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IMPLICATIONS OF INDIAN SUPREME COURT'S INNOVATIONS FOR ENVIRONMENTAL JURISPRUDENCE

Gectanjoy Sahu

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IMPLICATIONS OF INDIAN SUPREME COURT'S INNOVATIONS FOR ENVIRONMENTAL JURISPRUDENCE

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1

INTRODUCTION

Since the last two decades, the Supreme Court of India has been actively engaged, in many respects, in the protection of environment. While conventionally the executive and the legislature play the major role in the governance process, the Indian experience, particularly in the context of environmental issues, is that the Court¹ has begun to play a significant role in resolving environmental disputes. Although it is not unusual for Courts in the Western democracies to play an active role in the protection of environment, the way Indian Supreme Court has been engaged since 1980s in interpreting and introducing new changes in the environmental jurisprudence is unique in itself. Besides the assigned role of interpretation and adjudication² of environmental law the Court has laid down new principles to protect the environment, reinterpreted environmental laws, created new institutions and structures, and conferred additional powers on the existing ones through a series of illuminating directions and judgments. The Court's directions on environmental issues is involved not just in general questions of law as is usually expected from the Court of the land but also in the technical details of many environmental cases. Indeed, some critics of Supreme Court describe the Court as the 'Lords of Green Bench' or 'Garbage Supervisor'.³ International legal experts have been unequivocal in terming the Indian Courts of law as pioneer, both in terms of laying down new principles of law and also in the

application of innovative methods in the environmental justice delivery system.⁴

The enhanced role of the Court is not unique to cases of environmental jurisprudence in India. In fact, its role has become crucial and significant in every sphere of governance which includes: prisoners' rights, child labour, inmates of various asylums, ensuring the rights of the poor to education, to shelter and other essential amenities, sexual harassment of women at working place, preventing corruption in public offices, accountability of public servants, and utilisation of public funds for development activities.⁵ The reasons for the increasing concern of Court in governance arenas are varied and complex but one major factor has been failure of implementing agencies to discharge their Constitutional and Statutory duties.⁶ This has prompted civil society groups and the people to approach the Courts, particularly the Supreme Court, for suitable remedies. Interestingly, the Court has also responded in a pro-active manner to address different governance problems.⁷

The increasing intervention of Court in environmental governance, however, is being seen as a part of the pro-active role of the Supreme Court in the form of continual creation of successive strategies to uphold rule of law, enforce fundamental rights of the citizens and constitutional propriety aimed at the protection and improvement of environment. Unlike other litigations, the frequency and different types of orders/directions passed periodically by the Supreme Court in environmental litigation and its continuous engagement with

1 All instances of the term 'the Court' refer to the Supreme Court of India.

2 Speaking constitutionally, the role of the Supreme Court as proclaimed under Article 141 of the constitution of India is to 'declare' the law that shall be binding on all courts in India. As such, it does not envisage interaction, much less a direct dialogue, with the executive government of the day.

3 See S.S. Prakash and P.V.N. Sarma, 'Environment Protection vis-a-vis Judicial Activism', 2 *Supreme Court Journal* 56 (1998).

4 See G. L. Peiris, 'Public Interest Litigation in the Indian Subcontinent: Current Dimensions', 40 (1) *International and Comparative Law Quarterly* 66 (1991). See also M.R. Anderson, 'Individual Rights to Environmental Protection in India', in A. E. Boyle and M.R. Anderson eds., *Human Rights Approaches to Environmental Protection* 1 (United Kingdom: Oxford University Press, 1998).

5 Prashant Bhushan, 'Supreme Court and PIL', 39(18) *Economic and Political Weekly* 1770 (2004).

6 Upendra Baxi, 'Environmental Law: Limitations and Potentials for Liberation', in J. Bandyopadhyay et al. (eds), *India's Environment: Crises and Responses* (Dehradun: Natraj Publishers Pvt. Limited 1985).

7 See S.P. Sathe, 'Post Emergency Judicial Activism: Liberty and Good Governance', 10(4) *Journal of Indian School of Political Economy* 603 (1998).

environmental issues has evolved a series of innovative methods⁸ in environmental jurisprudence. A number of distinctive innovative methods are identifiable, each of which is novel and in some cases contrary to the traditional legalistic understanding of the judicial function.⁹ These innovative methods, for instance, include entertaining petitions on behalf of the affected party and inanimate objects, taking *suo motu* action against the polluter, expanding the sphere of litigation, expanding the meaning of existing Constitutional provisions, applying international environmental principles to domestic environmental problems, appointing expert committee to give inputs and monitoring implementation of judicial decisions, making spot visit to assess the environmental problem at the ground level, appointing *amicus curiae* to speak on behalf of the environment, and encouraging petitioners and lawyers to draw the attention of Court about environmental problems through cash award. It is important to note that these judicial innovations have become part of the larger Indian jurisprudence ever since the Court has started intervening in the affairs of executive in the post-emergency period.¹⁰ The innovative methods

initiated in resolving environmental litigation, however, have been almost entirely dominating the environmental jurisprudence process for more than the last twenty years.

The innovative methods in environmental jurisprudence, however, have both procedural and substantive characteristics. Procedural innovations refer to those judicial initiatives that expand the existing procedure of environmental jurisprudence for environmental protection and improvement. For example, entertaining petition on behalf of the pollution victim and inanimate objects, expanding the sphere of litigation, encouraging petitioners for bringing environmental litigations to the Court, making spot visit, appointing expert committees, and appointing *amicus curiae* to represent environment and pollution victims. On the contrary, substantive innovations however are in contrast to procedural innovations. Substantive innovations are decisions in which the Court creates, defines, or rejects policy and governance structure for environmental protection and determines how its directions should be implemented. For example, application of new principles to address environmental problems, expansion of fundamental rights, and creation of new structures and implementation of Court orders for environmental protection through a *continuing mandamus*.

The categorisation of judicial innovations into procedural and substantive, however, are neither water-tight nor mutually exclusive. Quite possibly substantive innovations could also provide scope for procedural innovations in environmental jurisprudence. For example, the expansion of fundamental right to include right to healthy environment is also possible through application of environmental principle like polluters pay principle in which case the Court may ask the polluter to pay for the damage done to the environment and public thereby ensuring people's right to healthy environment. More precisely, the objectives of procedural and substantive innovations for environmental jurisprudence have often been quite complex, thereby making such categorisation rather difficult. Nevertheless, these distinctions are useful in identifying patterns in the Court's innovations for environmental jurisprudence. The following section gives a brief summary of the key innovations in each category.

