluwer Law International, 1999) 62–63; See also Errol Meidinger, 'Regulatory Culture: A Theoretical Outline' (1987) 9 *Law and Policy* 355; Robert A Kagan, *Regulatory Justice: Implementing a Wage-Price Freeze* (Russell Sage Foundation, 1978); Stephen G Breyer, *Regulation and its Reform* (Harvard University Press, 1982); Alan Stone, *Regulation and its Alternatives* (Congressional Quarterly Press, 1982); Jerry L Mashaw, 'Bureaucratic Justice: Managing Social Security Disability Claims' (Yale University Press, 1983) as quoted in Abraham, above n 13, 63.

¹⁴Donald J Black, 'Social Control as a Dependent Variable' in Donald Black (ed), *Toward a General Theory of Social Control: Fundamentals* (Academic Press, 1984).

¹⁵Keith Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Pollution* (Clarendon Press, 1984).

¹⁶Robert Baldwin, 'Why Rules Don't Work?' (1990) 53 *Modern Law Review* 321; see also Hawkins, above n 15.

¹⁷Baldwin, above 'Why Rules Don't Work?' (1990) 53 *Modern Law Review* 321, reviewing what methods factory inspectors adopt under the UK Health and Safety at Work Act 1974.

¹⁸David Fieldman, 'Review Article: Discretions, Choices and Values' (1994) *Public Law* 279; Robert Baldwin and Hawkins Keith, 'Discretionary Justice: Davis Reconsidered' (1984) *Public Law*, 570; Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969).

for environmental management reflect a shift in the regulatory paradigm that is based on market-oriented risk management and retroactive liability.¹⁹

1 *Fault in Regulatory Design*

The market-oriented approach with the provision of incentives, price control taxes and tradable pollution rights has been explored by other countries to provide better operational strategies to their environmental regulatory regimes in Europe, for example, in the Netherlands.²⁰ While examining the extent that civil liability is being used as a tool to address environmental damage claims and deal with environmental justice, it appears that in India, uncoordinated over-regulation seems to have thwarted rather than encouraged the protection of the environment and served short-term political strategies. This has been reiterated by the Indian Supreme Court in several recent cases, when the Court has lamented the fact that environmental regulatory mechanisms work inefficiently.

In the *Indian Council for Enviro-Legal Action v Union of India*²¹ decided by the Court in 1996, the Court, in its activist role, commented on the deplorable implementation and the increasing number of cases of environmental pollution and violation of regulations such as the Water, Air and the Environmental Protection Acts, and recommended the establishment of specialised environmental courts to deal specifically with environmental matters and compliance with laws. Giving the judgment of the Court, Justices BP Jeevan Reddy and BN Kirpal observed that:

¹⁹See CERCLA 1980, (42 USC ss9601–9675); See also the US Superfund Amendments and Reauthorisation Act 1986 Pub Law No 99–499, 100 US Statutes 1613; For a detailed discussion see Kihan Lee, ‘The US Comprehensive Environmental Response, Compensation and Liability Act—EPA’s Policy and Implementation’ (1993) 21 *Korean Journal of Comparative Law* 171; Adam Babich, ‘Restructuring Environmental Law’ (1989) 19 *Environmental Law Reporter* 10057.

²⁰Lucas Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context* (Kluwer Law International, Netherlands, 2001) Chapter 3.

²¹AIR 1996 SC 1446.

The experience shows that the prosecutions launched in ordinary criminal courts under the provisions of the Water Act, Air Act and Environment Act never reach their conclusion either because of the workload in those courts or because there is no proper appreciation of the significance of the environment matters on the part of those in charge of conducting of those cases. Moreover, any orders passed by the authorities under Water and Air Acts and the Environment Act are immediately questioned by the industries in courts. Those proceedings take years and years to reach conclusion. Very often, interim orders are granted meanwhile which effectively disable the authorities from ensuring the implementation of their orders.²²

The ideology and the rationale of the Anglo-American model of environmental regulation have been critically scrutinised by Western academics to reveal ‘contentiousness and cooperation’, and non-functionality and inefficacy of environmental regulations within the UK and US.²³ Moreover, tools used for economic and market regulation such as incentives, cost-benefit ratios, price control, monopoly trade practices²⁴ have also been incorporated within environmental regulation, the pros and cons of which have also been a heated topic of discussion in the West.²⁵ Reforms in newer models for environmental regulation reflect economic

²²Indian Council for Enviro-Legal Action AIR 1996 SC 1446, 1465.

²³See Vogel, above n 12. See also J. Sax, *Playing Darts with a Rembrandt*, (University of Michigan Press, 1999)..

²⁴Richard Posner, ‘Natural Monopoly and its Regulation’ (1969) 21 *Stanford Law Review* 548, 625–635.

²⁵See Bruce A Ackerman and Richard B Stewart, ‘Reforming Environmental Law: The Democratic Case for Market Incentives’ (1988) 13 *Columbia Journal of Environmental Law* 171; Richard B Stewart, ‘Controlling Environmental Risks Through Economic Incentives’ (1983) 13 *Columbia Journal of Environmental Law* 153; For an elaborate discussion on legal controls for environmental regulation including economic control tools, see Richard B Stewart, ‘Economics, Environment and the Limits of Legal controls’ (1985) 9 *Harvard Environmental Law Review* 1; Howard Latin, ‘Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and ‘Fine-Tuning’ Regulatory Reforms’ (1985) 37 *Stanford Law Review* 1267; See also Abraham, above n 13, 63, Footnotes 14-17.

concerns,²⁶ incentives and disincentives and taxes in order to control and prevent pollution.

From a review of the literature and academic writing it is discerned that the use of sophisticated techniques of economic incentives and wealth maximisation has been able to shift the perception of regulatory environment only minimally and that this is still gradually evolving.²⁷ As has been pointed out above, the environmental regulatory laws in India maintained the command and control penal style of socio-legal control for a long time that was unenforceable and did not reflect the constitutional or moral values, the market requirements or socio-economic considerations. However, the operation of such regulatory laws through state organs, even with threat of sanctions does nothing to further the objectives of control, prevention, precaution, protection and compensation. This has resulted in gross injustice and violation of fundamental rights and destruction of the environment. The regulatory laws that have been enacted have thus failed to achieve their basic purpose (although laudable) due to failure of procedural as well as functional strategies which were dysfunctional from the very beginning.

D The Indifference of Regulators in Enforcement

The recent decision in the *Bichri* case provides food for thought as to how the Court has utilised not only regulatory and constitutional functions but also tort liability and objectives as an effective tool for the vindication of environmental claims in India within the wider framework of the current environmental liability regime. The

²⁶Rita Pandey, 'Economic Policy Instruments for Controlling Vehicular Air Pollution' (2004) 9 *Environment and Development Economics* 47.

²⁷For example, in the US one instance is provided by the 1977 Clean Air Act, 42 USC 7401, which introduced the limits fixed by the regulation for ambient air quality standards and tradeable pollution rights. However, authors like Sagoff and Dworkin have criticised the economic incentive approach most severely; See Mark Sagoff, *The Economy of the Earth: Philosophy, Law, and the Environment* (Cambridge University Press, 1988); Ronald M Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 237–266.

inefficiency of the enforcement of the weak regulatory laws is evident in the most recent case decided by the Court in 2011 where a group of chemical industries having a strong lobby within the state department stalled legal proceedings against them and dragged the case in the Supreme Court for over 20 years before the Supreme Court took a stern action. In *Indian Council for Enviro-Legal Action v Union of India(Bichri II decision)*, decided on 18 July 2011. the Court imposed punitive and exemplary damages in an environmental protection case on the respondent for abusing the judicial process for earning undeserved gains or unjust profits. The applicant industry was directed to pay Rs 37.385 crores (over USD 8 million) along with compound interest at 12 per cent per annum from 4 November 1997 as compensation to the government until the amount was paid or recovered. The Court also directed the respondents to pay punitive costs of Rs.10 lakhs (approximately USD 25,000) in two interlocutory applications which had been filed under the writ petition that was launched by an environmental organisation as a PIL under Article 32 in 1989. The Court based the judgment and justified the imposition of punitive and exemplary damages based on the principle of restitution under tort. The amount of damages required from the respondent was restorative compensation allocated to the government to be utilised for carrying out remedial measures in the village Bichri and surrounding areas in Udaipur District of Rajasthan.

The significant point to note from the decision such as Bichri is towards a reorientation of the Anglo-American model mixed with unique Indian characteristics. It illustrates the conjunction of public interests and private interests within the environmental dispute field, It also demonstrates the Court's design in shaping remedies and environmental jurisprudence while resolving the dispute.,Such an approach has provided a new path for use of regulatory tools in conjunction with restorative, economic and distributive justice functions of tort law in India. The economic incentive and market-oriented risk management approach has also been adopted slowly within the Indian environmental regulatory regime. To some extent it is reflected in the amendments to the major environmental laws and the decisions by

the Court in PIL cases. A recent regulation in December 2011 introduces a levy of INR 50–100 on vehicle owners entering crowded marketplaces in order to reduce air pollution in Delhi.

E Brief Overview and Critique of the Water (Prevention and Control of Pollution) Act 1974 and the Air (Prevention and Control of Pollution) Act 1981

After the Declaration of the United Nations Conference on Human Environment, (Stockholm Declaration) in 1972²⁸, the central government initiated the first significant legislation to prevent and control water pollution in India in 1974. The process required a resolution from all existing states as under the Constitution the division of powers between the States and the Centre allocated legislation over water under the state list.²⁹

²⁸U.N. Doc. A/CONF.48/14/Rev.1 (1972) reprinted in 11 I.L.M. 1417 (1972). See Divan and Rosencranz above n 1, 31–33, 43–47. The Stockholm Declaration was amongst the first international conventions which encouraged state parties to negotiate treaties in the environmental field, placing emphasis on the ‘first generation’ environmental problems and efforts to protect and improve the human environment and combat air, water and soil pollution arising from developmental and industrial actions, under-development and poverty. It encouraged members of the UN to preserve the world’s natural resources calling on all countries both developed and developing to carry out this goal. In response to the Stockholm declaration in India participated, the Parliament using its power under Article 253 introduced the Water (Prevention and Control of Pollution) Act 1974 and the Air (Prevention and Control of Pollution) Act 1981 and later on the EPA (1986). See Divan and Rosencranz, *ibid*, 47.

²⁹The Constitution enumerates three lists: the Union, the State and the Concurrent List reflecting the division of legislative power. Under Article 246, the Parliament has power to enact laws under the Union List (List I of the Seventh Schedule to the COI) which consists of 100 entries including subjects of national importance such as defence, railways, post and telegraph, industries, mines and minerals, natural resources. The State legislatures deal with matters under the State List (List II) which consists of 66 subjects of local interest such as water, aquaculture, fisheries, the distribution of river water, industries that do not fall under List I, the regulation of mines and minerals development not under List I, health, sanitation and local government functions. The Concurrent List (List III) has 47 subjects important to both the Union and the State such as electricity, trade unions, economic and social planning, forests, wildlife, oil, petroleum, cotton, jute, sugar (products declared to be of national importance and public interest); see Mahendra Pal Singh and Vijaya Narain Shukla, *VN Shukla’s Constitution of India* 11th edn (Eastern Book Company, 2008); See also Robert L Hardgrave and Stanley A Koachanek, *India: Government and Politics in a Developing Nation* 7th edn (Thomson/Wadsworth, 2008) 146.

2 The Water Act

The Water Act was passed by the Parliament under Article 252 of the Constitution after all existing state legislatures passed resolutions to that effect, giving their consent for the Parliament for such regulation.³⁰ The aims and objectives of the Water Act enumerated the purpose—a regulatory means for the prevention and control of water pollution and for establishing a Central Water Pollution Control Board and SPCBs that would function as the administratively designated authorities to carry out the objectives of preventing and controlling water pollution and for maintaining or restoring the wholesomeness of water in the country.³¹ It lays down a system of consent whereby no industry or operator process or any treatment and disposal system can be established without the consent of the State Board.

The Water Act also provided a wide definition for water pollution, *inter alia*, as contamination of water, alteration of its physical, chemical or biological properties by discharge of sewage and trade effluents (directly or indirectly), any kind of discharge of liquid, solid or gaseous substances that may create a nuisance or harm or injure public health or safety, any agricultural, industrial or other legitimate use that may be

³⁰Under the Constitution, Article 252 empowers the Parliament to legislate on certain matters even where there is no provision under the Union List for Parliament to legislate upon. This happens when two or more States desire that a matter be regulated by the Parliament and the Houses of the State Legislature pass a resolution to that effect. Such legislation is then applicable throughout the States and other States may later adopt the same law through a legislative resolution. Article 252 provides, *inter alia*, that (1) if it appears to the Legislature 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 Article 250 should be regulated in such States by the 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 in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature in that State'. Resolutions were passed in 12 Houses of Legislatures of the States of Assam, Tripura, West Bengal, Bihar, Karnataka, Kerala, Madhaya Pradesh, Gujarat, Rajasthan, Haryana, Himachal Pradesh and Jammu and Kashmir to the effect that matters connected to control of pollution and prevention of pollution ought to be regulated by an Act of the Parliament, the Water Act 1974 was enacted under Article 252.

³¹Water Act 1974, Aims and Objectives, Section 1; Air Act 1981, Aims and Objectives, Section 1.

harmful to the life and health of animals, plants or aquatic organisms.³² The Water Act operates on a permit and consent system (consent to establish and consent to operate) which is administered and operated by the Board. The effluents discharged by an industry are regulated through this consent/permit issued by each State Board under Sections 24 and 25. The State Board may also attach conditions for the operations by the industries and failure to comply with the permit or the conditions attracts criminal penalty.³³

3 The Air Act

Similar to the provisions of the Water Act, the provisions of the 1981 Air Act followed the same approach and provided for establishment of Central and State Control Boards. It delineated the functions, powers and scope of the Boards and a permit and consent system for the operation of industrial concerns and permit system for operations that would affect the atmosphere in and around areas of designated activity. Under Section 2(a) the Air Act defines ‘air pollutant’ as ‘any solid, liquid or gaseous substance (including noise³⁴) 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.’ The Air Act designates air pollution areas and regulates the control of vehicular emissions providing for use of unleaded fuel for private and public vehicles operating in urban areas.³⁵ Under Section 21 all industrial operations

³²Section 2e Water Act 1974 as amended in 1988. The enactment history of the Water Act has been earlier discussed in a report on the state of India’s environment in Anil Aggarwal and Sunitha Narain, *The State of India’s environment, 1984–85: The Second Citizens’ Report*, 3rd edn (Center for Science and Technology, 1985) 344.

³³For a critical analysis of the Water Act 1974, see PS Sangal, ‘Water Pollution Control Laws: A Critical Analysis’ in Paras Diwan and Peeyushi Diwan (eds), *Environment Administration, Law and Judicial Attitude* (Deep and Deep Publications, 1992) 211–239; M Krishnan Nair, ‘Law for Prevention of Water Pollution’ in Diwan and Diwan, above n 33, Chapter 24; Prem Verma, ‘Efficacy of Water Pollution Laws’ in Diwan and Diwan, above n 33, Chapter 26; MR Garg and NS Tiwana, ‘The Water (Prevention and Control of Pollution) Act: A Case for Amendments to Make it More effective’ in Diwan and Diwan, above n 33, Chapter 27; See also Desai Bharat, ‘Some Strategies for Combating Water Pollution: An Indian Experience’ (1987) 27 *Indian Journal of International Law* 63.

³⁴Inserted under the Air (Prevention and Control of Pollution) Amendment Act, 1987.

³⁵The Act provides for the setting up of Central and State Boards for the Prevention and Control of Air Pollution; however, Section 4 of the Act stipulates that in any State in which the Water (Prevention and

such as the manufacture of cement, asbestos, chemical fertilizers, pharmaceuticals, organic chemicals, textiles, pesticides, dyes, storage, transport and usage of petroleum products operate based on a permit system issued by respective State Control Boards.

4 Amendments Under the Acts and the Critique

Certain important provisions were added to the Water and Air Acts in 1987 and 1988 in order to make the Acts effective and to mirror in some part the objectives under the EPA of 1986.³⁶ However, once again under the amendment the broad powers of the SPCB under Sections 24 and 25 of the Water Act and Section 21 of the Air Act to provide ‘consent to operate’ and ‘consent to establish’ were hardly ever exercised, neither did the State Boards initiate any serious prosecutions against errant polluters for violating these acts.³⁷ Among other reasons, the primary reasons for not taking legal action or prosecutions included time constraints, budget cuts, lack of trained staff and officers, lack of resources and infrastructure for setting up research laboratories and the fact that a criminal complaint lodged in the criminal courts would take a long time to mature and overstretch the financial budget of the SCPB.³⁸ Sections 3–18 under both the Acts created an elaborate framework for the creation of administrative agencies providing for the structure, power and functions of the Boards.³⁹ However, the functions allocated to the administrative agencies under the

Control of Pollution) Act 1974 is in force and the State Government has constituted a SPCB, that State Board shall be deemed to be the State Board for the Prevention and Control of Air Pollution. For Union Territories the CPCB is empowered to perform the functions of a SPCB under the Act. The State Government, in consultation with their respective State Boards, is empowered to declare air pollution control areas. As per the provisions of the Air Act no person can establish or operate any industrial plant in an air pollution control area without obtaining the consent from the concerned State Board.

³⁶Water (Prevention and Control of Pollution) Amendment Act 1988; Air (Prevention and Control of Pollution) Amendment Act 1987.

³⁷See Abraham and Rosencranz, above n 11, 105.

³⁸Under the amended Sections 43 and 44, the State Board can file a criminal complaint for violation of Sections 24, 25, 7, and 26 of the Water Act; See also Abraham and Rosencranz, above n 11; Ramakrishna Kilparti, ‘The Emergence of Environmental Law in the Developing Countries: A Case Study of India’ (1985) 12 *Ecology Law Quarterly* 907.