8 M. K. Ramesh, 'Environmental Justice: Courts and Beyond', 3(1) *Indian Journal of Environmental Law* 20 (2002).

9 See Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?', 37(3) *The American Journal of Comparative Law* 495 (1989).

10 See Gobind Das, 'The Supreme Court: An Overview', in B.N. Kripal et al. (eds), *Supreme But Not Infallible* (New Delhi: Oxford University Press, 2001). The author argues that the Indian Supreme Court had always been uncomfortable with former Prime Minister of India, Mrs. Indira Gandhi's regime; during the late sixties her economic and political policies were struck down in the Bank Nationalisation and Privy Purse cases; in the early seventies the Court was locked in the Kesavananda battle and again in her election cases; when the Court supported her emergency in the Shukla case and Detenu case it was execrated by public opinion; and during the Janata rule the Court was confirming legal attempts for her political extinction in the Special Courts Bill and Assembly Dissolution cases. Whenever the Court opposed her policies it had to pay the penalty in the form of suppressions of judges and constitutional amendments. In the post-emergency period (1975-77), the Court decided not to interfere with the major political and economic decisions of government and opened up new fields of interest and different areas of judicial activities; it chose the poor, the helpless, the oppressed in the name of social justice, constitutional conscience, and the rule of law.

2

PROCEDURAL AND SUBSTANTIVE INNOVATIONS AND THEIR IMPLICATIONS FOR ENVIRONMENTAL JURISPRUDENCE

2.1 Concept of PIL

The most important procedural innovation for environmental jurisprudence has been the relaxation of traditional process of standing in the Court and introducing the concept of Public Interest Litigation (PIL).¹¹ Until the early 1970s, litigation in India was in its rudimentary form because it was seen as a pursuit for the vindication of private vested interests. During this time period, initiation and continuance of litigation was prerogative only to the individual aggrieved party. A complete change in the scenario in the 1980s with efforts taken by Justice P.N. Bhagwati and Justice V.R. Krishna Iyer was marked by attempts to bring wider issues affecting the general public at large within the ambit. The ambit and extent of PIL were expanded in 1980s from the initial prisoner rights concerns, to others like bonded labour, child labour, inmates of various asylums, ensuring the rights of the poor to education, to shelter and other essential amenities, sexual harassment of women at working place, preventing corruption in public offices, accountability of public servants, and utilisation of public funds for development activities.

The Court's approach to entertain PIL for environmental protection, however, is significant in many ways. First, prior to the emergence of the

concept PIL, Criminal Law provisions as contained in the Indian Penal Code, Civil Law remedies under the law of Torts and provisions of the Criminal Procedure Code were existed to provide remedies for public nuisance cases including air, water and noise pollution. However, due to lack of people's awareness about the environmental problems and limited knowledge of environmental laws there were problems in drawing the attention of the Court towards environmental problems. Again, there was no provision in the environmental legal framework for allowing the third party to seek the help of the Court if the party was not directly affected by environmental problems.¹² Hence, the biggest hurdle in the path of litigation for environmental justice had been the traditional concept of *locus standi*. Earlier when the third party approached the appellate Court for seeking relief against an injury they did not incur directly, the action was not maintainable as the appellate Court focused its attention on the identity of the petitioner rather than the subject of petition.¹³ But now the Court's approach has changed and it has been ruled that any member of the public having sufficient interest, may be allowed to initiate the legal process in order to assert diffused and meta-individual rights. Generally, in environmental litigation, the parties affected by pollution are a large, diffused and unidentified mass of people. Therefore, the question arises as to who ought to bring such cases to the Court's notice where no personal injury, in particular, has been noticed. In such situations, the Court has emphasised that any member of the public having sufficient interest may be allowed to initiate the legal process in order to assert diffused and meta-individual rights in environmental problems.¹⁴

A number of cases on environmental issues have been initiated through PIL. Beginning with the Dehradun lime stone quarrying case¹⁵ in 1983,

11 In the Indian context, some of the legal scholars prefer the expression 'Social Action Litigation' to 'Public Interest Litigation', as this tool for justice to protect basic rights of individuals and communities has, through innovations of higher Court in India, for greater positive impacts on the social lives of the people in India than the United States, where the PIL movement took roots. For more details, see Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India', in Tiruchelvam and Coomaraswamy eds., *The Role of the Court in Plural Societies*, (New York: St. Martin's Press, 1987).

12 See Atiyah Curmally, *'Environmental Governance and Regulation in India'* 96 (New Delhi: Indian Infrastructure Report, 2002).

13 See Peiris, note 4 above at 68.

14 *RLEK v. State of Uttar Pradesh and Others*, Supreme Court of India, Judgement of 19 December 1996, AIR 1985 SC 652.

15 The Dehradun lime stone quarries litigation filed by the Rural Litigation and Entitlement Kendra in 1983 was the first PIL on environmental issue in the country before the Supreme Court.

followed by the Ganga Water Pollution case, Delhi Vehicular Pollution case, Oleum Gas Leak case, Tehri Dam case, Narmada Dam case, Coastal Management case, industrial pollution in Patancheru, and T.N. Godavarman case, all of them came to Court's attention through PIL. These cases have been initiated by Non-Governmental Organisations (NGOs), and environmental activists on behalf of other individuals and groups or public at large, to ensure the implementation of statutory acts and constitutional provisions aimed at the protection of environment and enforcement of fundamental rights. It has been found from Indian Supreme Court Case reports that out of 104 environmental cases¹⁶ from 1980-2000 in the Supreme Court of India, 54 were filed by individuals who were not directly the affected parties and 28 were filed by NGOs on behalf of the affected parties. This suggests that the instrument of PIL has provided an opportunity to the third party to represent on behalf of the affected people and the environment itself.

The Court has also shown a willingness to alter the rules of the game wherever necessary to entertain environmental cases. For example, where there are a wide variety of offenders, the Court has chosen to treat a particular case as a rep-representative action and issued orders binding on the entire class. In one case concerning massive pollution of the river Ganga, the Court has published notices in the newspaper drawing the litigation to the attention of all concerned industries and municipal authorities inviting them to enter an appearance.¹⁷ In this case, the petition was filed against the Kanpur tanneries and Kanpur Municipal Council to stop polluting the river Ganga. The Court, however, asked all the industrialists and the Municipal Corporations and the town Municipal Councils having jurisdiction over the areas through which the river flows in India, to appear before the Court. Similarly, in 1995, T.N. Godavarman Thirumulpad filed a writ petition with the Supreme Court of India to protect the Nilgiris forest land from deforestation by illegal timber operations.¹⁸ The Court expanded the Godavarman

case from a matter of ceasing illegal operations in one forest into a reformation of the entire country's forest policy.

The positive impact of Court's approach to environmental litigations through third party representation has been such that it has dramatically transformed the form and substance of environmental jurisprudence in India. Recourse to judicial proceedings is a costly exercise for those who suffer substantial injuries from environmental pollution. Even if the aggrieved party takes recourse to judicial proceedings, the Court may only settle disputes between the appellant party and the polluter, and the rights of other aggrieved persons remain unsettled. Judicial remedies for environmental maladies would have effective results only if the remedies benefit those who are not parties to the litigation. By entertaining petitions on behalf of poor and disadvantaged sections of the society, from different NGOs and public-spirited people, the Court has attempted to ensure the rights of people in terms of deciding compensation and providing other remedies to the affected people.

Allowing third party to bring environmental problems to Court's notice has also an important bearing on inanimate objects, which cannot represent itself in the litigation process. The voice of the inanimate objects has been represented by concerned NGOs and environmental activists through the instrument of PIL. The polluter has been asked to pay for the damage done to the natural objects and restore the environment to its natural position.¹⁹

Notwithstanding the above progressive implications of the concept PIL for environmental jurisprudence, certain practical difficulties and constraints have emerged in recent years from judicial entertainment of PILs dealing with environmental cases. A close look at the history of environmental cases suggests that with the liberalisation of the *locus standi* principle, there has been a flurry of PILs on environmental issues.²⁰ Taking advantage of the

¹⁶ The information is based on the All India Reporter from January 1980 till December 2000, Supreme Court Cases.

¹⁷ *M.C. Mehta v. Union of India*, Supreme Court of India, Judgement of 22 September 1987, AIR 1988 SC 1037.

¹⁸ *T. N. Godavarman v. Union of India*, Supreme Court of India, Judgement of 12 December 1996, AIR 1997 SC 1228.

¹⁹ *Indian Council for Enviro-Legal Action v. Union of India* (Bichhri village industrial pollution case), Supreme Court of India, Judgement of 13 February 1996, 1996 (3) SCC 212.

²⁰ For more details, see Jona Razzaqhuie, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Hague: Kluwer Law International, 2004).

Court's lack of expertise on observation of technicalities, PILs are being filed with little or no preparation.²¹ Actions are initiated by filing complaints without proper evidentiary materials to support them. Expectations are that once a petition is filed, the Court would do the rest. But, the heart of the matter is that most of the time, energy and resources of the Court are getting diverted for getting information on multi-dimensional aspects of environmental problems, so much so that the justice delivery system is under great stress and the cracks in it are becoming visible. The Court has shown its annoyance at taking every conceivable public interest issue to its jurisdiction when compliance with the orders made at the local level, in most of the cases, would have prevented the flurry of litigation at the highest level. As early as in 1980, in the *Ratlam Municipal Council case*,²² the Court upholding the orders of the Sub-Divisional Magistrate, expressed that had the Municipal Council spent half of its litigative zeal of rushing from lowest to the highest Court, in cleaning up the streets and complied with the orders issued at the local level, the civic problems would have been solved a long time back.

Apart from this, the idea behind introducing PIL has been to address public interest. But there are certain alarming and emerging trends. One of the most significant ones is that of the PIL method becoming personalised, individualistic and attention-seeking. There are instances of their identification with the personality of a judge or a litigant.²³ It becomes a travesty of justice when the outcome of the case depends on the judge before whom it gets posted. No doubt the personality of the judge and the litigant, and their deep commitment to social justice and protection of the environment have contributed, in a major way, to the evolution of the jurisprudence on the subject. But, without such concern and commitment, the system gets influenced by different whims and fancies that may hurdle the justice delivery system.

In addition to this, what was considered as an inexpensive and expeditious mode of redressal has sometimes taken more than a decade to get settled. The *Godavarman case* is a classic example of the Court being seized of the problem for over a decade and its final resolution is a long way in coming. The case that began its life in 1996, as a petition seeking the intervention of the Supreme Court for the protection of Nilgiris forest land from deforestation by illegal timber operations, has grown into a case of mammoth proportions and has mired in controversies of interfering in administrative functions and traditional method of forest management and lack of attention in recognising the rights of forest dwellers.

Another immediate concern is the inconsistent approach of the Court in entertaining and rejecting PILs. The judicial restraint towards environmental litigations, especially challenging infrastructure projects, offers a well illustration in this context. In such nature of litigations, the Court has not only rejected PILs but has also made gratuitous and unmerited remarks regarding abuse of PIL. For instance, in the *Narmada Bachao Andolan v. Union of India case*,²⁴ the Court did not allow *Narmada Bachao Andolan* from making any submissions on the pros and cons of large dams. Despite the dissenting judgment of Justice S.P. Bharucha, who pointed out that the *Sardar Sarovar Project* was proceeding without a comprehensive environmental appraisal, majority of the successive judges allowed the government to construct the dam without any comprehensive environmental impact assessment, which was necessary even according to the government's own rules and notifications. The majority judgment observed that a conditional clearance given in 1987 was challenged in 1994 and stated that the pleas relating to height of the dam and the extent of submergence, environment studies and clearance, hydrology, seismicity and other issues, except implementation of relief and rehabilitation, cannot be permitted to be raised at this belated stage.²⁵

21 See Ramesh, note 8 above at 32.

22 *Ratlam Municipality v. Vardhichand and Others*, Supreme Court of India, Judgement of 29 July 1980, AIR 1980 SC 1622.

23 See Shyam Divan, *Cleaning the Ganga*, 30(26) *Economic and Political Weekly* 1557 (1995). In this article, the activist role played by Justice Kuldeep Singh & Advocate M.C. Mehta in Ganga pollution and other cases finds mention.