³⁹Establishment of the Central and State Boards for Prevention and Control of Water Pollution (Sections 3–12), Joint Boards (Sections 13–15), Powers and Functions of Boards (Sections 16–18), Prevention and Control of Water Pollution (Sections 19–33A), Penalties and Procedure (Sections 41–50); Under the Air Act 1981 the scheme of the legislation is similar to that of the Water Act and

Acts were not conducive to developing and adopting better pollution control techniques.⁴⁰ The Boards functioned only as an advisory body under the Department of Environment, with the power to institute prosecutions but with no actual power of enforcement.⁴¹

As illustrated in the *Bichri* case a fine of INR 10 lakh under Sections 43 and 44 of the Water Act against the defendant company and a simple imprisonment of six months and a personal fine of INR 10,000 against the director of the company did not have the required deterrent effect on the polluting chemical factories in the region.⁴² The sentencing came too late, and in any case, the avenue of appealing the order of the magistrate under Section 374(3)(a) of the Code of Criminal Procedure before the sessions judge provided an escape, at least in so far as the defendant is on bail and not actually incarcerated. A further recourse against the sessions judge to uphold the conviction lies in a review of the criminal appeal order or a revision petition in appropriate circumstances to the High Court.⁴³ As much as the many benefits available under procedural laws, it also provides the potential for abuse through legal means. The resultant residue reflects an ill-functioning statute and manoeuvrability of the procedural laws without any heed for the protection of the environment or righting the wrongs done to the people or remedies for the harm done to the groundwater, cattle, grassland and ecology of an area.

provides for definitions (Section 2), establishment of Central and State Boards for Prevention and Control of Air Pollution (Sections 3–15), Powers and Functions of Boards (Sections 16–18), Prevention and Control of Air Pollution (Sections 9–31A) and Penalties and Procedures (Sections 37–46).

⁴⁰See N S Chandrasekharan, 'Structure and Functioning of Environmental Protection Agencies: A Fresh Look' in Leelakrishnan, Chandrasekharan and Rajeev, above n 1, 153–161.

⁴¹Leelakrishnan, Chandrasekharan & Rajeev, above n 1, 158–159.

⁴²See Indian Council for Enviro-Legal Action (2011) 8 SCC 161, Para 56, per J Dalveer Bahndari and HL Dattu, The conviction and sentence was upheld by the learned Session Judge, Udaipur, in its judgment dated 21 July 2005. Against the judgment dated 21 July 2005 of the learned Sessions Judge, the accused preferred Criminal Revision Petition No. 634/2004 before the Rajasthan High Court at Jodhpur. The Criminal Revision Petition is pending adjudication before the High Court of Rajasthan at Jodhpur.

⁴³See Sections 369, 397, 398, 561A and 482 of the CrPC.

More significantly, both the Acts did not provide for any public participation or public involvement or compensation mechanism for victims of pollution. The only remedy for an individual was to institute a criminal complaint for public nuisance so that a magistrate could take cognisance under the CrPC under Section 144 or a police complaint for violation of the provisions of the IPC or a civil suit for damages under Section 9 and 19 of the CPC when it is not barred specifically by a statute and when the wrong is to a person's property.⁴⁴ Under Section 9 of the Code of Civil Procedure, the jurisdiction of Civil Court with regard to a particular matter can be said to be excluded if there is an express provision or by implication it can be inferred that the jurisdiction is taken away⁴⁵. So far as the claim for damages for the loss suffered by people in the affected area is concerned, it is open to them or any organisation on their behalf to institute suits in the appropriate civil court.

Although there is no specific bar for an individual to institute a private action, the review of literature indicates only a few cases have been brought under the law of tort.⁴⁶ Moreover, the objectives of both the Acts were different from the objectives of a tort action, the former determined the scope of a preventive policy and standards which regulated polluters' behaviour and did not aim at providing a compensatory

⁴⁴Section 19 states that where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

⁴⁵Union of India v Sasi S AIR 1999 Ker 336; See Section 9 which states that the Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred.

⁴⁶Scholars like Galanter provide a critical insight into tort law development in India and differ in their views as to why tort law is not suited for environmental action within the Indian legal system; See Marc Galanter, 'Law's Elusive Promise: Learning from Bhopal' in M Likosky (ed) *Transnational Legal Processes: Globalisation and Power Disparities* (Butterworths-LexisNexis, 2002) 175–176; M, Galanter, 'The Displacement of Traditional Law in Modern India', (1968) 24 *Journal of Social Issues* 24,65..There is no mention of tort cases or application of tort law in Alan, Gledhill survey in 1951 A, Gledhill, *The Republic Of India: The Development of its Laws and Constitution* (1951) and only a passing reference to tort cases in MP Jain's Outline of Indian Legal History, 649-650, 657-658. No tort cases were brought in respect of mine caving, industrial explosion or other mass injury leading to tort claims see G, Wilson and M, Versallies' Empirical Research On Tort Cases in India from 1975-84 (JD student 1986, 1991, Univeristy of Wisconsin , Law School) in M Galanter, 'The Transnational Traffic in Legal Remedies', at

<http://marcgalanter.net/Documents/papers/TransnationalTrafficinLegalRemedies.pdf>

mechanism for people who were not the affected parties, i.e., the person aggrieved being that person who was denied a permit within the scheme of the Act by the Board.⁴⁷ And although Section 58 specifies that ‘no injunction shall be granted by any other court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by the Act’, procedural avenues under the criminal and civil procedure for second appeals, reviews, revisions do not help promote the cause of environmental justice. Additionally, this applies only to the affected persons under the Acts.

F Regulatory Law and Tort Liability

The exclusion of the public from participating in pollution control decision-making is significant as it delineates the role of the statutory regulation and makes its purpose different from the function that tort law performs—that of redress for a civil wrong. Thus the different objectives of the regulatory law provided a paradigm shift and a point of departure from the function that tort law serves to protect for an individual person and their property. The theoretical underpinnings of tort liability, those that are critical to designing a liability system for dealing with environmental harms, need to be understood in conjunction with other regulatory aspects to identify the objectives in both and their overlap. It is submitted that at this point although there was potential for the tort doctrine to develop within the environmental field, minimal or non-existent public participation or involvement in decision-making steered the development of environmental jurisprudence towards a constitutional remedy for seeking justice under the Constitution. This can be posited as another reason why the tort doctrine did not develop fully in comparison to other jurisdictions such as the UK or the US.

5 Minimal Use of Tort Liability for Public Concern in the Environment

⁴⁷See Section 58, Water Act and Sections 28 and 31 of the Air Act.

Thus, during the early development of environmental regulations and during the decade before Bhopal, the cumulative effects of a number of factors and practices that affect the bringing of tort claims and those that tort regulates, including research technologies, emerging fields of knowledge, bodies of experts and public perceptions of injury and assignments of responsibility⁴⁸ and even the provisions under the Acts, stunted the development of tort law doctrine for environmental damage. After the amendments to the Water and Air Acts in consonance with the provisions of the EPA of 1986⁴⁹ both the Acts provided a limited opportunity and means for public participation and involvement. Section 25(3) of the Water Act and Section 21 (3) of the Air Act empowers the Board ‘to make such an 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’. As people in and around a polluting industry are the ones who would be affected it is reasonable to expect that they ought to be consulted and be privy to basic information as to the nature, scope, operations and kind of harmful pollutants that an industry might release. Thus, in the public interest it is required that people should participate in all stages of the approval of consent to establish an industry. Unfortunately the provisions under the Act did not provide for such consultation,⁵⁰ and neither did it provide any guidelines for pollution officers to consult the people who might be affected and seek their opinion. Licence and consent to establish, alter or change products were given based on the verification by one or more officers who would visit the premises and make their reports.⁵¹

⁴⁸See Marc Galanter, ‘Makers of Tort Law’ (1999) 49 *DePaul Review* 559.

⁴⁹Various amendments were introduced in the Acts through which the Board (PCB) could also issue orders restraining or prohibiting an industry from discharging any poisonous, noxious or polluting matter in case of emergencies, warranting immediate action; PCB was empowered to make an application to the court for restraining likely disposal of polluting matter in a stream or on land. However civil liability was precluded in respect of any matter under purview of the Appellate Authority constituted under the Act.

⁵⁰For a critique on defects in the regulatory water, air and environmental laws; see Abraham, above n 13, 67.

⁵¹P Leelakrishnan, ‘Public participation in environmental decision making’, in Leelakrishnan, Chandrasekharan and Rajeev, above n 1, 162–174; See also generally MC Mehta, *In the Public Interest: Landmark Judgements and Orders of the Supreme Court of India on Environment and Human Rights*, vol 1 (Prakriti Publications, LexisNexis, 2009) Chapter 1.

The applications made to the Board were not published either, and there was no means to access information filed by the industry as to the processes and schemes of pollution prevention mechanisms. Thus, only people who were ‘interested’ or affected by the decision of the Board could seek to have the records checked or scrutinised, while others were denied permission.⁵² Although their powers and functions were improved, the provision of a statutory bar of jurisdiction in the civil courts in respect of any matter under the purview of the Appellate Authority constituted under the Act, and no grant of injunction in respect of any action taken or proposed in pursuance of the Act, still posed an obstacle for an individual who was otherwise affected by water or air pollution. In *Indian Council for Enviro-Legal Action v Union of India* (1996) the Supreme Court lamented the non-functioning laws and the inadequacy of the prosecutions launched under the Water Act, Air Act and Environmental Protection Act, and suggested the establishment of independent environmental courts to deal with matters pertaining to the environment and related issues, both civil and criminal. The Court observed that:

The experience shows that the prosecutions launched in ordinary criminal courts under the provisions of the Water Act, Air Act and Environment Act never reach their conclusion either because of the workload in those courts or because there is no proper appreciation of the significance of the environment matters on the part of those in charge of conducting of those cases. Moreover, any orders passed by the authorities under Water and Air Acts and the Environment Act are immediately questioned by the industries in courts. Those proceedings take years and years to reach conclusion. Very often, interim orders are granted meanwhile which effectively disable the authorities from ensuring the implementation of their orders.⁵³

⁵²P Leelakrishnan, above n 51, 172.

⁵³*Indian council for Enviro-Legal Action v Union of India* AIR 1996 SC 1446, para 6.

In the earlier Acts, as there was no public participation procedure there was also no means for an individual to seek court enforcement of the legislative provisions under Sections 43 and 49 of the Air and Water Acts respectively unless he or she sought an express written permission from the Board, or the Board itself made a complaint. After the amendment, these provisions were aligned with Section 19 of the EPA which has provided an avenue for the people to participate and seek enforcement of the provisions theoretically by writing to the Board (giving notice)⁵⁴ and directly making a complaint to a magistrate.

Furthermore, the Board was also obliged to provide information and internal reports to a citizen who sought such information for prosecuting a polluter under the amended Section 49 of the Water Act and Section 43 of the Air Act. With the power granted to the Board under Section 33A Water Act and Section 31A Air Act to give directions and even exercise its orders to shut down, close, prohibit any industry and its processes or stop and regulate the electric supply, there seemed to be a new force added to the powers of the Board, which enhanced administrative discretion and public law control over polluting industries.

It is submitted then that these amendments and the enactment of the EPA 1986 reflect the wider scope and objectives and are not merely vindication of interpersonal conflicts. The EPA not only provided for deterrence and compensation for addressing wider environmental harm in the public interest but also for prevention, monitoring, licensing and regulating activity. Thus the objectives under the EPA reflected a public law rationale, in contrast to the narrower function of tort liability.⁵⁵ Despite the ineffective paradigm, criticisms and weakness, the environmental regulations provided for some measures to combat pollution, with prevention and control as the main objectives through administrative sanctions, in contrast to the objectives of tort liability. The wider objective of protection, prevention, monitoring and standard

⁵⁴See Water Amendment Act 1988, Section 49; Air Amendment Act 1987, section 43(2).

⁵⁵See Abraham, above n 13, 71–72.

setting observed in the Water and Air Acts were also reflected in the umbrella legislation enacted in 1986 for the protection of the environment soon after the Bhopal Gas leak in December 1984.

G Role and Working of the Environment (Protection) Act 1986

The EPA⁵⁶ was enacted to implement the decisions taken at the Stockholm Conference in 1972. It provided for a framework primarily designed to deal with the control of toxic and hazardous substances, and the protection and improvement of the environment along with the people and living creatures from the kinds of pollution, similar to the Water and Air Acts. It provides a very broad definition of ‘environment’ under S2(b) and includes water, air and land and the inter-relationships which exist among water, air and land and human beings, other living creatures, plants, microorganisms and property.

Sections 3–8 of the EPA empower the Centre to enforce policies with respect to standards and new guidelines for those substances not mentioned in the Water and Air Acts; introduce and regulate framework and specific guidelines and notifications for hazardous substances, safeguards for the use, handling, storage, transport and discharge of hazardous substances. Sections 15 and 16 provide for penal sanctions, such as imprisonment for up to five years and fines up to INR one lakh, for continuing offences and violation of the provisions. Moreover, the EPA reverses the burden of proof upon a person who is running a polluting enterprise to prove that the violation or the offence was committed without his knowledge or that he exercised due diligence to prevent the commission of the offence. Further, the penal provisions further extend the liability for persons who are officers, secretaries, directors or managers of the company who may have connived, consented to the violation, or been negligent in performing their statutory duties. As an umbrella legislation, the EPA

⁵⁶The EPA 1986 provides for Definitions (Section 2), General Powers of Central Government (Sections 3–6), Prevention, Control and Abatement of Environment Pollution (Sections 7–17), Miscellaneous (Sections 18–26).

imposed an obligation on the government to make policies and strategies for environmental protection, taking care that the administrative agencies set up were empowered to enforce and implement the regulations. It was also expected that the policies put forward by the government for furthering regulatory objectives include social ones.

6 The Role of the Environment (Protection) Act: Regulation and Licensing

However, the EPA did not reflect these social objectives nor did it take into account the historic or future effects of pollution. It lacked a clear policy and the broad objective stated in the Act was merely stated on paper and did not provide for a framework for the administrative machinery to achieve these objectives.⁵⁷ It filtered out the penal provisions as it provided that where any act or commission constituted an offence punishable under the EPA 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 the EPA.⁵⁸

The criticism leveled against the EPA reveals the nature, ideology and inadequacy in the environment regulatory system. However it is submitted that one of the positive aspect of the regulatory system has been to provide an impetus for the development of environmental jurisprudence, to create means for public participation and access to justice to people by providing a right to 'any person' to prosecute a polluter under Article 19 and doing away with the legal requirements of 'standing in the court'. It has also brought forth reasons to deliberate on and elaborate clear policy objectives and functions as an 'enviro-meter' indicative of pollution and damage to the

⁵⁷For critique of the EPA, see Divan and Rosencranz, above n 1, 72; Upendra Baxi (ed), *Environment Protection Act: An Agenda for Implementation* (NM Tripathi, 1987); K Jayakumar, 'Environment Act: A Critical Overview' in Leelakrishnan, Chandrasekharan and Rajeev, above n 1, 234–240; MK Prasad, 'Environment Act: Suggestions for Modification' in Leelakrishnan, Chandrasekharan and Rajeev, above n 1, 271–281; D'Monte, 'Environmental Law Has No Teeth' (1986) 1 *Encology* 24; NS Chandrasekharan, 'Environmental Protection: Two Steps Forward, One Step Back' (1988) 30 *Journal of Indian Law Institute* 184.

⁵⁸Section 24 EPA.

environment and people at all levels. However the EPA and the subsequent amendments to the Water and Air Acts have provided an impetus for awareness, and through public law control, attempt to add a certain direction to emphasise a public law rationale.⁵⁹

7 Gaps in the Regulations

The failure of the regulatory mechanisms for control of water and air pollution is evident in the *Bichri* case which highlights the weakness of the operational and functional machinery established under the Rajasthan State Water Pollution Control Board.⁶⁰ The Supreme Court judgement reflects the gaps evident in the administrative machinery, weak enforcement mechanisms, inefficiency of the SPCB to enforce and monitor the licensing requirements and minimal fines and no compensation provisions for the harm to either the environment or to the victims for personal injury and damage to property under the Water and Air Acts. In the most recent case decided in May 2012, the Himachal Pradesh High Court pointed out the inadequacies of procedure and inefficiency of the state government to follow the Environmental Impact Assessment (EIA) procedure under the EPA in setting up a thermal power plant by the defendant-a private corporation. The green bench of the High Court held the polluter liable and imposed damages of 100 crores. The defendant was also directed to dismantle the plant and repair the damage done to the environment.⁶¹ One can argue that award of compensatory damages to provide relief to the victims and grant of damages to repair the environmental damage provides an instance of not only corrective justice at the individual victim's level but also the retributory compensation for remediation of the ecology of the Bichri village to the Central Government in the former case. In the Himachal Pradesh thermal power plant case the, High Court goes a

⁵⁹Abraham, above n 13, 73.

⁶⁰Indian Council for Enviro-Legal Action,(2011) 8SCC 161, Para 1-4, 47 and 48.

⁶¹See Ravinder Makhaik, 'Green Bench Slaps 100 Crores', *The Times of India* (online) 5 May 2012, <http://timesofindia.indiatimes.com/home/environment/pollution/HC-slaps-Rs100-crore-green-fine-on-firm/articleshow/13003401.cms>>. The reported judgment for this case was not available at the time of writing.

step further in the legal recognition of public's right in a healthy environment and treating environment as having a right in itself.

Moreover, even after the amendments, the Acts have been criticised by experts and scholars. In a report published in 2010 by the Indian Institute of Management, Lucknow submitted evidence to the Government of the poor institutional framework and current discord in the functioning of the CPCB and the SPCBs.⁶² The report highlights the fact that at both the Centre and the State level there is paucity of trained officers and the need for restructuring the composition of the Board. The report illustrates the state of affairs at the Centre and the State level as follows:

The enforcement and compliance of the Water and Air Act is to be ensured by CPCB through State Boards. ...[however]... The situation regarding qualifications and tenure of chairman and member secretaries is much worse as the appointments are ad hoc. There is neither any advertisement for the post nor there is any panel of experts for selection of chairman and member secretary of State Boards as is the case in the CPCB. The same concern has been highlighted by the Department related parliamentary standing committee on science and technology, environment and forests (Rajya Sabha Committee) in its 192nd report on the functioning of the CPCB.⁶³

The above report points out that 'According to the report of the Supreme Court Monitoring Committee on Hazardous Waste, 77 per cent of Chairpersons and 55 per cent of Member Secretaries in different SPBCs are not sufficiently qualified to hold the post'.⁶⁴ Further, the Board is dominated by members nominated by the central government who represent central government, State Boards, companies and corporations of the central government. There is a need for restructuring the

⁶²See report by the Indian Institute of Management, *Evaluation of the Central Pollution Control Board* <<http://cpcb.nic.in/IIMLko.pdf>>.

⁶³Ibid, paras 2.5, 2.6.