24 *Narmada Bachao Andolan v. Union of India and Others*, Supreme Court of India, Judgement of 18 October 2000, AIR 2000 SC 3753.

25 *Id* at 3761.

The subordination of environmental interests to the cause of development was also evident in Supreme Court's judgment in the PILs challenging the construction of Tehri Dam and the construction of power plant at Dahanu Taluka in Maharashtra, where the government's own expert committee had given an elaborate report pointing out a series of violations of the conditions on which environmental clearance to the projects had been given by the Ministry of Environment and Forests. In such nature of environmental litigations challenging infrastructure projects, the Court held that in case of conflicting claims relating to the need and the utility of any development project, the conflict had to be resolved by the executive and not by the Courts.²⁶

The Court even held that if a project is stayed on account of a public interest petition which is subsequently dismissed, the petitioner should be made liable to pay for the damages occasioned by the delay in the project. In the words of the Court, 'any interim order which stops the project from proceeding further must reimburse all the cost to the public in case ultimately the litigation started by such an individual or body fails'.²⁷ Unlike the use of discretionary power in entertaining PILs on environmental cases in 1980s, the Court maintained a distance with regard to cases against public infrastructure projects since 1990s. The inconsistent approach of the Court has become a serious concern among the public spirited persons who see the Court as the last resort to protect the environment.

2.2 Expansion of Fundamental Right to Life

The six fundamental rights of Indian citizens are specified in Articles 14-32 of the Indian Constitution such as right to equality (Articles 14-18), right to freedom (Articles 19-22), right against exploitation (Articles 23-24), right to freedom of religion (Articles

25-28), cultural and educational rights (Articles 29-31) and right to Constitutional remedies (Article 32). There are four Constitutional provisions that are directly relevant to protect the fundamental rights of citizens. Under Article 13, the Court is granted power to judicially review legislation, so that the laws inconsistent with the fundamental rights may be held void. In addition, Article 32 confers on every citizen the Court's original jurisdiction for the enforcement of his or her fundamental rights. Through this provision, individuals can approach the Court to seek the protection of their fundamental rights. Article 32 and 226 of the Indian Constitution grant wide remedial powers to the Supreme Court and High Courts of each Indian State in Constitutional cases. Under Article 136, the Supreme Court has discretionary power to grant special leave to appeal from any judicial order, judgment, or decree in the land thereby providing another route for judicial review.

The earliest understanding of these provisions had been a narrow procedural one where fundamental rights and other Constitutional provisions were interpreted as procedure established by law.²⁸ Moreover, inconvenient Court decisions on the Constitutionality of state action were simply overturned by amending the Constitution until the 'basic structure' of the Constitution was declared unalterable.²⁹ In 1978 the Court breathed substantive life into Article 21 by subjecting state action interfering with life or liberty to a test of reasonableness; requiring not only that the procedures be authorised by law, but that they are 'right, just and fair'.³⁰

An account of the interpretation of right to environment as a part of fundamental right to life would illustrate the efforts of Court to expand the scope of existing fundamental right to life. For instance, in the Ratlam Municipal case, the Court has upheld that public nuisance is a challenge to the social justice component of the rule of law. Decency

²⁶ For a comprehensive analysis on the approach of Court towards infrastructure projects, see Vidheh Upadhyay, 'Changing Judicial Power', 35(43&44) *Economic and Political Weekly* 3789 (2000).

²⁷ *Ranauk International v. IVR Construction LTD. and Others*, Supreme Court of India, Judgement of 9 December 1998, 1998 (6) SCALE 456.

²⁸ *A.K. Gopalan v. Union of India*, Supreme Court of India, Judgement of 19 May 1950, AIR 1950 SC 27.

²⁹ *Kesavananda Bharti v. Union of India*, Supreme Court of India, Judgement of 24 April 1973, AIR 1973 SC 1461.

³⁰ *Maneka Gandhi v. Union of India*, Supreme Court of India, Judgement of 25 January 1978, AIR 1978 SC 597.

and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies.³¹ Likewise, in the Dehradun Lime Stone Quarrying case, the Court has made it clear that economic growth cannot be achieved at the cost of environmental destruction and peoples' right to healthy environment. In the Doon Valley case, concerning mining environment, the Court has interpreted Article 21 to include the right to live in healthy environment with minimum disturbance of ecological balance and without avoidable hazard to them and to their cattle, house and agricultural land and undue affection of air, water and environment.³² This exercise has been further emphasised in the Ganga water pollution case by Justice Venkataramiah, who has extended the right to life to include the right to defend the human environment for the present and future generation.³³ In *M.C. Mehta v. Union of India*,³⁴ the Court has accepted that environmental pollution and industrial hazards are not only potential civil torts, but also violation of right to health. In this way, through the interpretation of Article 21, the Court has sought to convert formal guarantees into positive human rights.

The above Court's interpretations in expanding the meaning of right to life have brought new dimensions not only in the environmental jurisprudence but also in the discourse on human rights in India. The credit for the creation of a host of environmental rights and enforcing them as fundamental rights goes to the Supreme Court of India. This is a significant contribution for environmental jurisprudence in India, if one learns from experiences elsewhere. The legal system may guarantee a Constitutional right to environment and statutes may accord the right to participate in environmental protection for citizens. However, when no methods for their participation are made available, then they are as good as non-existent. This is the experience in Spain, Portugal,

Brazil and Ecuador.³⁵ Importantly, Indian experience contrasts very significantly from these countries. There is no direct articulation of the right to environment anywhere in the Constitution or, for that matter, in any of the laws concerning environmental management in India. But this has been seized from below, by environmental groups, motivating the Court to find and construct environmental rights from the available legal material. What the Court has achieved since 1980, is to view the fundamental right to life to include different strands of environmental rights that are at once individual and collective in character. However, the expansion of fundamental right by the Court recognising right to environment as a part of right to life has neither been statutorily established nor has it been recognised in national environmental policy programmes.

2.3 Spot Visit

Another important procedural innovation of the Court in resolving environmental dispute has been found in judges' personal interest to have first-hand information through spot visit to understand the nature of environmental problem and the issues revolving around it. In the *Ratlam Municipal v. Vardhichand* case,³⁶ before arriving at a decision, Justice V.R. Krishna Iyer³⁷ visited the Ratlam town and assessed the problem and then directed the Ratlam Municipality to take appropriate measures to construct proper drainage system in the city. Similarly, in the Doon Valley case, Justice P.N. Bhagwati³⁸ visited the area and found that the environmental litigation involved certain complex issues including the rights of the workers, traders and

31 See *Ratlam Municipality*, note 22 above at 1629.

32 See *RLEK*, note 14 above at 656.

33 See *M.C. Mehta*, note 17 above at 1045.

34 In this case, the Court declined to determine whether or not the defendant in this case was sufficiently under government control to be an authority and therefore susceptible to constitutional control.

35 Article 45, Article 66, Article 335 and Article 19 (2) of the respective countries such as Spain, Portugal, Brazil and Ecuador contain specific provision for the enjoyment of fundamental right to live in a healthy environment but no substantive methods exist for their protection. See S Douglas-Scott, 'Environmental Rights in the European Union-Participatory Democracy or Democratic Deficit' in A. E. Boyle and M.R. Anderson eds., *Human Rights Approaches to Environmental Protection* 109 (United Kingdom: Oxford University Press, 1998)

36 See *Ratlam Municipality*, note 22 above at 1622.

37 Interview with Justice V. R. Krishna Iyer, Cochin, 21 August 2005.

38 Interview with Justice P.N. Bhagwati, New Delhi, 23 September 2005.

fragile ecology of the area. He then appointed an independent committee to assess the problem and based on the recommendation of the committee, the Court directed the state government of Uttar Pradesh to close down certain mining units which were illegally operating and allowed other mining units to operate only with certain conditions to ensure the protection of environment. In the Narmada Dam case, the visit of Justice S.P. Bharucha to the dam site also made a difference in the outcome of the case. In his dissent judgment, Justice S.P. Bharucha expressed dissatisfaction with the rehabilitation process and the way environmental clearance was given to construct the dam in the river valley.³⁹

The spot visit of judges has enabled them to assess the environmental problem on the ground and hence the decisions given by these judges have made a difference in the outcome of the case. However, most of the judges share the view that it is neither feasible nor possible for them to make spot visit to arrive at a decision always. Therefore, the innovative method to arrive at a decision through spot visit has become part of individual interest of judges rather than a standard practice in the decision-making process.

2.4 Application of Environmental Principles and Doctrines

The Court of India, while administering environmental justice, has evolved certain principles and doctrines within and at times outside the framework of the existing environmental law. Environmental principles, such as polluter pays principle,⁴⁰ precautionary principle⁴¹ and public trust doctrine⁴² have been adopted by the Court in

its concern to protect the environment from further degradation and improve the same. It is important to note that these principles have been developed in various international agreements and conferences to control and prevent further environmental degradation.

Drawing inference from international environmental principles, the Court of India has applied various principles to resolve domestic environmental problems. For example, the Polluter Pays Principle was invoked by the Court of India in the *Indian Council for Enviro-Legal Action v. Union of India*. Giving the judgment, the Judges held that 'we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country. Once the activity carried on is hazardous or inherently dangerous, the polluter carrying on such activity is liable to make good the loss caused to any other affected party by polluter's activity irrespective of the fact whether the polluter took reasonable care while carrying on his activity'.⁴³ In this case, the Court has stated that the 'Polluter Pays Principle' means that the absolute liability for harm to the environment extends not only to compensate the victims of the pollution but also the cost of restoring the environmental degradation. Subsequently, 'Polluter Pays Principle' as interpreted by the Court has been recognised as a fundamental objective of government policy to prevent and control pollution.⁴⁴

The precautionary principle, as applied by the Court in the *Vellore Citizens' Welfare Forum v. Union of India*,⁴⁵ imposes an obligation on every developer, industry and governmental agency to anticipate, prevent and attack the causes of environmental degradation. The Court also held that if there are threats of serious and irreversible damage then any lack of scientific certainty should not be used as a

³⁹ See *Narmada Bachao Andolan*, note 24 above at 3761.

⁴⁰ The Polluter Pays Principle is a principle in international environmental law where the polluting party pays for the damage done to the natural environment.

⁴¹ Precautionary Principle aims to provide guidance for protecting public health and the environment in the face of uncertain risks, stating that the absence of full scientific certainty shall not be used as a reason to postpone measures where there is a risk of serious or irreversible harm to public health or the environment.

⁴² The Public Trust Doctrine is the principle that certain resources are preserved for public use, and that the government is required to maintain it for the public's reasonable use.

⁴³ See *Indian Council for Enviro-Legal Action*, note 19 above at 215.

⁴⁴ See Government of India, National Environmental Policy, 2006, available at <http://www.envfor.nic.in/nep/nep2006.html>.

⁴⁵ *Vellore Citizens' Welfare Forum v. Union of India*, Supreme Court of India, Judgement of 28 August 1996, AIR 1996 SC 2716.

reason for postponing measures to prevent environmental degradation. Finally, the Court emphasised that the onus of proof shall be on the actors or the industrialists to show that their action is environmentally benign. The precautionary principle had also been emphasised in cases such as *M.C. Mehta v. Union of India* and *A. P. Pollution Control Board v. M.V. Nayudu* case.⁴⁶

To further justify and perhaps extract the state initiative to conserve natural resources, the Court also enunciated the doctrine of 'public trust' thereby obligating conservation by the state. The 'public trust' doctrine has been referred to by the Court in *M.C. Mehta v. Kamal Nath*.⁴⁷ The doctrine extends to natural resources such as rivers, forests, sea shores, air etc., for the purpose of protecting the eco-system. The State holds the natural resources as a trustee and cannot commit breach of trust. In the above case, the State's order for grant of a lease to a motel located on the bank of the river Beas, which resulted in the Motel interfering with the natural flow of the water, has been quashed and the public company which got the lease has been directed to compensate the cost of restitution of environment and ecology in the area.