⁶⁴Ibid, para 2.6.

composition of the Board of the CPCB for balancing the representation of all stakeholders (polluter and victim). Further, there is a need to include more independent persons in the Board who have expertise in pollution control and legal areas.⁶⁵

The 2011 Report by the office of the Comptroller and Auditor General of India submitted to the President of India under Article 151 of the Constitution provides the results of the Performance Audit of Water Pollution in India.⁶⁶ This report further highlights the inadequacies of the policies and legislation, and the ineffectiveness of the institutions that have been functioning or not been put into place for the prevention and treatment of pollution and the restoration of polluted water in rivers, lakes and groundwater. According to the Report, water pollution in the rivers of India and in both urban and rural water sources is a major cause for concern and has not been adequately addressed in any policy in India. Neither the Centre nor the States have followed any consistent policy and most of 'the efforts at both levels lack the required focus and emphasis.'⁶⁷

8 The Need For Overcoming Gaps

It is submitted that the above critique demonstrates the fallacies in the legal and institutional frameworks for water, air and environmental protection which the Supreme Court has attempted to overcome through means of the Constitutional rationale and application of tortious principles, and even international environmental principles, though in a fractured manner. However, what is lacking in the environmental protection regime that currently exists in India is a cohesive framework. This needs to evolve from the present laws and scattered guidelines and the current stop-gap arrangements, and be supported on a rational theoretical basis,

⁶⁵Indian Institute of Management, above n 62, 12.

⁶⁶See the report by Comptroller and Auditor General of India, Performance Audit of Water Pollution in India (1 December 2011) <<http://www.indiaenvironmentportal.org.in>>.

⁶⁷Comptroller and Auditor General of India, above n 66, Paras 2.1 and 2.3.

including provisions for prioritising environmental protection and environmental justice through public law control and the use of principles of tort within a narrow domain in a sensible manner, as compared to the haphazard manner where mere lip service is paid to the current fissured, and often unenforceable, guidelines.

The fact remains that these principles, policies and objectives do not reflect a central focus for the social reality in India. Much doubt and criticism is levelled against the government policies, which casts doubt and suspicion over the functioning of new laws such as the NGTA 2010 and the proposal for setting up a National Environment Protection Agency similar to the US EPA—the former, which recognises civil liability for environmental damage,⁶⁸ and the later for establishing an institution that helps in national environmental governance management by subsuming the CPCB and the SPCBs.⁶⁹ Before proceeding to the features of environmental jurisprudence that have emerged from the Supreme Court decisions in applying international law principles, the following section provides an overview and critique of the newly enacted NGTA.

H OverComing Gaps through Recognition of Statutory Tort Liability under the National Green Tribunal Act 2010 (NGTA) : An Overview

⁶⁸The NGTA Bill was introduced in the Parliament on 31 July 2009 and it was approved by the Lok Sabha (the Lower House of the Indian Parliament) on 30 April 2010 and the Rajya Sabha (the Upper House) on 5 May 2010 and received the President's assent on 2 June 2010. It became effective from July 2011. The objectives of the NGTA provide for effective access to judicial and administrative proceedings, including redress and remedy and to develop national laws regarding liability and compensation for the victims of pollution and other environmental damage; See the NGTA 2010; For an analysis of the NGTA, see Gitanjali Nain Gill, 'A Green Tribunal for India' (2010) 22(3) *Journal of Environmental Law* 461.

⁶⁹The Ministry of Environment and Forests issued a paper for comments on the proposal to establish a National Environmental Protection Agency (NEPA) for effective environmental governance; Ministry of Environment and Forests, *Towards Effective Environmental Governance: Proposal for a National Environment Protection Authority—Discussion Paper for Comments* <<http://moef.nic.in/downloads/home/NEPA-Discussion-Paper.pdf>> .

In accordance with its international commitments at the United Nations Conference on the Human Environment 1972, in Stockholm and the United Nations Conference on Environment and Development 1992 in Rio De Janeiro⁷⁰, to both of which India, is party, and the Supreme Court decisions construing the right to healthy environment as a part and parcel of the right to life guaranteed under Article 21 of the COI, the Parliament enacted the NGTA. This Act establishes a National Green Tribunal similar to the ‘multi-faceted court’ as proposed in the UK and those existing in other countries such as Australia, New Zealand, Canada, the US, Kenya, Bangladesh and Malawi.⁷¹ Gill provides a detailed analysis from the perspective of the viability and usefulness of a specialist dispute settlement institution for environmental issues in India and critiques the positives and the negatives of the Act with respect to its composition, jurisdiction, access to justice, the limits of civil courts to entertain appeals, foundational principles of PPP and adoption of the PCP and principles of natural justice in making decisions, procedural limitations and the inadequacy of a fixed penalty of up to 25 crores INR (approximately USD 5 million) for errant industries.⁷²

The main criticisms leveled at the NGTA by practitioners and scholars relate to the jurisdiction, functions and powers of the NGT. However, as suggested by Gill the NGT may not be a ‘panacea for all environmental ills but it could provide a lead in terms of new forms of environmental dispute resolution and do much to further the lead already given by the Supreme Court in advancing a distinctly green jurisprudence.’⁷³

The most significant feature of the NGTA for the purposes of this work is the empowering provision statutorily provided to the NGT to grant damages for the

⁷⁰ Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, 14 June 1992 UN.DOC.A/CONF.151/5/Rev.1, 31 ILM 874..

⁷¹ See Gill, above n 68.

⁷² Gill, above n 68, 476.

⁷³ Gill, above n 68, 474.

restitution of the environment and order compensation for the damage inflicted on a person, property and on the environment.⁷⁴ The Act provides access for all aggrieved parties to approach the Tribunal to seek relief or compensation or the settlement of environmental disputes under Section 18(2)⁷⁵ and the application of the PCP, SD and PPP in making decisions under Section 20. Further the NGTA is not bound to follow the procedure prescribed under the CPC, but will be guided by the principles of natural justice. The Court shall also not be bound by the rules of evidence contained in the Indian Evidence Act 1872. However as the Court functions as a civil court having original jurisdictions and also appellate jurisdiction the Act suggests that the normal procedure as followed in a civil action may be followed. This of course is necessary for the Court to act not only to determine legal evidence but also to act as a quasi-judicial and administrative organ as it envisages the determination of facts and working in cooperation with scientific and technical bodies and experts.

i. Recognising Tort Liability for Environmental Claims

Incorporation of tortious principles and adoption of the corrective justice and retributive justice principles for environmental damage signifies the legislative re-engagement with tort principles and its role in environmental claims. This recognition of civil liability for environmental damage is similar to the powers under the Environmental Liability Directive of the European Parliament and of the Council 2004 on environmental liability with regard to the prevention and remedying of environmental damage.⁷⁶

However, despite this statutory declaration one would question the manner in which the law has been enacted, as its provisions do not provide any guidelines for the kind of compensatory relief to be provided, nor do they protect a victim whose injury

⁷⁴Sections 15(1), 15(3) NGTA.

⁷⁵Section 18(2) NGTA.

⁷⁶See Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004, (2004) OJ L143/56.

manifests after five years, such as in the case of asbestos poisoning. Under Section 15 (3) of the Act, applications for compensation, relief or restitution of property or the environment must be made within a period of five years from the date on which the cause for such compensation or relief first arose. In other words, a victim whose disease took over ten years to manifest probably cannot seek relief from the NGT.⁷⁷ Sections 14–17, which deal with the jurisdiction, powers and functions of the NGT are unclear, in that they do not fix liability and responsibility on who should pay damages in case of an accident. Section 14 provides that ‘the Tribunal shall have the jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment) is involved’, besides the questions which arise ‘out of the implementation’ of the specified enactments. However, the definition section does not clearly delineate the factors on which the NGT would determine ‘substantial questions of law’. Section 19 provides that the technicalities of the Code of Civil Procedure 1908 and the Indian Evidence Act 1872 shall not restrain the working of NGT, which would rather be guided by the principles of natural justice. However, the NGT is to function primarily as a civil court and may make its own procedures, similar to those in CPC.⁷⁸

The NGTA also allows industries to appeal before the Tribunal if they fail to obtain environmental clearance from the Ministry of Environment and Forests.⁷⁹ Menon writes that the earlier the NETA envisaged strict liability for damages arising out of any accident occurring while handling hazardous substances and for establishing a NET for effective disposal of cases arising from such accidents. However, the failure of the NETA 1995 and the NEAA subsequently is evidenced by the fact that for ten years it did not have a chairperson, and most of the decisions under the NEAA were pro-industry and against the environment and people’s interests.⁸⁰ Mr Venkatachala,

⁷⁷Meena Menon, ‘How Green is my Tribunal’
<<http://www.thehindu.com/opinion/op-ed/article503099.ece>>.

⁷⁸Section 19 NGTA.

⁷⁹Section 16(g) NGTA.

⁸⁰Section 16(g) NGTA.

a retired Justice of the Supreme Court observes ‘that the government had put such a law which had stringent provisions in cold storage for 15 years to oblige the powers that be’ and that the NGTA provisions ought to be reconsidered.⁸¹

ii. *Difficulties with the National Green Tribunal Act 2010 : a Critique*

Consequently, the operation of the NGTA may also face difficulties in managing and operating the law for individual victims of historic pollution, or where injury manifests more than five years after exposure. Furthermore, the provisions under the NGTA do not provide any specific guidelines that the NGT ought to follow in applying the SD, PCP and PPP. Although there is a plan to establish circuit courts, as yet none have been established at the state level.⁸² Neither has the NGT, situated in Delhi, started its operations during the period when this research work was being undertaken.⁸³ The Ministry of Environment and Forests itself estimates that in 2009–2010, there were at least 5,000 environmental cases pending with the NEAA. As far as remedies for environmental harm are concerned, decisions of the Court as well as the intention of the government and the legislative enactments by the Parliament indicate the pursuit of both public law and private law remedies in order to do complete justice.

Further public law domain with respect to environmental law framework within India also encompasses principles that have been adopted from international environmental treaties and covenants and consideration of public international law. As such the Supreme Court has adopted a strategy that reflects balanced consideration and application of significant international environmental principles in pursuit of rendering justice. However in applying and adopting these principles in order to

⁸¹See L Brown, ‘India Sets up Green Tribunal to try Environmental Crimes’ at <http://earth911.com/news/2010/10/21/india-sets-up-green-tribunal-to-try-environmental-crimes/>.

⁸²See Sara Vinson, ‘Interview: Bharat H Desai: India’s National Green Tribunal’ (2010) 3*Journal of Court Innovation* 361–374, 365.

⁸³. See Bharat H Desai and Balraj Sidhu, ‘On the Quest for Green Courts in India’ (2010) *Journal of Court Innovation* 92.

strengthen the environmental jurisprudence the Supreme Court has also overstepped its judicial functions.

I Judicial Design and Strategy for Environmental Justice: Application of the Principles of International Law

The following section explores the rationale that the Supreme Court has applied in various cases spanning the last three decades to evolve a ‘legitimate’ path for environmental decision-making in India. The evolution of Indian environmental jurisprudence progressed through interpretation of the Constitution and the role played by the Supreme Court. The move towards recognition of a virtual right to the environment and recognition of constitutional torts are two significant factors that need closer attention and examination to understand their overlap and interconnectedness with tortious liability in order to conclude whether blurring of private law and public law boundaries within India furthers environmental justice. Of course the Supreme Court’s activist role cannot be denied and the recognition of the right to healthy environment under Article 21 has been cemented through its various decisions, and finds statutory recognition in the newly adopted NGTA. Another factor which requires close scrutiny is the manner in which the Court has also made use of international environmental law principles. The principle of SD⁸⁴, PPP, PCP⁸⁵ and

⁸⁴The SD principle was accepted to be part of customary international law around 1999, although it has been in discussion since the Stockholm conference 1972, but was coined under the Bruntland Report in 1987; See Philippe Sands, ‘International Courts and the Application of the Concept of Sustainable Development’ (1999) 3 *Yearbook of UN LAW* 389; Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press, Cambridge, 2003) 252; It was acknowledged by the International Court of Justice in *Gabcikovo-Nagymaros (Hungary v Slovakia)* 1997 ICJ Rep 78 and interpreted and used by both countries which provided an opportunity to the International Court of Justice to refer to it; See also Patricia W Birnie, Alan E Boyle and Catherine Redgwell, *International Law and the Environment* 2nd edn (Oxford University Press, 2002) 113.

⁸⁵Principle 15 of the Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, 14 June 1992 UN.DOC.A/CONF.151/5/Rev.1, 31 ILM 874; Much controversy exists as to whether PCP forms part of customary international law, see D Bodansky, Proceedings of the 85th Annual Meeting of the American Society of International Law 1991, 413–417; Christopher D Stone, ‘Is there a precautionary principle’ (2001) 31(7) *Environmental Law Reports* 10789; Philippe Sands, ‘The Precautionary Principle: a European Perspective’ (2000) 6 *Human and Ecological Risk Assessment* 448; See also Birnie, Boyle and Redgwell, above n 84, 118–119.

PTD⁸⁶ have been internalised by the Court and now form part of the law of the land and part of the domestic law.⁸⁷ In order to ascertain the method, manner and rationale behind the application of these principles that did not become binding at the time the Indian Supreme Court applied them as such, begs an analysis to ascertain this development.

i. The Method, Manner and Rationale in Adopting International Environmental Law Principles

It is significant to note that in order to resolve the environmental crisis and human rights violation after Bhopal and throughout the 1990s and the last decade, the Court has not only adopted these principles but declared them to be the law of the land without Parliamentary approval by adoption through legislation. Bandopadhyay states that the Court has followed a specific strategy (whether intentional or not) to read environmental norms and interpret them liberally even where they were not recognised, acknowledged or declared within international conventions or accepted as part of binding *opinio juris* or international customary law.⁸⁸ As the highest legal institution determining the validity of domestic law and the interpreter of rights the Court has not desisted from a lawmaking function and transgressed into the domain of the legislative, and has even acted as a harsh monitor of the Executive. According to some scholars, the Court adopted such a role because it stood as the last bastion of people's rights. While the Court has earned a reputation for its activism and is respected internationally for its environmentalist role, it is submitted that upon analysis of significant environmental decisions where the Court has applied

⁸⁶See Joseph L Sax, 'Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 *Michigan Law Review* 471.

⁸⁷Vellore Citizens Welfare Forum v Union of India and Others AIR 1996 SC 2715.

⁸⁸Saptrishi Bandopadhyay, 'Before the Cart Situates the Horse: Unrecognised Movements Underlying the Indian Supreme Court's Internationalisation of International Environmental Law' <http://works.bepress.com/saptrishi_bandopadhyay/2 downloaded> 38–42.

international environmental norms, the Court has relied on an ad hoc approach that reflects a lack of coherence and justification.⁸⁹

It is perhaps not enough to state that in making environmental decisions the Court has variously relied upon a public law rationale applying features of the Constitution, features from ancient Indian indigenous tradition, tort law features or even international environmental norms. These efforts of the Court are, without doubt, unprecedented. It is undeniable that the Court has provided a positive direction and led towards the development of an environmental jurisprudence. In its pronouncements, the Court has justified its action either under a statutory provision, or as an aspect of their inherent powers, or by adopting and internalising a traditional belief, or even by relying on the Constitutional rationale and the Preamble. It is equally important to note that in using and devising various devices, the Court has been able to obtain specific facts and become aware of the complexities of the social, economic and scientific issues in respect of environmental problems by appointing specific enquiry committees in each case, and has painstakingly arrived at a decision. But with this increasing role, the Court has also become a regulator. This has further complicated the process of environmental governance.⁹⁰ Consequently, with a multifaceted approach adopting various methodologies, the foundational basis, rationalisation and reasons for application of a certain law or policy are not clear.

ii. Judicial Strategies to Fashion Remedies

Environmental law and policy in India exhibits a majority of public law features, with shades of private law with some international law thrown in for good measure. The system governing environmental management, vindication of environmental harms and providing access to justice does not stand as an integrated whole. The following

⁸⁹For a critical analysis see Bandopadhyay, above n 88.

⁹⁰See Geetanjoy Sahu, 'Implications of the Indian Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4/1 *Law, Environment and Development Journal* 3–19.

cases illustrate this lack of coherence and rationalisation and the disconnected manner in which the Court has adopted international law norms and domesticated them within local laws. This, it is argued, reflects the weak foundation on which environmental law rests in India.

The following sections reflect how the Court's has used international environmental principles, constitutional law and regulatory law in resolving environment versus development conflicts within India .

iii. Interpreting Constitutional and International Principles: (a) Sustainable Development

The first in the series of decisions in this line is the RLEK case where the Court began interpreting a right to healthy environment under Article 21 of the Constitution.⁹¹ This was judicial creativity⁹², according to some, or the need at the time to take up a judicial lawmaking function⁹³ where there was a gap within the law or, as it happened in this case, there was a no existing law.⁹⁴ The RLEK case is also known as the Dheradoon Valley quarrying case. The case arose from dangerous limestone quarrying in the Mussoorie Hill Range of the Himlayas. Private mine owners having obtained earlier leases for the mines had been consistently blasting the hills with dynamite over thousands of acres. They also dug deep into the hills illegally which resulted in caves-ins and landslides killing villagers, destroying their homes, cattlestock, agricultural lands. The Mining operation also affected the hydrological system of the Doon Valley which consequently resulted in dried springs acute water shortages in the rural and urban areas. Further the mining debris clogged rivers and resulted in severe floods. From 1961 onwards through 1982 the illegal minning continued despite government curtailment of quotas of leases. All the while mining

⁹¹Rural Litigation and Entitlement Kendra v State of Uttar Pradesh AIR 1985 SC 652, this case has been discussed earlier in Chapters 1 and 5.

⁹² Upendra Baxi, 'Environmental Law: Limitations and Potential for Liberation' in J Bandhopadhyay, *India's Environment: Crises and Responses* (Natraj Publishers, 1985) 291–309.

⁹³S P Sathe, 'Judicial Activism: The Indian Experience' (2001) *Washington Journal of Law and Policy* 29, 40.