Unfortunately most of the above principles borrowing from international environmental agreements by the Court have neither been followed consistently nor been institutionalised to make a long term impact for the environmental jurisprudence process. For example, in the *Bichhri* case⁴⁸ regarding the contamination of ground water, the Supreme Court, after analysing all the provisions of law rightly found that compensation can be recovered under the provisions of Environment Protection Act. However, the assessment of compensation, its payment and the remedial measures have still not been complied with. In the case of *S. Jagannath*,⁴⁹ concerning destruction of

coastal ecology by intensive and extensive shrimp farming, the Court had directed closure of shrimp firms and payment of compensation on polluter pays principle as well as cost of remedial measures to be borne by the industries. But after the judgment, firstly the Court itself stayed its own directions in review and thereafter, the Parliament brought a legislation over-ruling the directions given in the said judgment. Therefore, neither any compensation has been paid to the farmers and the people who lost their livelihood nor the damage done to the environment has been remedied. As far as the Court's emphasis on polluters pay principle is concerned, it has not been able to control pollution, especially created by the big enterprise, and has rather provided an instrument to the polluter to pay and pollute.

The precautionary principle has also not been applied in the Tehri Dam case where the petitioner as well as the Environmental Appraisal committee of the Government expressed concern about the safety of the dam. Likewise, in the Narmada Dam Case, the Court refused to apply precautionary principle on the big dam as if protection of natural resources and its ultimate cost for the present and future generation is not an integral part of development. The observation of the Court that the said principle will apply in cases where extent of damages are not known but not in the cases where they are known is, with respect, incorrect.⁵⁰ Natural resources, once destroyed cannot be rebuilt by mitigative measures or even be substituted.⁵¹

2.5 Expert Committee

The Court's dependence on expert committee has traditionally been part of the jurisprudence process, irrespective of the nature of litigation. The Supreme Court's use of discretion power whether to appoint independent expert committee or rely on state appointed expert committee on environmental issues, however, has brought substantial changes in

⁴⁶ *Andhra Pradesh Pollution Control Board v. Prof. M.V. Nayudu*, Supreme Court of India, Judgement of 27 January 1999, AIR 1999 SC 812.

⁴⁷ *M.C. Mehta v. Kamal Nath*, Supreme Court of India, Judgement of 13 December 1996, 1997 (1) SCC 388.

⁴⁸ See Indian Council for Enviro-Legal Action, note 19 above at 231.

⁴⁹ *S. Jagannath v. Union of India and Others*, Supreme Court of India, Judgement of 11 December 1996, 1997 (2) SCC 87.

⁵⁰ See Narmada Bachao Andolan, note, 24 above at 3757.

⁵¹ See Sanjay Parikh, 'Development of Environmental Law: A Critical Appraisal', Paper presented at the National Consultation on Critiquing Judicial Trends on Environmental Law, organised by the *Human Rights Law Network* in New Delhi, from 23 to 24 February 2008.

the outcome of the environmental litigation. In the Doon Valley case,⁵² the Court required information on whether indiscriminate mining, continued under a legally valid license, had any adverse impact on the ecology. The Court appointed a Committee headed by D.N. Bhargava, for the purpose of inspecting the lime-stone quarries mentioned in the writ petitions and also in the list given by the Government of Uttar Pradesh. On the basis of the Committee's report, certain mining operations were ordered to be closed immediately, and others in a phased manner. In *S. Jagannath v. Union of India*,⁵³ intensive and semi-intensive aquaculture, were declared to be environmentally harmful by the Court, on the basis of studies by the Central Pollution Control Board and the expert committees at the national and international levels. In the *Godavarman* case,⁵⁴ the Court asked the state government and the Central government to appoint committees to study several problems, and to oversee implementation of orders relating to forest protection.

In contrast to this, the Court, however, exercising its discretionary power did not appoint independent committee to examine the impact of infrastructure projects on environment and people at large. For example, in the Tehri Dam case, the Environmental Appraisal Committee of the Ministry of Environment and Forests, taking into consideration the geological and seismic settings, came to the unanimous conclusion that the Tehri Dam Project did not merit environmental clearance and should be stopped.⁵⁵ While giving the dissent judgment, even Justice Devbrat Dharmadhikari held that in order to ensure compliance with the conditions of environmental clearance, it was necessary to constitute an independent expert committee which would monitor the compliance and further construction of dam could only proceed on the green signal of the expert committee. But the majority judgment given by Justice S. Rajendra Babu and Justice G.P. Mathur allowed the government to

construct the dam without ensuring compliance with the conditions of environmental clearance of the project.⁵⁶ Similarly, in the *Dahanu Taluka Environment Protection Group and others v. Bombay Suburban Electricity Supply Company Limited and others*, the Court did not follow the report of the Appraisal Committee which had the opinion that Dahanu is not a suitable location for the construction of the thermal power plant as it violates environmental guidelines.⁵⁷

The Court's strategy of appointing committees, which are supposedly expert bodies sometimes also results in leading to a different set of unforeseen problems while solving disputes. The Central Empowered Committee (CEC), for example, in the *T.N. Godavarman* case,⁵⁸ which was constituted vide a Court's order is perhaps one of the most glaring examples. The procedural requirements mandate that the Central Empowered Committee can recommend certain things to the Court in the light of facts presented before them. Again, it is only when the Court endorses such recommendations that the order would be more effective. For example, the CEC set up by the Court directions is of the view that mining in the Niyamgiri Hills would cause immense harm to the biodiversity of the area and the lives of the Dongria Kondh tribal whose lives, culture and very existence are deeply linked with the Niyamgiri Hills.⁵⁹ The committee has recommended to the Court against diversion of forest lands for the project. Furthermore, the CEC highlighted that area allocated to company forms part of Schedule V area as specified by the Constitution. Schedule V provides protection to the *adivasi* people living in these areas. No land in these

⁵² See RLEK, note 14 above at 653.

⁵³ See Jagannath, note 49 above at 96.

⁵⁴ See Godavarman, note 18 above at 1231.

⁵⁵ *Tehri Bandh Virodhi Sangarsh Samiti and Others v. State of Uttar Pradesh and Others*, Supreme Court of India, Judgement of 7 November 1990, 1992 Supp (1) SCC 45.

⁵⁶ See Bhushan, note 5 above at 1773.

⁵⁷ *Dahanu Taluka Environment Protection Group and Another v. Bombay Suburban Electricity Supply Company Ltd. and Others*, Supreme Court of India, Judgement of 19 March 1991, 1991 (2) SCC 542.

⁵⁸ The Court in its order on 9 May 2002 constituted an Authority at the national level called the Central Empowered Committee. The task assigned to it included the monitoring of the implementation of the orders of the Court, removal of encroachment, implementation of working plan, compensatory afforestation plantation and other conservation issues.