⁹⁴Bandopadhyay, above n 88.

safety laws were also violated. IN 1982 18 large leases came up for renewal and the state government of Uttar pardesh recognising the threat to the eocology of the area rejected the applications for renewal. However the state high court allowed the applicants to continue minning in the belief that economic considerations outweighed ecological factors. In 1983 the Supreme Court accepted a letter from the non governmental organization , the Rural Litigation and Entitlement Kendra, complaining against the ecological degradation and the destruction of the the hydrology of the Doon valley and its affect on the people, as an Article 32 writ petition under the Constitution. The case developed into a complex litigation which went on for more than six years and involved over 100 minning leases. This case brought out the environmentalist role of the Court. The Court ordered the closure of the limestone mines based on the premise that environmental rights were protected under Article 21. Referring to the FD as envisaged under the Constitution, the Court opined that although Article 51A is not enforceable in court and not punishable as such, it was referred to and has been interpreted as obiter. The Court passed an oral order stopping the quarrying operations and observed that that preservation of the environment and keeping the ecological balance unaffected is a task which not only governments but also every citizen must undertake as a social obligation. It was further stated that:

competent government agencies to enforce environmental laws has been deduced from Article 21, and it has been ruled that such agencies may not plead non-availability of funds, inadequacy of staff or other insufficiencies to justify the non-performance of their obligations under environmental laws.⁹⁵

⁹⁵See *Virender Gaur v State of Haryana* 1995 (2) SCC 577 (In this case the Court held that open lands, vested in the municipality, were meant for the public amenity for the residents of the locality and there was a duty upon the municipality and the government authority to maintain ecology, sanitation, recreational, amenities for the resident and provide for amenities such as a play ground and ventilation . The buildings directed to be constructed for “public purpose” necessarily affected the health and the environment, adversely, sanitation and had other harmful effects on the residents in the locality). ; *Indian Council for Enviro-Legal Action v Union of India* (CRZ Notification Case) 1996 (5) SCC 281

Similarly, in *Subhas Kumar*, the Court observed that:

The right to live is a fundamental right under Article 21 of the Constitution, and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution.⁹⁶

In 2006 in the case of *Bombay Dyeing*, the Court opined that:

Expansive meaning of such [constitutional and fundamental] rights had all along been given by the Courts by taking recourse to creative interpretation which led to creation of new rights. By way of example, we may point out

Bichri Case (The errant industries were ordered to pay a total amount of Rs.37.385 crores along with compound interest @ 12% per annum from 4.11.1997 and Rs 10 Lakh as costs to the villagers of Bichri); Dr BL Wadehra v Union of India (Delhi Garbage Case and the Courts order against municipal corporation of Delhi and other authorities to perform their statutory duties in particular the collection, removal and disposal of garbage and other waste and the duty upon the state under articles 48A and 51 (g) read with article 21 right to life) AIR 1996 SC 2969, 2976. See also T Damodar Rao v Special officer, Municipal Corporation of Hyderabad AIR 1987 AP 171

⁹⁶*Subhash Kumar v State of Bihar* AIR 1991 SC 420/ 1991 (1) SCC 598 (the Court highlighted the dangers of frivolous litigation under the garb of PIL but recognized the right to a pollution free and clean environment under article 21 right to life provision. It also held that the petitioner's allegation that the water of the river Bokaro was being polluted by the discharge of sludge or slurry from the 'washerries' of the respondent-company was in response to a personal grudge against the respondent company. In fact it was found that the State Pollution Control Board had taken effective steps to check the pollution. The Court did not consider it necessary to delve into greater detail as the present petition did not appear to have been filed in public interest instead. Imposing cost against the petitioner the Court held that the petition has been made by the petitioner in his own interest and was abuse of the PIL process.

that by interpreting Article 21, this Court has created new rights including right to environmental protection.⁹⁷

In *Vellore* the Court held that the traditional view of ‘development and ecology [as] opposed to each other, is no longer acceptable. ‘*Sustainable development* is the answer’ (emphasis added).⁹⁸ In its justification to the application of the concept of SD the Court states that SD is an acknowledged part of international law, ‘though [its] salient features have yet to be finalised by the international law jurists’.⁹⁹ *Vellore* was decided in 1995 and the concept of SD, although having existed for 20 years was defined only in 1987 in the Bruntland Commission Report. How in the Court’s opinion it formed part of customary international law is questionable.¹⁰⁰ Verma states that the only method under which an international instrument could be adopted by the Supreme Court lies in Article 51 (c) of the Constitution.¹⁰¹ Other than that, there is no power, and even this power to access international rules is qualified by Article 372 that provides that the Court follows the British tradition as it stood before commencement of the Constitution in 1950, unless the same laws are amended by an

⁹⁷*Bombay Dyeing and Manufacturing Co Ltd v Bombay Environmental Action Group* AIR 2006 SC 1489 (emphasized upon the mandatory process of environmental impact assessment process under the EPA regulations (2001) and the applicability of the sustainable development, polluter pays, precautionary principles within the Indian environmental jurisprudence when deciding questions of development , especially in this case of ousting of the mills and the harm to the workers and the environment in and around the old mills and those to be relocated. .

⁹⁸*Vellore* AIR 1996 SC 2715, Para 10. The petitioner in this case, Vellore Citizens Welfare Forum filed a public interest litigation petition under Art 32 alleging extreme pollution caused to the river Polar due to the discharge of untreated effluents by the tanneries and other industries in the State of Tamil Nadu. The Court appointed a committee to report on the matter. The Supreme Court after examining the report- submitted by the Committee, delivered its judgement making all efforts to maintain a balance/harmony between economic development of the people on one hand and welfare of the people on the other. The Court held that "sustainable development is a balancing concept between ecology and development.

⁹⁹*Ibid.*

¹⁰⁰Birnie, Boyle and Redgwell, above n 84, 46, rightly point out that ‘[s]ustainable development requires political action if it is to be implemented, and it may be easier to deliver in certain systems than in others’.

¹⁰¹Article 51(c) provides that the State shall endeavour to take steps, inter alia, ‘to foster respect for international law and treaty obligations in the dealings of organised people with one another’; This Article allows the Court to access international rules (in absence of specific legislation) for purposes of municipal application, see Bandopadhyay, above n 88, 9.

enactment of the legislature. The actual power lies with the Parliament in Article 253 to legislate after India has signed and ratified an instrument under an international convention and incorporated it into domestic law.¹⁰² Moreover, customary international law comprises the criterion of 'state practice' and '*opinio juris*'. In India's case there was no state practice recognised under any law to have internalised SD and nor was there in existence any norm creating a standard of behaviour to that needed to be followed as law.¹⁰³ While deciding custom, the International Court of Justice under Article 38(1) (b) applies international custom whenever it can be determined that there is 'evidence of a general practice accepted as law' and the application depends upon on the subject matter of the rule, the nature of state practice and the extent to which it is observed.¹⁰⁴

There has been much debate about whether SD formed a binding international customary law. It was not until 1998 or 1999 that international jurists like Sands accepted that SD had become part of customary international law, even when it was interpreted and used in the *Gabčíkovo-Nagymaros* (Hungary v Slovakia) claim in 1997.¹⁰⁵ Sands refers to this case where the International Court of Justice had an opportunity to elaborate on the concept of SD. However, Birnie and Boyle listed three factors that prevented it from being recognised or matured into a principle of customary international law, as the term was abstract and non-standardised as to its content; being only a concept rather than a legal principle it did not have a

¹⁰²See Article 253 on Parliament's power to enact legislation to give effect to international agreements, treaty or convention with any other country or countries or give effect to any decision taken at an international conference, association or other body; See also Bandopadhyay, above n 88, who explains while analysing a landmark case on sexual harassment, *Vishakha and Ors v State of Rajasthan and Ors* AIR 1997 SC 3011; in this case the Court has ingeniously applied India's international commitments to international in absence of any legislation. Up until *Vishakha*'s decision the application of customary international law was made by the Court into domestic law on a case-by-case basis and no clear trend or specific method that was followed.

¹⁰³Birnie, Boyle and Redgwell, above n 84, 16f, hold that '[b]oth conduct and conviction on the part of the state are required before it can be said that a custom has become law... [It] involves examination not only of states' authoritative statements, unilateral and multilateral declarations, agreements, legislative and other acts, and actions in international organisations.'

¹⁰⁴Bandopadhyaya, above n 88, 9.

¹⁰⁵Sands, above n 84 (*Principles of International Environmental Law*), 254.

‘norm-creating character’.¹⁰⁶ Thus, when the Court decided *Vellore* the concept of SD was still in the form of a non-binding soft law, it was not recognised under any legislative enactment.

The Court does not provide any justification or rationale for this importation and is simply stating that SD included the *PCP* and the *PPP* that ‘have been accepted as part of the environmental law of the land.’¹⁰⁷ Moreover, as Bandopadhyaya argues, up until *Vishakha*’s decision the application of customary international law was made by the Court into domestic law on a case-by-case basis and no clear trend or specific method was followed.¹⁰⁸ In applying non-existing principles into domestic law the Court ‘read’ the same under the Constitutional FR provision and included these as part of FR as long as ‘they were not inconsistent with the FR and in harmony with its spirit’,¹⁰⁹ thus recognising its own earlier decisions, legitimising its rationale of environmental protection and substantiating its own agenda and assertion.¹¹⁰ So in *Vellore* the Court jumped to the constitutional commitment and duties under Articles 47, 48A and 51 A(g) and hastily states that:

[I]n view of the above mentioned constitutional and statutory provisions [Water, Air and EPA] we have no hesitation in holding that the PCP and the PPP are part of the environmental law of the country.¹¹¹

¹⁰⁶Birnie, Boyle and Redgwell, above n 84, 113–118.

¹⁰⁷*Vellore* AIR 1996 SC 2715, Para. 10.

¹⁰⁸See Bandopadhyay, above n 88, 9, 10.

¹⁰⁹See *Vishakha* AIR 1997 SC 3011 (compensation awarded for sexual harassment); *Neelabati Behra v State of Orissa* (1993) 2 SCC 746, where the Court reads the provisions of the International Covenant on Civil and Political Rights to provide compensation under the provisions of public law under Article 32. See also *Bhim Singh v State of Jammu and Kashmir* (1985) 4 SCC 677 ; *Rudul Shah v State of Bihar* (1983) 4 SCC 141, a three-judge bench of Court awarded compensation (Rs 30,000) for illegal detention. For medical negligence, compensation was awarded in *Supreme Court Legal Aid Committee v State of Bihar* (1991) 3 SCC 482; *Dr Jacob George v State of Kerala* (1994) 3 SCC 430 and *Paschim Banga Khet Mazdoor Samity v State of West Bengal and Others* (1996) 4 SCC 37. For environmental damage cases see *MC Mehta and Another v Union of India and Others* (1987) 1 SCC 395.

¹¹⁰*Vellore* AIR 1996 SC 2715, Para 10.

¹¹¹*Ibid*, Para 12–13.

Surprisingly the Water, Air and the EPA Acts do not provide any direct PCP or PPP in their substantial provisions; see Sections 24 and 25 of the Water Act, Sections 21 and 22 of the Air Act and Sections 7 and 8 of the EPA. On a closer examination one can see that rest of the provisions lay down procedure, penalties and administrative functions. They do not provide any inroads for compensation in the nature of tortious claim. The Court has carved out the PPP and PCP from the prohibition contained in the regulatory statutes. For example, the Water Act prohibits the use of streams and wells for disposal of polluting matters without obtaining consent from the Board. One can note here that the Court is overstretching the intention of the legislation and has overshoot the meaning of the provision to extend it to non-existent international customary laws of SD, PPP and PCP.

In *Vellore*, it would not be incorrect to state that the Court has exceeded and overstepped into the domain of the legislative organ and indulges in judicial lawmaking. The Court has definitely not confined itself to ‘discovering and drawing upon principles’ as Dworkin claimed the function of courts was,¹¹² and in expanding the meaning of statutory provisions under the regulations in order to lay down that the PCP and the PPP are part of the positive, valid body of law is quite extraordinary.¹¹³ The second feature to note about this significant judgment is that it reintroduces an often shunned idea that common law provides a basis of the Indian legal system.

In earlier cases the Court had categorically stated that whatever development occurred in common law in England, the Indian law was not bound to follow it, and hence in the *Oleum Gas Leak* case the Court modified the principle of strict liability under *Rylands v Fletcher* to absolute liability. It is in *Vellore* that the Court reverts to common law doctrine, connecting it with a constitutional duty and statutory obligation. It is not anomalous for the Court to revert to the common law doctrine and not only focus on *Rylands v Fletcher* rule. In cases like *Vellore* and later cases the

¹¹²Ronald M Dworkin, *Law's Empire* (Harvard University Press, 1986) 148.

¹¹³See Bandopadhyay, above n 88, 21–22.

Court's reliance on common law concepts and remedies arising from that is a small step towards expansion of environmental jurisprudence and private and public tools to fashion remedies in contemporary times. In Vellore the Court observes that:

[T]he Constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution free environment, *but the source* of the right is the *inalienable common law* right of a clean environment' (emphasis added).

It refers to the right of a person to a pollution-free environment which it states is a part of the basic jurisprudence of the land.¹¹⁴ It also refers to the maxim *sic utere tuo, ut alienum non laedas* ('good neighbourliness' or the 'no harm' principle). So tort principles, which until 1995–1996 were given up as redundant or at least not workable, are recognised here to reflect the law of nuisance. The tortious principles have later been used by the Court to justify the PPP, incorporate the corrective justice function and apply its retributive character to recognise the PTD and grant retributory compensation against polluters and to the government to restore the environment and ecology of an area.¹¹⁵ In *Vellore* the Court imposed damages and the cost of remediation from the government to the polluting industries. It observed that:

Remediation of the damaged environment is part of the process of SD and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.¹¹⁶

Of course determining an individual's right against physical harm or harm to property would have meant that 'property' be held and given the same level of protection as a person. However, with the socialist objectives, the right to property has been whittled down, and due also to the needs of a developing population, earlier recognition of an

¹¹⁴Vellore AIR 1996 SC 2715, Para 16.

¹¹⁵See *MC Mehta v Kamalnath and Ors* (1997) 1 SCC 388, 414; *Indian Council for Enviro-Legal Action v Union of India*(2011) 8 SCC 161(Bichri II).

¹¹⁶Vellore AIR 1996 SC 2715, Para 18.

environmental wrong to a person or his property was never a concern.¹¹⁷ Moreover under common law, ownership of property denotes the right of the owner to possess the thing which she owns and right to enjoy and use the land to the exclusion of others. This right then extends to destroying, consuming alienating the property she owns inclusive of natural resources. The right of use becomes inseparable from the right of ownership which denies communal ownership of property. This private law doctrine of ownership is comparable in its width and extent to the public law doctrine of sovereignty. But the traditional laws of protection of property (private law) and constitutional right to property (public law) come in conflict in case of protection of natural resources and or environmental issues which ought not to be destroyed needlessly. In *T Damodar Rao v Special Officer, Municipal Corporation Hyderabad* i, the question concerned the inroads into the collectivist jurisprudence of the municipal corporation's right to use its property, doctrine of ownership and communal right of the people to have a recreational facility according to the zonal development plan. Under the impact of the environmental jurisprudence the unbridled right of the owner to enjoy her piece of land granted under the common law doctrine of ownership is substantially curtailed. As protection of the environment is not only the duty of the citizen but it is also the obligation of the state and all the other state organs including the courts. The Court held that

To that extent, environmental law has succeeded in unshackling man's right to life and personal liberty from the clutches of the common law theory of individual ownership.... In this case the very purpose of preparing and publishing the developmental plan is to maintain such an environmental balance. The object of reserving certain area as recreational zone would be utterly defeated if private

i AIR 1987 AP 171 (A writ petition filed by the residents to direct the municipal corporation of the state to develop the demarcated area under the zoning developmental plan as public park and recreational area instead of residential buildings which the authority was claiming it had a right to do.

ii *ibid*,

¹¹⁷The right to property and the reasons why tort was and is underdeveloped in India have been discussed earlier in Chapters 1, 2, 3 and 4. This right to property was deleted from the list of FR by the 44th Constitutional Amendment Act of 1978, in April 1979.

owners of the land in that area are permitted to build residential houses and assert their right to individual ownership and use of property. ii

Thus a tortious liability would arise where the statutory authority acts outside its legal authority while purporting to act pursuant to the legal authority conferred upon it. Further the role played by the Supreme Court in the recognition of a virtual right to the environment and the recognition of constitutional torts is demonstrated over the time; however, the development and the method and manner of internalising international law into domestic law lacks a coherent interconnectedness and rationalisation.

For these reasons, it is difficult to ascertain the method the Court followed to declare international environmental norms as binding and part of the law of the country. Although the spirit behind the decision and the judgment is commendable, the decision does not provide clear reasoning of the ‘how’ question.¹¹⁸ Moreover, even internationally, the application and the recognition of the PCP has had its share of criticism in the uncertainty and broad sweep of the objectives it includes.¹¹⁹ Several scholars argue that the application of the PCP has its downside when attempts are made to balance it within environmental justice claims.¹²⁰

This decision also reflects how an activist Court, influenced by the environmental agenda and human rights cause, uses its discretionary power for importing, interpreting and introducing principles from various available legally binding or

¹¹⁸Bandopadhyay, above n 88, 12–13.

¹¹⁹See Andrea Laura Mackielo, ‘Core Rules of International Environmental Law’ (2009) 16 *ILSA Journal of International and Comparative Law* 257–299; Daniel Lawrence, ‘The New Environmental Liability Regime: Not Only The Polluter Will Pay’ (2009) 25(4) *Professional Negligence* 162–173; Danai Papadopoulou, ‘The Role of French Environmental Associations in Civil Liability for Environmental Harm: Courtesy of Erika’ (2009) 21(1) *Journal of Environmental Law* 87–112; Noah Sachs, ‘Beyond the Liability Wall: Strengthening Tort Remedies in International Environment Law’ (2008) 55 *UCLA Law Review* 837–904; AE Boyle, ‘Globalising Environmental Liability: The Interplay of National and International Law’ (2005) 17(1) *Journal of Environmental Law* 3–26; ME Lloyd-Smith, ‘Toxic Disputes and the Rise of Environmental Justice in Australia,’ (2003) 9 *International Journal Of Occupational Environmental Health* 14–23.

¹²⁰See David Scholsberg, ‘Reconceiving Environmental Justice: Global Movements and Political Theories’ (2004) 13(3) *Environmental Politics* 517–540; Francesco Francioni, ‘International Human Rights in an Environmental Horizon’ (2010) 21(1) *European Journal of International Law* 41–55.

non-binding sources. Thus, the decisions rendered by the Court have been created by examining various international sources (soft and hard law) and internalising these by accepting that the external principles or norms form part of the pre-existing legal domestic rules. Badopadhyay posits that the Court has done this in threefold manner: (i) establishing its ability to access international rules; (ii) isolating various principles from existing statutes and (iii) by simply relying on its own earlier precedents.¹²¹

iv. Judicial Monitoring and Imposition of Liability: Adopting a Multifaceted Strategy for Environmental Justice

The continuing judicial involvement in supervising the implementation of its orders illustrates the supremacy and the monitoring role that the Court has assumed in environmental cases. This is evidenced in the *Bichri* case (1996).¹²² The *Bhichri* judgment, rendered in 1996, concerned a group of chemical industries that were responsible for discharging among other things, untreated toxic sludge, contaminating groundwater sources in the village of Bichri in Udaipur in the State of Rajasthan. This rendered some 70 wells, used by about 10,000 residents, useless. The SCPB was unsuccessful in mitigating the environmental damage in the area under the Water and Air Acts. The Court also examined the scope of Section 5 EPA read sections with 2(a) and 3 to explore the remedial measures and observed that:

In the present case, the said powers will include giving directions for the removal of sludge, for undertaking remedial measures and also the power to impose the cost of remedial measures on the offending industry and utilise the amount so recovered for carrying out remedial measures. *This Court can certainly give directions to the Central Government/its delegate to take all*

¹²¹Bandopadhyay, above n 88, 16–18.