⁵⁹ See Geetanjoy Sahu, 'Mining in Niyamgiri Hills and Tribal Rights', 43(15) *Economic and Political Weekly* 19 (2008).

areas is allowed to be transferred to non tribal.⁶⁰ The Supreme Court decision on 23 November, 2007 delighted the Dongria Kondh tribe by barring the UK company Vedanta Resources Plc from mining bauxite in the sacred Niyamgiri hills in Orissa. However, the decision offered the tribe only a temporary reprieve, as the Court ordered the company's Indian unit, Sterlite Industries,⁶¹ to come back with a new proposal for the project⁶² sidelining the recommendation of the CEC that mining in Niyamgiri Hills would bring disastrous consequences for the local environment, biodiversity and people's livelihood.

Apart from this, there have been serious concerns over the functioning and composition of such Court appointed committees. For example, the members of the CEC set up by the Court consists entirely of wildlife conservationists who have traditionally prioritised wildlife over people, and officers of the Ministry of Environment and Forests, with their strong inclination to enlarge the territory under forest department control. There is no representative of tribal people, the Ministry of Tribal Affairs or the Constitutional Authority of the Commissioner, Scheduled Castes and Scheduled Tribes.⁶³ The committee is empowered to make recommendations to the Court on any of the interlocutory applications and also to monitor the orders passed by the Court.

The reports of expert committee given to apex Court also raise problems of their evidentiary value. No Court can base its decisions on facts unless they are proved according to law. This implies the right of an

adversary to test them by cross-examination or at least counter affidavits. However, in the *S. Jagannath v. Union of India* case, the Court did not permit even counter affidavits to be filed in response to National Environmental Engineering Research Institute's (NEERI) report thereby making it difficult for individual affected parties to set out their own case. In such instances, the Court has unnecessarily invited criticism as using its discretionary power by not allowing other parties to participate in the decision-making process.⁶⁴ In the *Taj Trapezium* case, the Court relying upon the report of NEERI, ordered closure and relocation of several small-scale units, especially the foundries in the area. The report, unfortunately was not based on all facts and its methods, analysis and conclusions left a lot to be desired from a reputed scientific and research organisation.⁶⁵

It is also being strongly felt that the statutory obligation of the executive is being diluted by creation of such committees, which now have assumed a status of permanent statutory bodies as such committees are now being created under the Environment Protection Act as Special Environment Protection Authorities and their terms depend on the Central Government's will. In other words, Court initiated committees or commissions are being converted into statutory authorities thereby creating a parallel power structure within the governance frame.

3

ANALYSIS OF INNOVATIONS EFFECTED BY THE COURT

3.1 Interference in the Affairs of Executive Action

The dominant understanding of judicial functioning in the common law world is that it can be rendered

⁶⁰ For more details, see Central Empowered Committee Report in IA NO. 1324 Regarding the Alumina Refinery Plant being set up by M/s Vedanta Alumina Limited at Lanjigarh in Kalahandi District, Orissa (2005).

⁶¹ Sterlite Industries is a public limited company manufacturing aluminum and aluminum products. Other major Sterlite Group Companies operating in India include Sterlite Optical Technologies Ltd., Bharat Aluminum Company Ltd. (BALCO), and Hindustan Zinc Ltd (HZL).

⁶² See Ashish Kothari's letter to The Chief Justice of India appealing to protect the rich biodiversity of Niyamgiri and the lives of the Dongria Kondh Adivasis from being destroyed by bauxite mining, 22 January 2008, available at www.kalpavriksh.org/campaigns/campopenletter/niyamgiri%20letter.pdf.

⁶³ See Madhu Sarain, 'Who is Encroaching on Whose Lands?' *Seminar*, October 2002, page 69, available at <http://www.india-seminar.com/2002/519/519 comment.htm>.

⁶⁴ See Ashok H. Desai and S. Muralidhar, 'Public Interest Litigation: Potentials and Problems', in B.N. Kripal *et al.* (eds.), *Supreme but Not Infallible* 180 (New Delhi: Oxford University Press, 2001).

⁶⁵ See Raghuram, 'The Trouble with the Trapezium', *Down to Earth*, 15 April 1996, page 32.

compatible with liberal democratic principles only if adjudication remains distinct from legislation. Indeed, ever since Montesquieu clearly formulated for the first time the theory of separation of powers in 1748, it has been argued that for the smooth functioning of democracy, judicial power needs to be separated from the legislative and the executive. The impossibility of having a rigid separation of powers has, however, been illustrated in the Constitution of U.K., America and India.⁶⁶ For example, under American Constitution the President has got legislative powers in his right to send messages to Congress and the right to veto, while Congress has the judicial power of trying impeachments and the Senate participates in the executive power of making treaty and appointments. Similarly, in U.K., the emergence of the Cabinet system of government presents a standing refutation to the doctrine of separation of powers because Great Britain has a very closely connected legislature and executive, with further links to the Court.

The framers of the Indian Constitution have not incorporated a strict doctrine of separation of powers but have rather envisaged a system of checks and balances. However, the Indian Supreme Court, in the Delhi Laws Act case⁶⁷ has noticed that the Indian Constitution does not vest the legislative and judicial powers in the Legislature and the Court in clear terms. The framers, in effect, have imported the essence of the modern doctrine of separation of powers, applying the doctrines of Constitutional limitation and trust. Therefore, none of the organs of government such as, legislature, executive and Court under the Constitution can usurp the function or powers which are assigned to another organ by the Constitution.