¹²²(1996) 3 SCC 212/AIR 1996 SC 1446; Divan and Rosencranz, above n 1, 74.

such measures, if in a given case this Court finds that such directions are warranted (emphasis added).¹²³

In *Vellore*,¹²⁴ it is to be noted that after the judgment the government legislated the Loss of Ecology (Prevention and Payments of Compensation) Act 1996 and constituted a statutory authority under the Act. This authority delivered its award on 12 March 2002 and ordered 547 tanneries in the District of Vellore to pay a compensation amounting to Rs.26.82 crores to 29,193 families as pollution damages arising from the leather factories and three crores to restore the environment.¹²⁵

Taking precedence from *Vellore* in *MC Mehta v Union of India and Others*¹²⁶ (Tanneries case) the Supreme Court ordered that ‘one who pollutes the environment must pay to reverse the damage caused by his acts.’¹²⁷ The court ordered the unconditional closure of the tanneries and payment of compensation by them for reversing the damage and for rights and benefits to be made available by them to their workmen.

The Court applied the PCP in *AP Pollution Control Board II*¹²⁸ reiterating and expanding upon the principles stated in *Vellore*. The Court relies upon its own decision in *Vellore* and observes that:

...following India’s example—there is building up, in various countries, a concept that the rights to a healthy environment and to SD are fundamental human rights, implicit in the right to life.

¹²³Bichri I (1996) 3 SCC 212/AIR 1996 SC 1446, 1464.

¹²⁴AIR 1996 SC 2715.

¹²⁵See Geetanjoy Sahu, ‘Implementation of Environmental Judgments in Context: A Comparative Analysis of Dahanu Thermal Power Plant Pollution Case in Maharashtra and Vellore Leather Industrial Pollution Case in Tamil Nadu’ (2010)6/3 *Law, Environment and Development Journal* 335–353.

¹²⁶(1997) 2 SCC 411.

¹²⁷MC Mehta (Tanneries case) (1997) 2 SCC 411, 417.

¹²⁸(2001) 2 SCC 62; See also AP Pollution Control Board I 1995 (2) SCC 577.

The Court then refers to various international instruments but does not clarify whether or not SD, including PPP and PCP, are a part of customary international law. It refers to the Stockholm Declaration, the World Charter for Nature¹²⁹, Principle 15 of the Rio Declaration¹³⁰, the UNEP Governing Council's 1989 recommended use of the PCP, the Bamako Convention¹³¹ and the 1990 Bergen Ministerial Declaration on SD;¹³² however, the Court does not explain how it is adopting from or reading these concepts into pre-existing laws that hardly reflect these norms, concepts or principles, except perhaps in vague policy statements.

v. *Application of the Precautionary Principle*

After referring to all the international instruments the Court defines PCP¹³³ in *AP Pollution* to mean that in this context (i) the regulatory environmental measures that are taken by the government and pollution control boards ought to anticipate, prevent and attack the causes of environmental degradation; that PCP also means that (ii) where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation; and that (iii) The onus of proof is on the developer/industrialist to show that his action is environmentally benign.¹³⁴ Once the PCP became law of the land

¹²⁹The UN General Assembly Resolution on World Charter for Nature, A/RES/37/7 (48th Plenary Meeting, 28 October 1982).

¹³⁰Rio Declaration on Environment and Development, The Earth Summit, 1992, see above n 70.

¹³¹The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Bamako, 29 January 1991; Article 4(3)(f) whereby the standards of 'preventive' and 'precautionary' are linked and the threat no longer needs to be 'serious' or 'irreversible'; Further, the Bamako Convention also lowers the overall scientific threshold after which the PCP may be applicable.

¹³²Bergen Ministerial Declaration on Sustainable Development in the ECE Region, Bergen, Norway, 16 May 1990, A/CONF.151/PC/10, Annex I.

¹³³Vellore AIR 1996 SC 2715, 2721, Para 11.

¹³⁴AP Pollution Control Board I 1995 (2) SCC 577, The precedent in Vellore was reiterated in the following cases to provide relief to the victims and settle environmental and developmental conflicts; See Environment Awareness Forum v State of J and K (1999) 1 SCC 210; Centre for Environment Law, World Wildlife Fund India v Union of India (1999) 1 SCC 263; T N Godavaram Thirumulpad v Union of India AIR 1999 SC 43, Workmen of M/S Birla Textiles v KK Birla and Others (1999) 3 SCC 475; Narmada Bachao Andolan v Union of India AIR 1999 SC 3345.

the Court has simply followed its precedent. In the case of *MC Mehta v Union of India* (the Taj Pollution case)¹³⁵, the Court gave a number of directions to 292 industries located near the Taj Mahal. The Court, in this case, observed that the 'old concept that development and ecology cannot go together is no longer acceptable. Sustainable development is the answer.' The development of industry is essential for the economy of the country, but at the same time the environment and ecosystem must be protected. The pollution created as a consequence of development must be commensurate with the carrying capacity of our ecosystem. In any case, in view of the PCP, the environmental measures must anticipate, prevent and attack the causes of environmental degradation. Again in *MC Mehta v Union of India* (the Badkhal and Surajkund Lakes case) the PCP was affirmed.¹³⁶ However, the spirit with which the Court was applying and internalising international norms was tested once again in *Narmada Bachao Andolan* and surprisingly, the Court was in favour of the dam being built and held that:

[I]t appears to us that the PCP and the corresponding burden of proof on the person who wants to change the status quo will *ordinarily* apply in a case of polluting or other project or industry where the *extent of damage* likely to be inflicted is *not known*. When there is a state of uncertainty due to lack of data or material *about the extent* of damage or pollution likely to be caused then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution (emphasis added).

¹³⁵[1997] 2 SCC 353.

¹³⁶In *MC Mehta v Union of India* (Badkahl and Surajkund Lakes) [1997] 3 SCC 715, the Court observed that the preventive measures had to be taken keeping in view the carrying capacity of the ecosystem operating in the environmental surroundings under consideration. The Badkhal and Surajkund lakes are popular tourist resorts close to the capital city of Delhi and any large scale construction activity in the vicinity of the two lakes is bound to cause an adverse impact on the local ecology of the two lakes.

The Court in *Narmada* invoked the PCP but found its own reasons for not applying it, as according to the various reports put forward by the Government it would not have led to ecological disaster.

vi. Application of the Polluter Pays Principle

The PPP was adopted by the Court in the *Bichri* case 1996 (*Bichri I* 1996).¹³⁷ The rules of liability in the *Oleum Gas Leak* case were discussed, but the Court then observed that:

[T]he question of liability of the respondents to defray the costs of remedial measures can also be looked into from another angle, which has now come to be accepted universally as a sound principle, viz., the PPP ... Thus, according to this principle, the responsibility for repairing the damage is that of the offending industry.¹³⁸

The PPP was affirmed in *Vellore* and the Court held that ‘[t]he PPP as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation’. However, the Court joined the PPP with absolute liability in this case.¹³⁹

vii. Application of Public Trust Doctrine

In the *Span Motels* case the Court applied the Roman doctrine of public trust over natural resources and declared it to be the law of the land.¹⁴⁰ In extending the PTD to domestic law, the Court considered the works of well-known

¹³⁷Vellore AIR 1996 SC 2715, 2721, Para 11.

¹³⁸Bichri (1996) 3 SCC 212/AIR 1996 SC 1446, 1466.

¹³⁹See Divan and Rosencranz, above n 1, 107–108.

¹⁴⁰MC Mehta v Kamal Nath 1997 (1) AD SC 1/(1997) 1 SCC 388, Para 24–35.

scholars—Joseph Sax, Barbara Ward and Rene Dubos.¹⁴¹ It was in this case that the Court obfuscates the scope of public law remedies and introduces tortious remedies, emphasising the retributory function that tort law performs. The Court of course makes reference to the PPP but ordered the defendant to pay remedial costs to restore the ecology of the area that had been damaged by building the motel. It also criticised the Minister for Environment and Forests, who had allowed the defendant to proceed with the construction and licensing.¹⁴² It stated that, ‘[T]he area being ecologically fragile and full of scenic beauty *should not have been permitted* to be converted into private ownership and for commercial gains’ (emphasis added).¹⁴³ It also observed that the PTD primarily rests on the principle that certain resources, including the air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them the subject of private ownership. These resources, being a gift of nature, should be made freely available to everyone irrespective of their status in life. Doctrine enjoins upon the Government to protect these resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.¹⁴⁴

This is a significant conclusion, as in the earlier paragraphs the Court held that where there is law made by the ordinary legislator, the courts can serve as an instrument for determining its intent, thereby exercising their power of judicial review. However, in the absence of any legislation, the executive, which is acting under the doctrine of public trust, cannot abdicate responsibility over the natural resources and convert them into private ownership.¹⁴⁵ The Court reiterated the application of SD, PCP, PPP

¹⁴¹Sax, above n 86; Barbara Ward and Rene J Dubos, *Only One Earth: The Care and Maintenance of a Small Planet* (Penguin Books Ltd, 1972), this work was also submitted as a report to the UN for the 1972 Stockholm Conference.; See also Sax, above n 21.

¹⁴²Kamal Nath 1997 (1) AD SC 1 /(1997) 1 SCC 388, Para 12.

¹⁴³Ibid, Para 22.

¹⁴⁴Ibid, Para 35.

¹⁴⁵Ibid, Para 35.

and the PTD in *Essar Oil Ltd v Halar Utkarsh Samiti and Others*¹⁴⁶ in 2004, *Karnataka Industrial Areas Development Board v Sri Kenchappa and Others*¹⁴⁷ in 2006 and *Thervoy Gramam Munnetranala Sangam v Union of India*¹⁴⁸ (Thervoy) in 2009. Referring to Ben Boer's writings from Australia,¹⁴⁹ among other commentators, the Court observed:

Strategies for SD have been formulated in many countries in the past several years. Their implementation through legal and administrative mechanisms is underway on a national and regional basis. The impetus for these strategies has come from documents such as the Stockholm Declaration of 1972, the World Conservation Strategy, the World Charter for Nature of 1982 and the report of the World Commission on Environment and Development, our Common Future. The initiatives are part of a world wide movement for the introduction of National Conservation Strategies based on the World Conservation Strategy. Over 50 National Conservation Strategies have been introduced over the past decade, all of which incorporate concepts of SD.

¹⁴⁶(2004) 3 SCC 392.

¹⁴⁷AIR 2006 SC 2038.

¹⁴⁸Thervoy, DOJ 16 September 2009, SC. See the recent decision rendered by the NGT in Gram Panchayat Totu (Majthai) Tehsil and District Shimla v State of Himachal Pardesh original application No 2 of 2011 , NGT ,on inadequacies in the Municipal Solid Waste (Management and Handling)Rules 2000 and the confusion with respect to the provision under the rukes with respect to the selection of dumping site for garbage and waste, reiterating that the MSW rules need to be corrected and that people have a right to clean pollution free environment under article 21 and therefore the precautionary principle has to be adopted to protect the rights of the inhabitants. Considering People's Union for Civil Liberties v Union of India (1973) 3 SCC433 where the supreme Court observed that environment and ecology are arre national assests that ought to be protected and the approach of the Supreme Court in MC Mehta v Union of India (2004) 12 SCC 118 (precautionary principle even when no direct harm evident) the Tribunal held that the propject proponent would only be allowed to construct a dumping plant after haing mandatorily complied with the MSW 200 rules rules and getting an environmental clearance certificate under the EIA notification 2006 and 2009. it further directed the MOEF to review and revise the MSW Handling rules 2000 to make them more specific within six months of the date of the judgment. Furhter it directed the municipal copropration of shimla to repair the harm done to the ecology by planting and supplying twice the number of trees and saplings that had been filled by the propject proponent. See at <[http://www.greentribunal.in/orderinpdf/2-2011\(RA\)_11Oct_final_order.pdf](http://www.greentribunal.in/orderinpdf/2-2011(RA)_11Oct_final_order.pdf)>. See also Tripur Dyeing Factory Owners Association v Noyyal River Ayacutdars Protection Association and Ors AIR 2010 SC 3645.

¹⁴⁹Ben W Boer, 'Implementing Sustainability' (1992) 14 *Delhi Law Review* 1; See also BW Boer and ID Hannam, 'Legal Aspects of sustainable Soils: National and International' (2003) 12(2) *Review of European Community and International Environmental Law* 149.

The document 'Caring for the Earth' is the chief successor to the World Conservation Strategy.¹⁵⁰

Subsequently, the Court provided an exposition of international efforts for protection of the environment and held that:

Sustainable use of natural resources should essentially be based on maintaining a balance between development and ecosystem. Coordinated efforts of all concerned would be required to solve the problem of ecological crisis and pollution. Unless we adopt an approach of sustainable use, the problem of environmental degradation cannot be solved.¹⁵¹

From the above analysis of cases, it emerges that there is no doubt that the Court has made remarkable contributions in developing an environmental jurisprudence in India. The role played by the Supreme Court in the recognition of a virtual right to the environment and the recognition of constitutional torts is demonstrated over the time; however, the development and the method and manner of internalising international law into domestic law lacks a coherent interconnectedness and rationalisation.

J The Court's Role and Lessons Learned from earlier environmental cases : Bhopal

Legal liability as a tool for the vindication of individual rights or those of the public comes into play once there are disputes, but the growth and realisation of the significance of liability, whether private or public, in environmental and human right matters was catapulted into the Indian social scene with the Bhopal gas tragedy in

¹⁵⁰Thervoy, above n 148, 10, 14.

¹⁵¹Thervoy, above n 148, 14.

December 1984.¹⁵² This evolution of constitutional environmental rights is relevant and essential to determine and highlight the overlap and interconnectedness with tortious liability in order to conclude whether blurring of private law and public law boundaries within India furthers environmental justice.

The deaths of over 3,000 residents around the chemical factory and the suffering of over 15,000 from the effects of poisoning by the isocyanate(MIC) gas jolted the State and Central Governments alike to take policy-oriented and legislative steps to deal with the dismal state of the environmental protection laws, liability for hazardous accidents, liability of multinational corporations,¹⁵³ the compensation mechanisms and the vagaries of unsustainable development. The effects of the poisonous gas left over 100,000 people affected and even after 26 years, the people of Bhopal are being treated for physical injuries and illnesses that have become ‘chronic and are debilitating’ as well as for mental trauma.¹⁵⁴ The Bhopal gas disaster was an unprecedented accident on this scale in India, and has often been compared with the Chernobyl nuclear reactor leak in Kiev, Ukraine (the former USSR), which was equally tragic and equally controversial.¹⁵⁵

¹⁵²See generally Divan and Rosencranz, above n 1, 547–562; Abraham, above n 13, 90; Upendra Baxi and Amita Dhanda, *Valiant Victims and Lethal Litigation: The Bhopal Case* (NM Tripathi, 1990); TR Chouhan, Indira Jaising and Claude Alphonso Alvares, *Bhopal, the Inside Story: Carbide Workers Speak Out on the World's Worst Industrial Disaster* (Apex Press in cooperation with the International Coalition for Justice in Bhopal, 1994); Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (University of Toronto Press, 1993); Ingrid Eckerman, ‘The Bhopal Saga: Causes and Consequences of the World’s Largest Industrial Disaster’ (Universities Press Ltd, 2005); *Clouds of Injustice: Bhopal Disaster 20 Years On*, in Amnesty International, ‘Twenty Years After the Bhopal Disaster: Some Facts’ (Amnesty International, 2004); See also Terrorism Watch, ‘Bhoposhima’ disaster <<http://www.terrorismwatch.org/2011/12/bhoposhima-disaster.html>>.

¹⁵³See Robert V Percival, ‘Liability for Environmental Harm and Emerging Global Environmental Law’ (2010) 25 *Maryland Journal of International Law* 37.

¹⁵⁴See Mick Brown, ‘Bhopal Gas Disaster’s Legacy Lives on 25 year later’ in *The Telegraph* (online), 6 August 2009, <<http://www.telegraph.co.uk/news/worldnews/asia/india/5978266/Bhopal-gas-disasters-legacy-lives-on-25-years-later.html>>.

¹⁵⁵See Charu Sharma, ‘Chernobyl: Case Study’ in Klaus Bosselmann, Daniel S Fogel and JB Ruhl (eds), *Berkshire Encyclopedia of Sustainability: The Law and Politics of Sustainability* vol 3 (Berkshire Publishing Group, 2010) 31–34, Over half a million people were exposed while over 5,000 suffered from cancer due to radiation. The official death toll accounted for 57 people.

The Indian government discovered a major fault in its existing legal framework—there were no laws that protected the environment per se and allowed for the imposition of criminal or civil liability focusing on environmental damage; the Water and Air Acts were vague statutes which were given mere lip service, there was no law with respect to the handling of hazardous material, there were no provisions for insurance in case of an accident of that kind; there were no procedural laws to deal a number of claimants or determine the liability of a multinational corporation and the government.¹⁵⁶

Apart from these legal liability questions, the Bhopal disaster initiated a strong response from all levels of civil society; from monetary aid, medical services, the setting up of research hospital and laboratories, psychological counseling centres, writing, research papers, books, analysis and a special tribunal for the processing of claims.¹⁵⁷ Academics, social scientists, engineering experts, lawyers, doctors, social activists and judges have all expressed their opinion.¹⁵⁸ However, the truth for the victims is that many are still fighting for justice and there is much trauma and anger that still lingers among the people and the new generation that was born after the accident and lives in its shadow.¹⁵⁹ Justice Krishna Iyer compares it to the bombing of Hiroshima in World War II, and has named the accident ‘Bhoposhima’.¹⁶⁰

¹⁵⁶Much literature exists on Bhopal, it is not possible in this work to explore all the relevant material as it is beyond the scope of this work. Articles and writing discussing the liability of UCC and multinational corporations in general and those analysing the Bhopal judgments have been researched; See also Divan and Rosencranz, above n 1, 549.

¹⁵⁷A special tribunal for processing of claims was set up in 1986 by The Bhopal Gas Leak Disaster (Processing of Claims) Claims Act, March 1986; In Charan Lal Sahu v Union of India AIR 1990 SC 1480, it was held to be constitutionally valid when it was challenged by a group of survivors.

¹⁵⁸See Suketu Mehta, ‘A Cloud Still Hangs Over Bhopal’ in the *New York Times* (online), 3 December 2009, <<http://www.nytimes.com/2009/12/03/opinion/03mehta.html>>; Rhys Blakely, ‘Activists Mark Bhopal Anniversary With Renewed Call for Justice’ in *The Times* (online), 3 December 2009, <<http://www.timesonline.co.uk/tol/news/world/asia/article6942219>>.

¹⁵⁹See Brown, above n 154.

¹⁶⁰Krishna VR Iyer, ‘Bhoposhima: Crime without Punishment’ (1991) 26(47) *Economic and Political Weekly* 2705.

However, the most notable feature of the struggle can be seen in the legal battle that the victims have fought for the last 26 years to obtain justice. This struggle has been for claiming just compensation and establishing the negligence of the chemical company.

i. *The Bhopal Litigation in Brief: Tracing Constitutional and Tort Liability*

Four significant Supreme Court decisions have been rendered since the matter was filed as a special leave petition in 1988 by the Union of India and the Union Carbide Corporation(UCC). Under the Bhopal Act 1986 the government was conferred a right as *parens patriae* to represent all claimants within and outside India. The Union of India instituted a civil suit against UCC for damages in the New York District Court. This move by the government reflected an undermining of confidence in its own legal system.¹⁶¹ It also reflected poorly upon a failed understanding of domestic laws.¹⁶² Other reasons included the lure of the large damages that an American court would award.¹⁶³ The US court rejected the choice of forum and rejected the suit. In 1986, the Union of India sued UCC in the District Court in Bhopal for USD 3 billion and the District Judge awarded an interim compensation of USD 270 million. The case went to appeal to the High Court where Justice Seth upheld the finding of the District Court in granting of an interim award and held that ‘more than a *prima facie* case was made out against the defendants’. But the High Court reduced the amount of damages to USD 192 Million. Under various appeals by the UCC and the Union of India the matter reached the Supreme Court. On 14 February 1989 the Court directed an overall settlement of the claims for USD 470 million and directed the consequential termination of all civil and criminal proceedings.¹⁶⁴ The defendant company was

¹⁶¹Divan and Rosencranz, above n 1, 549, 550, 551.

¹⁶²*Ibid.*

¹⁶³*Ibid.*

¹⁶⁴Union Carbide Corporation v Union of India (1989) 1 SCC 674 (settlement order), RS Pathak, CJ, ES Venkataramaiah, Ranganath Mishra, MN Venkatachaliah and ND Ojha, JJ; Union Carbide Corporation v Union of India (1989) 3 SCC 38 (4 May order), RS Pathak, CJ, ES Venkataramaiah, Ranganath Mishra, MN Venkatachaliah and ND Ojha, JJ; Charan Lal Sahu v Union of India (1990) 1

represented at the Court by Mr Fali Nariman who argued against the High Court order stating that it did provide a good rationale basis for determining the interim award.¹⁶⁵ However, the five-judge bench of the Supreme Court, dismayed at the turn of events that the case had taken and in view of the extreme pressure and protests and in view of the change in the government and ‘appearing to do justice’, reduced the amount of compensation and proceeded to give a settlement order. In the settlement order the Supreme Court recorded that the civil cases and the criminal prosecutions were being brought to a close ‘to enable the effectuation of the settlement.’¹⁶⁶

Ramanathan observes that there were many contradictions which arose out of the Court orders involving the UCC in the *Bhopal* litigation that has now dragged on for 26 years. She comments that ‘some startling results can be surmised upon analysis of the four Supreme Court decisions including, inter alia, that the Claims Act 1985 had nothing to do with the criminal proceedings and that the Court settled civil and criminal proceedings to enable effectuation of the settlement.’¹⁶⁷ The following

SCC 613 (Claims Act), Sabyasachi Mukharji, CJ, KN Singh, S Ranganathan, AM Ahmadi, KN Saikia, JJ; *Union Carbide Corporation v Union of India* (1991) 4 SCC 584 (review), Ranganath Mishra, CJ, KN Singh, MN Venkatachaliah, AM Ahmadi, and ND Ojha, JJ, *Keshub Mahindra v State of MP* (1996) 6 SCC 129, AM Ahmadi Majmudar JJ.

¹⁶⁵Fali Nariman, counsel for UCC, in his autobiography in 2001 admits in retrospect that he was incorrect in going against the High Court order in 1989. ‘I must confess that when I first read Justice Seth’s judgment, I was not at all impressed by the reasoning and attacked it with considerable force before the Constitution Bench of the Supreme Court. I had submitted that it was illogical. But, as they say, wisdom comes (sometimes!) with age. Looking back, I find that the judgment does afford as good a rationale as any I can see, absent enacted law, for relieving hardship caused to litigants in a mass tort action...’; This was first published in the 2004 December issue of *Seminar*, and reproduced in Fali S Nariman, *Before Memory Fades... An Autobiography* (Hay House India, 2010) 218, as quoted in Usha Ramanathan, ‘Bhopal: As the Law Develops’ (2010) 45(34) *Economic and Political Weekly* 82.

¹⁶⁶See Ramanathan, above n 165.

¹⁶⁷Ramanathan states that there were many contradictions which arose out of the Court orders in the four cases involving UCC, and the Court applied feeble principles of law without much legal ground to stand on (these included the following: the Court considered that it had the power to terminate criminal cases even if it was contrary to the law, and it had exercised the power in 1989; the court had been given no occasion to quash the criminal cases, but had done so anyway; the quashing was not a consideration for the settlement, which may be distinguished from motive, and neither is explained by the Court; this could not be said to amount to stifling of prosecution because it was not a private individual, but the Union of India, that had been party to settling the cases which would stop all prosecutions; yet, the termination of the criminal proceedings was not introduced into the settlement by the Union of India, Ramanathan, above n 165.

points can be discerned from the long litigation, which provides a dismal picture of how the victims had to struggle for environmental justice.

Upon a critical analysis one cannot fail to conclude that the principles that were applied in the *Bhopal* cases were ill-suited and weak and the outcome of the cases has been more than contentious.¹⁶⁸ The scheme of compensating individual victims directly failed, as it did not take into account basic medical, social and justice-related goals.¹⁶⁹ Further, the Court had no legal basis in its settlement order to terminate the criminal cases in 1989. The Court quashed the criminal cases against the defendant company and its officers even though this was not a consideration for settlement and the Court never provided an explanation to this effect. This indicates that had the Court not considered the application of absolute liability the little relief that was provided to the Bhopal victims would not have been possible but for a minimal compensation through government aid. However tort law procedures and compensation funds like that available in the US, e.g. CERCLA and rules and procedures to provide compensation for mass toxic torts were not developed at that time within the Indian environmental law framework and the opportunity to develop such procedures was not resorted to until much later, especially, when PLIA 1991 was enacted. Had the courts been able to handle mass tort claims, and had the civil procedure contained elaborate rules for representative suits and handling large scale evidence, had tort claims for environmental harms been a strong suit under the existing environmental law framework or had tort law justifications been developed to suit the circumstances- the victims would have had a better remedial option for the victims. Nevertheless in the current legal scenario, the legal position after Bhopal and consequent development in environmental liability, the following points can be summarised:

¹⁶⁸See Armin Rosencranz, Shyam Divan and Antony Scott, 'Legal and Political Repercussions in India' in Sheila Jasanoff (ed), *Learning from Disaster: Risk Management after Bhopal* (University of Pennsylvania Press, 1994) as quoted in Divan and Rosencranz, above n 1, 556–557.

¹⁶⁹See Paul S Kibel and Armin Rosencranz, 'A Blanket Spread Too Thin: Compensation for Bhopal Victims' (1996) 29(27) *Economic and Political Weekly* 1643.

- a) There is no question that strict liability and tort principles are applicable in India and have been used by the courts in various decisions including environmental nuisance.
- b) The principle of *Rylands v Fletcher* (1868) and strict liability have existed in India as part of the common law. Justice Bhagwati had laid down the foundations for cementing the role of tort in disaster situations and the Court ought to have given appropriate shape to the doctrine of ‘absolute liability’ as that case ‘provided a battlefield of legal principles and moral accountability.’¹⁷⁰ The opportunity would have been tempting for Chief Justice Pathak ... but the Pathak court turned away from it all.¹⁷¹ In the *Oleum Gas Leak* case case, the Bhagwati court decided that they had to ‘evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy’. So they moved the law beyond strict liability to ‘strict and absolute liability’.
- c) Strict liability application in India can be found in various laws, e.g., the Motor Vehicles Act 1988 and the Public Liability (Insurance) Act 1991. Its significance is that it takes away the burden of proving the ‘fault’ of the offending person from the victim.
- d) In the review judgment, Justice Ranganath Mishra weakened the application of the tort principles when he suggested that it was not a binding pronouncement.
- e) However, the principle has been expressly rejected in 1996 in the *Bichri* case and again in 2011 in the *Bichri II* judgment. In fact the Court has proceeded to

¹⁷⁰Gobind Das, ‘Supreme Court in Quest of Identity’ (Eastern Book Company, 2000) 264–267.

¹⁷¹Ibid, 267; Gobind Das quotes extensively from Justice Krishna Iyer’s *Justice at Crossroads* which carries an indictment of the Court, especially Justice Pathak, and where Justice Krishna Iyer comments on, ‘the beholdenness of the candidate [for the International Court of Justice] to the litigant government in getting the great office for him’ quoted in Das, above n 170, 268.

apply not only regulatory standards but also tortious principles. These reflect the use of not only the PPP (as in a corrective justice function) but the Court also applied the retributive and distributive functions that tort law offers. It has imposed an award of approx 40 crores as damages on the errant industries to remedy the damage to the people, their property and for restoring the environment of the area (to be paid to the government) along with punitive and exemplary damages for dragging the litigation out for over 20 years since 1989.

iii. Recent Developments in the Bhopal Litigation and Public Interest

The latest case on the Bhopal tragedy was decided by the Supreme Court on May 2011, and saw the dismissal of a curative petition¹⁷² filed by the government of Madhya Pradesh and the Central Bureau of Investigation to re-examine the decision rendered by the Court in 1996 diluting charges of culpable homicide under Section 304 Part II of the IPC providing maximum of ten years imprisonment to Section 304(A) that provides for rash and negligent act with a maximum of two years punishment. The state of Madhaya Pradesh and the Central Bureau of Investigation had both filed revision petitions in the Sessions Court against the judgment of the Chief Judicial Magistrate, Bhopal, which had awarded two years jail term to the eight accused persons in June 2010.¹⁷³ In response to the curative petition filed in the Supreme Court, senior advocate Mr Ram Jethmalani, inter alia, representing Baxi, argued for it to be dismissed.¹⁷⁴ He echoed Baxi's concern as to whether the government had any ground to state that the earlier Court's judgment in 1996 had caused injustice to the victims, when due to its own lackadaisical policies and closed

¹⁷²Central Bureau of Investigation v Keshub Mahindra, not reported, SC DOJ, 11 May 2011; See also J Venkatesan, 'CBI Curative Plea in Bhopal Case "Fallacious", Rules Supreme Court' *The Hindu* (online) 11 May 2011, <<http://www.thehindu.com/news/national/article2008782.ece>>.

¹⁷³Ibid.

¹⁷⁴ Venkatesan, above n 172 See also J Venkatesan, 'Reviving Dropped Charges Will Help Bhopal Accused' *The Hindu* (online) 27 April 2011, <<http://www.thehindu.com/news/national/article1773669.ece>>.

mind, it had betrayed the Bhopal victims by settling on a significantly smaller compensation amount (one seventh of the USD 3.3 billion claimed) and compounded the wrong by enacting the Bhopal Act in 1985, divesting the victims of their legal right to sue and standing as a trustee for the survivors in matters of claims against the UCC.¹⁷⁵ It was further argued that in the case of the disaster, the Union of India was more guilty than anybody else and that the Union Of India was liable to pay compensation because they were guilty of selling out in the settlement. The argument was based on the interpretation that once a judgment has gone through review or the procedure of review was not invoked, the judgment attained finality.¹⁷⁶ The Court can only recall a judgment in which the affected parties were not heard and principles of natural justice were not followed and/or where there was evidence of bias of the judge. Once the 1996 review filed by the Bhopal survivors' organisation was dismissed it attained finality as there was no appeal made by any of the interested parties within 30 days as required under the Supreme Court Rules.¹⁷⁷

The Bhopal litigation has definitely changed the dynamics of environmental justice in India and reoriented the scope and breadth of environmental law and the interconnectedness between public, private and international law. The boundaries existing earlier between public and private law have been obfuscated in the environmental arena. The re-emergence of the application of tortious doctrines by the Court signifies the role that tort can play within its narrow confines in conjunction with environmental regulations, constitutional rights and for the vindication of private rights. The next section discusses the features that emerge from the latest judgment that reflects the re-emergence of the tort principles for environmental harm.

¹⁷⁵Venkatesan, above n 172.

¹⁷⁶*Ibid.*

¹⁷⁷*Ibid.*

K Re-emergence and Reiteration of Tort Principles for Combatting

Environmental Harm: Bichri I (1996) and Bichri II (2011)

The *Bichri I* (1996) litigation was initiated by Mr MC Mehta in 1989 through an environmental organisation as a PIL under Article 32 seeking a remedy against a group of chemical industries engaged in the manufacture of sulphuric acid, 'H' acid, oleum and phosphate. The group, comprising eight industries, has set up their manufacturing plant in the village of Bichri, in the district of Udaipur in the State of Rajasthan. The respondent industries had applied for various licenses under the Water Act and Air Act. However, due to lack of proper inspection and enforcement of the regulatory provisions by the authorities the manufacturing process of hazardous chemicals led to conditions of extreme pollution resulting in the death of residents, their cattle and the disruption of life among the villagers. The matter was investigated by the local magistrate and criminal proceedings were initiated but the plight of the area and the villagers did not change. The sludge from the factories was discharged without proper treatment and the toxic chemicals gradually percolated through the underground aquifers and the subterranean, affecting the drinking water source for the villagers.

The activities of the industry also caused surface water sources, such as wells and ponds, in the area to become extremely toxic and replete with sludge and toxic chemicals. The petition under Article 32 was filed praying for relief from the Court to restrain the industries from continuing to pollute the area, to remove the sludge and restore the damaged environment and to compensate the victims who had lost their lives, cattle and their livelihood. In 1996, after considering various reports from the Central Government and the CPCB, the Court gave judgment for the petitioners and directed the respondents to pay compensation to the affected people and for the environment based on the PPP.

However, the respondents, through abuse of the legal procedure, kept filing interlocutory and interim applications, a review of the 1996 judgment and even a curative petition. All of these were dismissed, but even after 15 years the ecology of the village had not been restored nor had the respondents taken any steps to provide compensation. In 2011, in *Bichri II* ¹⁷⁸deciding two applications arising out of the 1989 petition, the Court finally ordered the respondents pay heavy costs and punitive damages.

i. *Disregard of Existing Regulatory Law and Recognition of Tort Liability*

Delivering a lengthy judgment on to the utter contempt and disregard of existing laws and abuse of procedural laws by the respondent chemical industries, this judgment also highlights the systemic defects existing within the legal system for dealing with environmental issues, the liability of polluters and the extent of compensation to be provided for victims who have suffered the ill effects of chemical industries and poor regulatory laws. The judgment also highlights the legal gaps and weak enforcement of the Water Act and the Air Act. In ordering the polluter to pay, the 1996 judgment clearly reiterated the application of common law tort principle of strict liability under *Rylands v Fletcher* (1868) that was modified in the *Oleum Gas Leak* case (1987) into absolute liability.

Contrary to the belief that tort law principles were outdated and did not work in the unique Indian setting the Court applied the very same principle for compensating the villagers and for restoring the damaged environment. It also stated that individual victims could proceed against the respondents for a civil claim and damages separately and that the SPCB was directed to provide such litigants with legal aid. In the 2011 judgment dismissing the interlocutory applications with punitive and exemplary costs the Court considered the principle of restitution, drawing from a

¹⁷⁸Indian Council for Enviro-Legal Action v Union of India (2011) 8 SCC 161, per JJ Dalveer Bhandari and HL Dattu.

variety of English cases, American and Canadian case law and materials. Adopting Denning LJ's words in *Nelson v Larholt*¹⁷⁹ on the blurring of boundaries between law and equity and doing away with old forms of action while considering an appropriate remedy, the Court held that:

Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires.' This principle has been accepted in several cases in India on unjust enrichment...¹⁸⁰ [further] ...the Public Liability Insurance Act 1991 makes it mandatory for industries handling hazardous material to be insured against environmental hazards. However, this legislation only provides relief to persons affected by accidents whilst handling hazardous materials, who are most likely to be workers. Members of the local community would not obtain relief under this legislation, though they are also adversely affected by hazardous industries. This was most pertinently exemplified in the *Bichri* case.¹⁸¹

L Summary and Conclusion: Increasing Role of Tort Law in Environmental Decision-Making and Other Areas

This chapter has examined the role that public law instruments have played in determining environmental liability and development of environmental jurisprudence through environmental standards. Environmental statutes comprise the bulk of

¹⁷⁹[1947] 2 All ER 751.

¹⁸⁰Enviro-Legal Action v Union of India(2011) 8 SCC 161 (Bichri II), Para 164, 165, 169–190.

¹⁸¹MC Mehta on behalf of the petitioners, Ibid, Para 110–111.

environmental law and lay down licensing and permit requirements for pollution emissions within prescribed limits. Each central legislation, such as the Water Act 1974, the Air Act 1981 and the Environmental Protection Act 1986, are umbrella legislation and statutory authorities are empowered to introduce specific rules for the abatement of pollution and introduce amendments to use more advanced methods and newer technologies. The authorities are also empowered to pursue criminal actions and prosecute offending polluters and impose fines. For example, the subdivisional magistrate¹⁸² is empowered to prosecute persons for violation of the use, operation and permits for generators sets in residential and industrial areas in Delhi. The subdivisional magistrate may also impose a penalty of up to five lakh and imprison an offender who violates these environmental standards for up to seven years. EPA authorities have pursued statutory action against offenders; however, the deterrent effect of these criminal sanctions is not efficient since at least 5,600 environmental cases are pending in civil and criminal courts, according to the official statistics.¹⁸³ Of course environmental cases are filed in both civil and criminal courts and at administrative level and comprise a multiplicity of issues and it is difficult to determine precisely the percentage of cases pending to be solved.¹⁸⁴ The regulatory mechanism for environmental protection, however, does not provide a foolproof

¹⁸²Under Section 15 of the EPA, for example, the Department of Environment, Government of NCT of Delhi has issued directions regarding the operation of generator sets in Delhi. The guidelines regulate the use of generator sets for sound in all residential/commercial and industrial areas within Delhi. The directions also empower the subdivisional magistrate to issue licences and/or prosecute those who infringe these guidelines. The contravention of these directions makes the offender liable for prosecution, which stipulates punishment of imprisonment for a term which may extend to five years with a fine which may extend to one lakh rupees, or with both. In case of failure or if the contravention continues then the offender must pay an additional fine which 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, and if still the failure or contravention continues beyond a period of one year after the date of contravention, the offender shall be punishable with imprisonment for a term which may extend to seven years.

¹⁸³Ministry of Environment and Forests, Government of India <<http://www.moef.gov.in>>.

¹⁸⁴There are 21 High Courts in India, in which there are over 3.2 million civil cases that are pending, the Supreme Court has over 40,000 cases pending in the year 2009–2010 (both civil and criminal). Of the 30 million cases pending in the courts including the trial courts, environmental cases form only a very small percentage. Over 5,000 environmental cases were pending in 2009–2010 in the various High Courts. See the Right to Information website indicating the figures that were realised by Home Ministry, Department of Justice 'Pending cases in the Court' <<http://www.rtiindia.org/forum/2385-nearly-30-million-cases-pending-courts.html>>.

method to tide over all sorts of environmental issues. Every tool or instrument of liability has its strengths and weaknesses thus the use of licenses, permits and criminal sanctions does leave gaps in enforcement and tort law may perform a useful role in reducing the weaknesses that are apparent. This it can do if a tort action is recognised under the statute to force a statutory authority to take action against errant polluters in the form of applying for injunctions. Thus civil liability could be used as an effective tool for the vindication of environmental claims and address environmental damage claims of individuals that would contribute to balancing of environmental justice considerations.

Where private harm has been caused then a claimant may seek to enforce the regulation by applying under the relevant regulation. However, as in other areas the environmental authorities are severely resource-starved and the enforcement of criminal actions against violators, especially large industrialists and well-connected businessmen, requires not only evidence but also courage and conviction in a politically charged environment of industrial towns and cities. The enforcement agencies therefore prosecute the parties with a weaker bargaining position and the enforcement agencies may be selective in choosing the matters to be investigated, e.g., if there are high profile cases such as environmental disasters due to gas explosions, chemical spills, industrial or electrical fires or where the media has highlighted the plight of the victims affected by polluting activities.

Many polluting incidents are not pursued by the authorities for a number of reasons and they are not accountable. Where private loss is caused then a person has the option to file a civil action under the CPC 1908 but where many people have been affected the best course is class action. However, in India class action is modified as PIL.¹⁸⁵ Civil remedies are more flexible than criminal ones, as the latter require the prosecutor or the complainant to provide scientific evidence and meet a higher burden

¹⁸⁵PIL is dealt in detail in Chapter 5 above,180-196 .

of proof, while for civil action a court may impose a cost on the polluter as is a method of cost internalisation, either through court decisions or through the statutory provisions and amendment to already existing rules.

Fines under the statutes are deposited with the Treasury while damages and compensation where these awarded may reflect the harm so caused and may be applied to the cost of remediation as reflected in the *Span Resorts* case. Here, the Supreme Court ordered Span Motels to pay for the restoration and remediation of the area near the Beas River, which it had taken for the development of a resort.¹⁸⁶ It also explored the innovative methods that the Supreme Court has employed to provide environmental justice to the victims and for protection of the environment through use not only of regulatory standards that have been weak but through use of constitutional rationale and incorporation of international norms into domestic law.

The analysis of regulations and the newly adopted law on setting up an environmental tribunal (NGTA), having powers to deal with environmental issues and grant damages for environmental harm, has come close to providing some measure of access to justice to the people and the recognition of the overlap between public law, private law and fashioning mixed remedies. It also raises certain significant questions as to the method that has been employed by the Court, which does not provide a coherent rationale for application of international norms; however, the Court has cemented environmental law principles such SD, PPP, PCP, PTD and EIA. The Courts have also led towards the formulation of tortious remedies for not only the victims of environmental harm, but also for remedying the damaged environment. Apart from the efforts of the government in formulating specific policies and laws, the Court has actually guided and initiated awareness, discussion, the right to access information and has provided a forum for healthy debate based on the various rights that Court has

¹⁸⁶MC Mehta v Kamal Nath (1997) 1 SCC 388.

interpreted for recognising the right to healthy environment, air and water among others.

It is also evident that the newly enacted NGTA finally makes the international principles of SD, PCP and PPP recognized in statutory law. A closer examination of the NGTA indicates that there will be difficulties in managing and operating the law and providing for individual victims of historic pollution or where injury manifests itself more than five years after exposure. Furthermore, the provisions under the NGTA do not provide any specific guidelines that the NGT ought to follow in applying SD, PCP and PPP, and although the jurisdiction of the civil court is ousted by the NGTA, at the moment the NGT is situated in Delhi. The Ministry of Environment and Forests itself estimates that in 2009–2010 there were at least 5,000 environmental cases pending with the repealed NEAA¹⁸⁷.

The arguments presented in this chapter, and the earlier chapters, indicate that as far as remedies for environmental damage claims are concerned, decisions of the Court, policy objectives formulated by the Government and the legislative enactments by the Parliament provide a wide array of legal liability and policy tools to combat environmental injustice.

The above discussion demonstrates that pursuit of both public law and, where appropriate, private law liability tools have been increasingly adopted in order to do complete justice. Thus, utilisation of tort law and its corrective and reparative justice functions, which have been overshadowed and underutilised for environmental claims, is remerging to provide supplemental support in the environmental arena. Consequently, neither the Courts nor the Government is reluctant in adopting them. The ongoing process of application of civil liability for the common objectives of environmental protection and rendering environmental justice are being adopted as an

¹⁸⁷Ministry of Environment and Forest, Government of India, above n 189.

effective tool for vindication of environmental claims in India within the wider framework of the current environmental liability regime.

The next chapter, which forms the concluding part of this thesis, summarises the findings in Chapters One to Five, and explores the limits and scope of using tort law for environmental damage claims in conjunction with public liability instruments. It also provides an overview of the existing framework within which public law and private law interconnect within the environmental liability framework and makes suggestions to clarify and ascertain the scope and narrow limits within which tort liability may operate to provide certainty and direction for environmental claimants, lawyer, judges and policymakers in India.

VII CHAPTER SEVEN: SUMMARY AND CONCLUSION—THE OPERATION, PROVINCE AND LIMITS OF TORT LIABILITY AND THE WAY FORWARD

A Introduction

This research work has attempted to explore the scope of public law and civil liability with a focus on tort law as instruments available for victims of environmental damage struggling for environmental justice in India. It has examined in detail whether tort law can be used as an effective tool for vindication of environmental claims in India within the wider framework of the current environmental liability regime; and the extent to which it is being used as a tool to address environmental damage claims and deal with environmental justice. This chapter reflects on the findings of the thesis, provides the salient features of the existing environmental liability strategies and suggestions for clarifying the rules on the applicability of tort liability for environmental claims.

Environmental issues in India have a significant impact on the social, cultural, economic, political and legal discussions, debates and movements for achieving environmental justice. Environmental claims traverse complex legal issues and environmental damage not only affects the ecological balance negatively but also impacts upon individual rights of the people, property and their life and livelihood. In order to achieve environmental justice, the legal liability regime needs to be clearly defined to provide a direction for environmental victims, lawyers and policymakers. Unfortunately, this is not the case in India, despite a strong public law liability regime that has helped in developing an environmental law framework. In reality, the pursuit

of an environmental claim for personal injury in India presents a daunting uphill battle due to the uncertainty in the outcomes, choice of legal tools and defective procedural rules within the environmental law framework. The Court grants remedies for environmental claims by adopting a mixed approach that has made prediction of environmental cases uncertain both for victims as well as lawyers. Litigation under tort law is extremely time-consuming, and it is difficult to establish evidence due to a lack of expert scientific institutions in India and equally difficult for the courts to quantify compensation within the existing legal framework.¹

B The Operation and Limits of Tort and its Philosophy in Environmental Claims

Earlier the main liability tools for handling matters that raised an environmental issue were through the common law torts of negligence, nuisance and the rule under *Rylands v Fletcher*,² or dealt with under criminal law. Common law tools are still available; however, the use of tort liability for environmental damage claims has been largely subsumed by statutory law, especially the NGTA, which bars civil actions in the courts in respect of any environmental matters arising from the violation of specific regulations (such as the EPA, Water and Air Acts). Arguments for and against the utility and use of tort law principles for environmental actions indicate a decreased role of tort law for environmental harms and tort law is characterised as having a ‘gap filling’ role.³ As discussed earlier in Chapters Two, Three, Four and Five, tort liability has been used reluctantly in India for a variety of reasons, including the post-colonial mentality, economic and cultural factors, as well as procedural law that did not support the institutions required for proving factual causation. These

¹See above Chapter I at 3 n 15.,.

²(1868) LR 3 HL 330.

³See Mark Latham, Victor E Schwartz and Christopher E Appel, ‘The Intersection of Tort And Environmental Law: Where the Twain Should Meet and Depart’ (2011) 80 *Fordham Law Review* 737–773.

factors have included, but are not limited to, lack of specific rules under the CPC for wide-ranging discovery for determining technical facts and managing large amounts of technical evidence; lack of the expert institutions and technical facilities required in a tortious claim, lack of training to undertake investigations for a civil trial dealing with environmental and medical injury claims, and the expenses involved. In addition to this, a practice that has emerged in environmental disaster situations that the government of a state would announce an immediate ex gratia payment to the victims, launch an investigation, a criminal prosecution or institute a commission of inquiry. In such a scenario one can also see that where compensation is provided it is not associated with clearly defined tortious liability.⁴

The scope and function of tort law⁵ is at risk and vulnerable to judicial discretion and reflects justifications both for and against its application for environmental harms. Justifications of the distributional and corrective justice principles from the West have been adapted to suit the Indian legal tradition, having transformed the character of environmental law in India into a unique one exhibiting pluralistic justifications and mixed objectives. Further, the distributional objectives cannot be determined in totality by wealth maximisation but must include the wider criterion of a moral and political philosophy that includes the desirability of environmental protection. This latter function, it is submitted can be traced within the indigenous cultural tradition which has not found mainstream legal recognition.

However, tort law has the capacity to augment the regulatory responses as it allows each individual member to be able to participate in policymaking and caring for the environment. Although common law principles form part of the law of the land, the

⁴See *MC Mehta v MC Mehta v Kamal Nath* (2002) 3 SCC 653 (in the Span Resorts Case the Supreme Court awarded INR ten lakhs as damages for reparation) and *Indian Council for Enviro-Legal Action v Union of India*, (2011) 8 SCC 161, (over 38 lakhs INR was awarded as compensation in the Bhichri II case).. However in both cases the Court did not clearly identify application of tort functions and theoretical justifications. See above Chapter 6 at 256-258.

⁵A Hutchinson and D Morgan, 'The Canengusian Connection: The Kaleidoscope of Tort Law' (1984) 22 *Osgoode Hall Law Journal* 69. See above Chapter 4 at 144.

Court has not followed or adopted the developments in the UK, distinguishing cases based on the facts, circumstances and different policies in India. For a considerable time even the absolute liability principle was not accepted or applied until the decision by the Court in *Vellore*⁶ and after the 1995 *MC Mehta* cases.⁷ Further, standard uniform structure exists for establishing negligence liability within an environmental claims context in India. This stands to reason, as negligence itself raises difficult issues of causation. Most decisions after Bhopal and until 1995 reflected the limits of tort law, pointing out the inappropriateness of the corrective justice function and the distributive function aspects of tort in the Indian context. Corrective justice functions of tort liability for environmental damage can be seen only in a few decisions. While use of tort law functions has not obviously provided for a solution to cases of historic pollution, such as evidenced in the earlier Ganga pollution cases⁸

Notwithstanding that environmental harms have been addressed through application of tort law, the province of tort law application is limited within the environmental liability framework. In contrast with the manner in which tort law evolved in the West, Indian academic literature on building and evolving civil liability theory provides little guidance, diverse opinions and opposing views.⁹ The diversity of opinion on the application of tort law for environmental issues and strongly differing views of scholars,¹⁰ (in)applicability and (in)efficient use of environmental regulations and overstretching of constitutional rights provides a ground for legal arguments and debates. It also calls for clarification of the legal philosophy, and substantive and procedural law.

⁶*Vellore Citizens Forum v Union of India* AIR 1996 SC2715. See also *Kamalnath v Union of India* (1997) 1 SCC 388.

⁷*MC Mehta v Union of India* (Oleum Gas Leak case); *MC Mehta v Union of India* (Ganga Pollution cases, Taj Trapezium, Calcutta Tanneries, Delhi Pollution cases).

⁸*MC Mehta v Union of India* AIR 1985 SC2185.

⁹*Contra* CM Abraham, *Environmental Jurisprudence in India* (Kluwer Law International, 1999), 137. See also Chapter 4 above 146-147.

¹⁰For a discussion on the indeterminacy in law see CL Kutz, 'Just Disagreement: Indeterminacy and Rationality in the Rule of Law' (1994) *Yale Law Journal* 997, (who argues that 'the conflict and indeterminacy that is inherent in the law is both ineradicable and deeply valuable to a self-scrutinising moral and political culture' at 999).

Contrary to the above, the use of tortious principles can be seen in recent developments not only in environmental law cases determining the liability of polluters but also in cases where plaintiffs have sought damages from a host of duty bearers, whether under the statute or otherwise under tort law.¹¹ Compensation has been awarded upon tortious liability principles against private operators of cinemas (Uphaar Cinema explosion), town planning boards (*Ratlam v Vardichand*) and even the government in criminal cases (*Nilabati Behra v State*¹²).¹³ This delineation in the recognition and provision of just remedies is more characteristic of a postmodern legal development, albeit with a traditional conceptualisation of law, flexible enough to change with the changing circumstances of the legal, cultural, social, economic and political scenario in India. This indicates environmental jurisprudence has developed based on a public law rationale mixed with private law characteristics.

C The Province and Potential of Role of Tort Liability

In the Indian context environmental risks have been addressed through both liability and legal regulations. Although there are numerous regulations addressing different facets of the environment—the central and state legislation addressing environmental aspects numbers over 200 laws—civil liability principles have intersected both constitutional liability and regulation. Although civil liability has not played a role in the enforcement of these regulations one can argue that after Bhopal, the enactment of the Public Liability Insurance Act 1991 was one such trigger. The recognition of the strict liability principle into absolute liability in the *Oleum Gas Leak*¹⁴ case was a significant factor for the promulgation of the Public Liability Insurance Act.¹⁵

¹¹See Usha Ramanathan, 'Bhopal: As the law Develops' (2010) 45(34) *Economic and Political Weekly* 82.

¹²See above Chapter 6 at 242, n 109.

¹³*Ibid.*

¹⁴*MC Mehta v Union of India* (1987) 1 SCC 395.

¹⁵See above Chapter 2 at 50, 51.

1 *Functions of Tort Liability*

Theoretically, with the functions that civil liability harnesses, it is possible that it can be potentially useful in situations where new risks materialises and where there is no regulation to cover such a situation. In fact, as scholars point out in other common law jurisdictions, the availability of civil liability may in fact sometimes be a catalyst for regulation.¹⁶ Similarly, environmental regulation in India also plays a role in recognising or precluding tortious liability. Under the EPA, Water and Air Acts, a citizen may proceed against an errant polluter for violating the regulatory standards, and therefore a violation of regulatory standard may be evidence of negligence per se. Within a mixed system of liability, different aspects of liability are useful; civil liability takes care of the deterrent and compensatory functions and environmental regulatory liability takes care of other functions such as preservation, conservation and setting standards, licencing, monitoring, deterrence, compensation and reparation of harm.¹⁷

In order to establish the potential function of tort law as a risk control mechanism it is necessary to determine how tort law operates not only theoretically but also practically.¹⁸ In the Indian scenario, the emerging focus on deterrence, compensation and reparation of harm within the public liability framework on which environmental issues are addressed provides the link and the interconnectedness of civil liability, environmental regulation and constitutional liability. It is this link between compensation and risk control that the Supreme Court has been attempting to harness, since the decisions in *Vellore*¹⁹, *Span Resorts*²⁰ and *Bichri II*. This provides a strong

¹⁶See Robert Rabin, 'Reassessing Regulatory Compliance' (2000) 88 *Geological Law Journal* 2049, 2069 (for example, there were no specific regulations that existed to deal with the effects and harms of asbestos and tobacco).

¹⁷See above Chapter 6 at 256, 257.

¹⁹*Vellore Citizens' Welfare Forum v Union of India* AIR 1996 SC 2715. See above Chapter 6 at 247, 248..

argument that environmental law development is rebounding to re-engage with the distinctiveness of tort liability rules in India. Although the Court has not examined the nature and functions of tort law explicitly in any of these decision, but in devising the remedies as in the most recent decision in *Bichri II* the Court has examined the two-sided or ‘bipolar’ nature of tort law, looking at both harm and the causation of harm.²¹ In *Bhichri II*²² the Court ordered the polluters to provide compensation for remediation and restoration of the damage done to the ecology of the village by establishing a common fund, providing for limited statutory compensation for victims and restoration. But this kind of compensation for the clean-up costs for a contaminated area and the restoration of natural resources has only been provided in an ad hoc manner.

2 Application of Tort in contemporary Context

In utilising liability tools for environmental justice the Court has used both the features of tort law as a limited compensation mechanism and also as a deterrent mechanism. The courts have utilised the technique of specific deterrence by allowing a person to be ordered by an injunction not to engage in harmful activity or potentially harm-causing conduct, especially within the environmental field for nuisance actions. This is another area where private law and public law intersect in the environmental field. Further, the provisions for public nuisance under the CrPC and the IPC, similar to the features in UK, recognises public nuisance as an unreasonable interference with a public right. Again, the remedies for a nuisance action are provided under the CrPC and the CPC in the form of injunctions and damages.

Thus, tort law can be utilised as a tool within the environmental law framework in several respects and has a potential role in environmental protection. However,

²⁰MC Mehta v Kamal Nath and Others AIR 2002 SC 1515.

²¹See Peter Cane, ‘Using Tort Law to Enforce Environmental Regulations’ (2002) 41 *Washburn Law Review* 427–467.

²²Indian Council for Enviro-Legal Action v Union of India(2011) 8 SCC 161.(Bichri II).

because of its interpersonal nature and focus on harm it only functions where identifiable harm has occurred, and hence its main focus is on providing a remedy in the form of a near cure rather than prevention of environmental harm. Therefore, the sector of environmental law it overlaps with is smaller. In contrast, the EPA or the Biodiversity Act or even the Water and Air Acts differ from tort law chiefly in not being interpersonal and in extending beyond harm to persons and focus on wider objectives such as on monitoring, licencing, providing for guidance of administrative agencies along with deterrence, protection and compensation. Thus one can state that tort law is a liability tool that has a narrow focus which can be used as a supplement to the enforcement of environmental rights and providing support for regulations.

Further, for the Indian circumstances and developmental needs, focusing more on the vindication of public interest and social objectives in deference to the Preamble to the Constitution, the public law liability framework was better suited as an appropriate tool in conjunction with the Aristotelian theory of commutative justice.

D Legal Pluralism and the Influence of Dharmic Liability

In terms of legal theory and philosophy, moral justifications and fairness espoused in the theoretical explanations from the West are accepted contemporaneously with the Indian indigenous cultural traditions. Hence another factor that needs attention is the simultaneous operation of legal pluralism and the influence of cultural factors for environmental decision-making. The indigenous cultural concept of dharma and the understanding of the moral and social norms with respect to the environment have influenced a rethinking in environmental law among legal academics and the judiciary as is evident in the design and direction of certain Supreme Court cases.²³ It is argued

²³Indian scriptures were quoted in several cases by the Supreme Court, see eg, the case of Rural Litigation and Entitlement Kendra v State of UP AIR 1987 359; Rural Litigation and Entitlement Kendra v State of UP AIR 1988 SC 2187; Sachidanand Pandey v State of West Bengal AIR 1987 SC1109; State of Bihar v Murad Ali Khan AIR 1989 SC 1; MC Mehta v Union of India AIR 1988 SC 1037; Tarun Bharat Sangh Alwar v Union of India AIR 1992 SC 514, Virendra Gaur v State of

that the Indian judiciary has followed an environmental strategy to have internalised the conceptual indigenous tradition and has stretched the legal frames of regulatory environmental liability and constitutional liability and common law liability (e.g., absolute liability) to do environmental justice. Thus, within this liability framework that rests on theoretical foundations drawn from various sources, the development of environmental liability reflects a mixed approach. The environmental liability framework encompasses a spectrum of liability rules and theoretical underpinnings of morality from dharma, corrective justice, distributive justice and human rights along with public liability tools, statutory standards and tort liability. This spectrum of liability needs to be clearly identified and made certain to yield certain legal outcomes.

E Role of Public Law Liability

As discussed in Chapter Five, constitutional liability has provided a basis for the growth of environmental jurisprudence within which the interpretation of fundamental rights, directive principles, fundamental duties and a human rights conscience has provided for the recognition of a virtual right to the environment. This significant development has been made possible by the design and strategy of the leading legal institution—an ‘activist’ Supreme Court that has earned critical acclaim not only in India, but also internationally.

The Constitutional rationale carries a strong and substantive potential to vindicate environmental justice claims and provide certainty and direction to not only the claimant but also to lawyers, judges and policymakers. The overlap of tort liability with public liability tools within the environmental law framework allows the judiciary and policymakers to yield it in an effective manner to address environmental claims. Although the change in procedural laws, the expansion of fundamental rights

Haryana 1995(2) SCC 577; Indian Council for Enviro-Legal Action v Union of India 1996(3) SCC 212 (Bichri I); TN Godavarman Thirumalpad v Union of India 1997 (2) SCC 267; 312.

and the circumstances that arose out of the Bhopal tragedy have provided for the modification of the common law and strict liability principle, in parallel it has also fashioned a remedy of constitutional tort²⁴ and the provision of compensation to victims of environmental disasters. The treatment of constitutional tort is, however, substantively different from traditional tort litigation. This presents a dilemma for the environmental victim and the lawyer, especially in seeking remedies. It also makes it difficult to distinguish and comprehend the distinction between the theoretical explanation of remedying a constitutional wrong and a tortious wrong against a person, his or her property and against the environment per se. One is uncertain of the outcome and no clear strategy exists. This is further compounded by the fact that the newly enacted NGTA bars the institution of civil actions with respect to the environment in any other court. It does not clarify whether a person could still proceed to the High Court or the Supreme Court under writ jurisdiction. It can be argued that where the right to the environment under Article 21 is violated and the matter reflects urgent remedial recourse a victim could still invoke Article 32 to move the Court.

F Significant Features of the Environmental Liability Framework

The environmental liability tools and institutional structures through which legal liability rules and principles have been practically applied so far for environmental issues reflect the following features upon which environmental jurisprudence has evolved in India.

- a) There are over 200 statutory instruments under the environmental law framework within the public law domain in India that regulate activities and provide for strategies to preserve and protect the environment and natural resources.

²⁴See above Chapter 5 at 179-181, 195.

- b) The environmental liability framework is premised largely upon public liability tools, consisting primarily of environmental regulations and a constitutional liability rationale that recognises a virtual right to the environment.
- c) Unfortunately, the plethora of statutes and the recognition of a virtual right to a healthy environment under the Constitutional provisions have not prevented environmental degradation in the country. Nor have the public liability tools been able to adequately meet environmental justice claims. By and large, the laws have remained unenforced, inefficiently administered and poorly managed, which reflects the failure of the regulatory framework and the gaps in the public liability laws for environmental protection. This has generated a crisis within the current Indian scenario and an urgent need to adequately address environmental claims. This situation also raises a sharp conflict between the rights of the people, the right to development and the escalating harm to the environment. Within this context, an environmental justice movement has taken shape similar to the struggle witnessed in the US. The victims of environmental and development conflict, environmental activists, environmental lawyers and NGOs have alternatively led the struggle and approached the Court for suitable remedies.
- d) In the context of resolving environmental issues, the right to life under Article 21 of the Constitution has been interpreted and extended to include a virtual right to a healthy environment, but simultaneously the Court has also emphasised the correlative duty of the citizens and the public authorities towards environmental protection. This development in turn reflects a unique manoeuvring of the cultural and ancient traditional beliefs in according respect to the environment and presents a value-added feature of the Indian environmental jurisprudence. It also reflects reliance upon indigenous

concepts and upon the understanding of nature in the Indian context. However, this cultural aspect is arguably only recognised subjectively and not practically.

- e) The Court, rather than the Parliament, has provided a path in fashioning remedies for environmental claims by providing innovative modifications to procedural and substantive law under the growing PIL tool. It has not only evolved a virtual right to the environment from Constitutional design but relied upon indigenous traditional beliefs, tort liability functions and international environmental law principles of SD, PPP, PTD and PCP. The latter international principles were adopted and internalised by the Court into domestic law prior to their adoption and ratification by the Parliament.
- f) Within this public liability domain it has fallen upon the Court to provide direction, indicate gaps in the existing laws and provide solutions where no remedies exist. The Court has stepped up and provided direction and at times it has intervened *sou motu*. This process of judicial intervention in resolving environmental disputes has earned the Indian judiciary the epithet of an 'activist judiciary' and at times it has even influenced policy and legislative actions.
- g) The earlier reluctance in using common law and tort liability has given way to modification of the strict liability principle into an absolute liability one. Further, after 1995 the Court has re-engaged with tort law in fashioning compensatory and reparatory damages for not only victims but also for harm to the environment, for violation of the right to life and the right to a healthy environment. This is a domain where the objectives and functions of public environmental law and the corrective and reparative justice functions of tort law overlap.

h) Lastly, the current National Environmental Policy 2006 objectives that encouraged the adoption of civil liability for environmental damage have been concretised in the recent NGTA. The NGTA recognises, inter alia, a civil liability for both a personal injury and property damage claim by a victim. This statutory inclusion of tort liability within the environmental law framework reflects the interconnectedness of tort liability and environmental law.

G Where Public Environmental Law Liability and Tort Liability Meet

From the analysis presented in this thesis it is proposed that the identification and critical analysis of these areas will yield clear principles and allow the design of new pathways for the resolution of environmental claims in India. The demarcation of areas where tort liability and environmental protection interconnect within specific spheres would provide certainty and direction to claimants, lawyers, the judiciary and policymakers, as well as provide more impetus for detailed research in the future for resolving environmental conflicts. While considering the role and nature of environmental torts in India and operation of civil liability, it is also clear that tort law functions in a narrow sectoral domain. The applicability of civil liability principles is narrow in the sense that these apply only where there is harm to a person or their property. On the other hand, the width of environmental law and the liability framework is much wider. Both intersect where the objectives that have been identified for a particular environmental issue pursue similar objectives: deterrence and compensation. However tort law must not interfere in areas where environmental law deals with functions and objectives other than protection of an individual and her property, such as preservation, conservation and administration of statutory standards. All such functions do not belong to the province where tort law can interfere.

The confining boundaries of tort liability in India and the overlap within environmental law lies in the field of harm to an individual in violation of the virtual environmental right. It overlaps where compensation and reparation of harm to the person and the environment, whether due to a hazardous accident or due to the right to the environment and development, is threatened. Earlier, in handling liability issues for mass accidents, such as in Bhopal, the utilisation of tort liability failed to meet the legal substantive and procedural expectations of a number of disaster victims.

One logical corollary of this failure lies in the legal lacunae within the existing environmental laws and procedural gaps, rather than any fault in pursuing claims based on tortious liability theory. The problem in India has rather been the emphasis on the social justice requirements of the Constitution and the manner in which Constitutional and public interest issues have been handled by the ruling government.

H Recognition of Civil Liability: The Way Forward

The higher judiciary and the government of India have become sensitive to environmental harm only recently and hence any harm to the person or to a person's environmental interest consists of an exercise by not only the victims' lawyers but also the court to determine how legal liability tools ought to be used to provide an effective remedy. The Supreme Court has assumed the authority and the jurisdiction to fashion a remedy by utilising a constitutional rationale, invoking regulatory standards, and impliedly, by utilising the features of tort liability in the environmental context. The creation of a right to a healthy environment, whether by strategy or by design, has also seen a revival of traditional indigenous cultural beliefs and a combination of international environmental principles and instruments being adopted by the Court as part of domestic law even before these were legally ratified by the Parliament.

This development is surely unprecedented. In attempting to mainstream the ancient Hindu philosophy ingrained within the indigenous culture, the Court has provided a unique solution. It has only gradually applied the corrective justice functions of tort law within the environmental context, having provided a subtle acceptance of the compensation and deterrence functions for violation of other aspects of the right to life and the fundamental rights chapter under the Constitution. Hence, in this context the overlap of tort law with environmental law has seen a gradual progression, however limited. In widening the scope of public liability tools and constitutional rights the Court may also have saved itself from the risk of potentially creating unlimited tort liability.

Similar and even higher powers and considerations reside with the Parliament to legislate for environmental harm. In creating legislation or an environmental regulation, the Parliament defines its objectives. Defining the objectives provides a clear domain within which the public law operates and the practical application of the law provides for the inadequacies that need to be addressed by amendments. The objectives of any such environmental legislation may be very wide, or narrow, as the case may be. Such a law may have objectives that overlap with the function of tort law and then it may have other objectives that provide a different function than deterrence and compensation.

The recent NGTA is an example of legislation where for certain harms the Act recognises civil liability and the rest of its provisions deal with the institutional, administrative and public liability functions that the Act envisages. Similarly, under the EPA the broader objectives of the law allow the CPCB to make rules to enforce standards with criminal sanctions or civil fines, and to issue guidelines for administering byelaws, while on the other hand the Act's provisions also provide for a citizen to bring a suit for violation of these standards. The guidelines issued by the institutions under the EPA further affect policy and shape it for future, and where these guidelines provide for the practice and application of administrative remedies in

actual situations, informs decisions at the policy level. Such delineation of objectives and liability issues within the legislation provides certainty and also acts as a guide to administrators so that they can respond to an environmental claim in a procedurally fair manner.

Institutions and administrative departments also need a clear understanding of the domain of environmental regulations and liability tools so that they can provide a smooth path for the resolution of an environmental claim. The Court's laudatory role in providing solutions to environmental problems has been through Constitutional developments that have provided legal standing to victims and modified principles of *stare decisis*. The the judicial interventions in the establishment of expert committees, *amicus curiae* services and provision of legal standing to public-spirited NGOs have also proved to be a valuable asset²⁵ for the pursuit of environmental justice claims and the growth of environmental jurisprudence. With the growing economy, and the overlap of public and private law with respect to environmental issues, current situations demand a multifaceted approach to solving environmental and related issues.

Tort liability is obviously not a panacea to all environmental problems and claims. The environmental law framework comprises not only laws, but also policies, directions, international commitments and constitutionally protected interests. Thus, tort liability is only one part of this framework, and operates theoretically within its own domain. The fact that both overlap and their similar functions and objectives are being increasingly recognised and internalised within the public liability tools makes it important to re-engage and determine the province where tort liability can be held to vindicate claims. The purpose of this thesis has thus been to show how legal liability tools within the public liability domain and private law have operated for environmental justice claims.

²⁵See Geetaonjoy Sahu, 'Implications of the Indian Supreme Court's Innovations for Environmental Jurisprudence' (2008) 4/1 *Law, Environment and Development Journal* 3–19.

I Suggestions for Reform and Clarification of Liability Tools

It is suggested that the following areas need clarification so that an environmental claimant can be certain of their rights, duties and remedies:

- a) As tort liability is premised on a legal wrong or an injury there must be an actual identifiable injury to the person or her property. Both negligence and nuisance require an recognized injury. Procedural rules inclusive of causation and legal standing rules need to be spelled out under the CPC specifically for environmental harms (for example individual and representative action) and under the NGTA, and not merely within the vague statements such as ‘principles of natural justice are applicable for an environmental claim under NGTA’.²⁶ When legal standing and procedural rules are clarified and followed through, vexatious claims are less likely to flood the courts.²⁷
- b) Harm in an environmental tort action needs to be the result of wrongful conduct, and there should be an identifiable defendant. Thus, where a person or an industry has lawfully discharged effluents and this has resulted in a diffuse injury to all residents living in an area the defendant will not be liable as it has followed the reasonable statutory standard. This happens mostly in cases where the State has harmed residents in the pursuit of development policy objectives within the statutory standards. There is no liability on the State when it is following prescribed standard, even though these may be detrimental to the local population. This may entail moving the Court for review of administrative action and the State may be tortiously liable for

²⁶See above Chapter 6, 241–244.

²⁷ See above Chapter 6, 234–235.

non-sovereign actions that result in harm. It may also be liable for reparation and rehabilitation utilising the tortious liability functions, as observed in the *Tehri Dam*²⁸ or *Narmada Dams*²⁹ decisions. Arguably, the Court in these decisions tried to strike a balance between the wrongful conduct and blameworthiness associated with the alleged environmental harm, and applied corrective justice and reparative justice liability principles after consideration of the specific objectives of the construction of the dam and development and environmental policy. Such matters also require political action and solutions outside the courts, rather than pursuit of environmental claims for vindication of rights or compensation.

- c) The intersection of environmental law and tort law must clearly provide for corrective justice and reparative justice functions. Courts ought not to promote unlimited liability to further public policy goals.
- d) The Courts need to be careful while upholding the standards under a given legislation and the promotion of specific objective under an environmental regulation. Where the objectives of a specific regulatory enactment perform functions that are different from tort liability, such as corrective justice, then enforcement of a regulation ought not to be met by imposing tortious liability. Unless the legislation, for example the NGTA, provides for civil liability, especially strict liability for hazardous accidents, liability for upholding the constitutional right to a healthy environment that has been violated or under the seven legislation mentioned under the Act, tort liability ought to be utilised only in its specific domain—where there is fault and a harm has resulted due

²⁸In *ND Jayal v Union of India* (2004) 9 SCC 362, (the Supreme Court considered the issues arising out of the construction of the Tehri Dam, especially EIA procedures and rehabilitation of displaced people). See also the 186th Law Commission Report on the proposal to constitute environmental courts, September 2003.

²⁹In *Narmada Bachao Andolan v Union of India* (2000) 10 SCC 664 (rehabilitation of the displaced villagers was a major concern although Court found that there was no violation of Article 21).

to the negligence of the tortfeasor. Normally, regulation for environment ought not to be a gateway to tort liability.

- e) In accordance with the National Environmental Policy 2006, which recognises civil liability and compensation for environmental damage, the NGTA, which similarly provides for civil liability for hazardous substances and forms of liability recognised under the seven specific environmental legislation mentioned under the Act, the broader environmental liability framework ought to be clarified and liability rules should be certain and specific. For instance the limitation period for environmental tort injury that ought to be calculated when the victim gains the knowledge of harm instead of when the accident happened, i.e latent injuries ought to specifically recognized.
- f) The recognition and utilisation of indigenous traditional norms and dharmic liability ought to become a separate subject of research and study not only within primary and secondary school education but ought to be made mandatory within law school studies. The pursuit of this study with respect to environmental concerns (whether it is translation and interpretation of dharmic texts, cultural norms and indigenous practices) in conjunction with comparative environmental liability rules ought to be promoted not only through education but also through social awareness programs and form part of government policy. This will lead to specialised research institutes comprising expert environmentalists, not only skilled in anthropological and socio-economic studies but also legal ones. On another level, this expertise all over India will also provide employment opportunities to such experts and provide avenues for a resource base for the newly established Green Courts.
- g) The rules with respect to the traditional burden of proof evidence and scientific findings, including medical diagnosis studies, must be strengthened and research laboratories providing unbiased studies and reports need to be

established so that plaintiffs have a sound backing of scientific proof to satisfy causation and establish causation in law and causation in fact. Thus, modification is required with respect to the rules governing environmental torts under the NGTA as well as the Civil Procedure Code (CPC) and the Evidence Act to take account of uncertainties that arise because of the long latency of harms in environmental torts.

- h) The clear role of tort liability and its overlap with environmental law is thus important to achieve the policy-oriented goals and pursuit of environmental justice. In enacting environmental legislation for a specific purpose, the government ought to provide more opportunities for public discussion, consultation, access to information and debate before it passes a law, so that liability questions and objectives, if any, are clearly discussed and debated from the point of view of the public and the individuals who are affected by such law. It is natural that as urban development increases more complex environmental issues will arise and tort liability will not be applicable across the board. Obviously, in such circumstances a specific law is required; however, where the objectives of a specific legislation and the harms that tort law addresses overlap, liability principles ought to be clearly stated and recognised instead of leaving it to the Court's benevolence, design or discretion as has been the case until recently.

J Conclusion

Tort law has its effective use in a limited context in the environmental law framework. This work highlights how tort liability has been used as a tool to address environmental damage claims and how it can be used as an effective tool for vindication of environmental claims in India within the wider framework of the current environmental liability regime. The Parliament, the Courts and the

government has started to re-engage with the recognition of civil liability. However, there is a need to clarify the theoretical principles and establish clear guidelines for tortious liability to function within the environmental field. There are of course many downsides to the application of tort law for environmental claims in India. However, it is essential that for future environmental claims victims, lawyers, judges and policymakers have clear guidelines within the environmental liability framework with a view to pursue the advantages that civil liability provides as a supplement to public liability tools.

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