Importantly, the most visible aspect of the doctrine of separation of powers in India has been reflected in the *Indira Gandhi v. Rajnarain* case in 1975. It was held by the Court that 'though the doctrine of rigid separation of powers in the American sense does not obtain in India, the principles of checks

and balances, underlying that doctrine constitutes a part of the basic structure of the Constitution or one of its basic features which cannot be impaired even by amending the Constitution; if any such amendment of the Constitution is made, the Court would strike it down as unconstitutional and invalid'.⁶⁸ The Court has elevated this feature of separation of powers to the basic inviolable structure of the Constitution in the landmark judgment of the Court in *Kesavananda Bharti v. Union of India*.⁶⁹ The separation of powers is accepted so as to preserve the freedom and independence of the organs of the state, whose independence is necessary for their proper functioning and also for the smooth functioning of democracy.⁷⁰

Importantly, the application of the theory to modern governments has shown consistently that the separation of powers has to be reconciled with the need for their cooperation with each other.⁷¹ Nevertheless, for free and efficient working of government, it is crucial that there be a balance and equally felt need for the cooperation and dependence amongst the three distinct organs of governance. A closer look at the Indian political system in general and the judicial system in particular, shows that this balance might have been lost. As indicated earlier, the judicial power has surged ahead in recent times and its presence is felt in every arena of governance such as environmental protection, human rights protection, protection of prisoners' rights, and workers' rights, which are supposed to be dealt by the executive and legislature. As in case of other governance problems, the role of Court in resolving environmental disputes through interpretation and expansion of existing policy and creation of additional structure for environmental protection has become an important part of environmental jurisprudence in India.

This raises the question as to why there is a need for judicial intervention in resolving disputes revolving around environmental problems. In view of the

⁶⁶ See Durga Das Basu, *Introduction to the Constitution of India* (New Delhi: Princeton Hall of India, 1986).

⁶⁷ In re Article 143, Constitution of India and Delhi Laws Act (1921) etc., Supreme Court of India, Judgement of 23 May 1951, AIR 1951 SC 332.

⁶⁸ *Indira Gandhi v. Rajnarain*, Supreme Court of India, Judgement of 7 November 1975, AIR 1975 SC 2299.

⁶⁹ See *Kesavananda Bharti*, note 29 above at 1461.

⁷⁰ See Upadhyay, note 26 above at 3789.

⁷¹ See Durga Das Basu, *Administrative Law* (New Delhi: Prentice Hall of India, 1986).

Stockholm Conference on Human Environment and growing awareness of the environmental crises in the country, India has amended its Constitution and added direct provisions for protection of environment.⁷² The Constitution (Forty-Second Amendment) Act, 1976 has made it a fundamental duty to protect and improve the natural environment. Article 48-A states that the state shall endeavour to protect and improve the environment and to safeguard forests and wildlife of the country. Corresponding to the obligation imposed on the state, Article 51 A (g), which occurs in Part IV (A) of the Constitution dealing with Fundamental Duties, casts a duty on every citizen of India. Article 51-A (g) provides that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creature.

In the subsequent years, India has also enacted a number of statutory acts for the protection and improvement of environment. The enactment of the Water (Prevention and Control of Pollution) Act of 1974 has given the statute book its first real foundation for environmental protection. Other major enactments that have followed are the Forest Conservation Act (1981), the Air Prevention and Control of Pollution Act (1986), the Environmental Protection Act (1986), the National Environment Tribunal Act (1995), the National Environment Appellate Act (1997) and the Biodiversity Protection Act (2002).⁷³ In this way, India has enacted a range of regulatory instruments to preserve and protect its natural resources. Unfortunately, the plethora of such enactments and the Constitutional provisions has not resulted in preventing environmental degradation in the country. Noticeably, the last two decades have been a period of rapid degradation in the Indian environment. The enactment of a number of laws both by the Central and State governments relating to environment has not made much headway in controlling the environmental degradation process and the laws, by and large, have

remained unenforced, misadministered or mismanaged. In such situations, the environmental activists and NGOs have approached the Court for suitable remedies and the Court's intervention has resulted in reminding and compelling the implementing agencies to perform their statutory obligations towards the protection of environment. This process of judicial intervention in resolving environmental disputes is viewed as judicial activism in present days. Judicial activism means essentially that the judiciary expands its own scope and jurisdiction and goes into matters not normally considered to be within its own domain and that the judiciary often goes beyond giving of judgments and issuing of specific directions for executive action and sometimes even monitoring the progress of action, resorting to what is known as 'continuing mandamus'.⁷⁴

The expansion of judicial activism through environmental cases, in particular, is widely debated and discussed in India. On the one hand, critics of the theory of separation of power view this kind of judicial activism as a sign of hope to correct shortcomings on environmental issue. They argue that the approach of the Court in intervening in the affairs of executive is to ask whether the implementation or non-implementation of the policy results in a violation of the fundamental rights or not. If the Court finds a violation of the Constitutional provisions then it can direct authorities to discharge their duties. In *M.C. Mehta v. Union of India*,⁷⁵ the Court has explained how, despite the enactment of the Environment Protection Act, 1986, there had been a considerable decline in the quality of environment. The Court has noted that despite several PILs required attention has not paid by the authorities concerned to take the steps necessary for the discharge of duty imposed on the state. Any further delay in the performance of duty imposed by the Central Government cannot, therefore, be permitted. Suitable directions by the Court to require performance of its duty by the Central Government need to be mandated by the law. The Court, however, required the Central

⁷² See Atiyah, note 12 above at 96.

⁷³ For more details on Indian Environmental Law, see Sanjay Upadhyay and Videh Upadhyay, *Handbook on Environmental Law: Forest Laws, Wild Life Laws and the Environment*, Volume I & II (New Delhi: The Lexis Nexis Group of Companies, 2002).

⁷⁴ See Ramaswamy Iyer 'Some Constitutional Dilemmas', 41(21) *Economic and Political Weekly* 2064 (2006).

⁷⁵ *M.C. Mehta v. Union of India*, Supreme Court of India, Judgement of 18 November 1997, 1998 (9) SCC 589.

Government to indicate what steps it had taken thus far and also place before it the national policy, if any, drawn up for the protection of the environment.

The Court's directions to the implementing agencies to implement the environmental laws or when it asks the polluter to pay the compensation for the damage it has done to the environment and to the people have been welcomed. This process of judicial interpretation of existing law and policy to ensure better quality of life and an attempt to check governmental lawlessness are said to have 'transformed the Supreme Court of India into a Supreme Court for Indians'.⁷⁶

On the other hand, the advocates of theory of separation of power argue that the intervention of Court in the affairs of implementing agency to protect the environment and enforce fundamental rights is violating the principle of separation of powers as the theory of separation of power suggests that each organ of the government has to perform within the prescribed limits as designed by the Constitution of India. In a number of cases, the Court has gone beyond its adjudication function to protect the environment thereby violating the principle of separation of powers and creating problems for other organs of the State. Its continuous intervention in the affairs of executive, questioning the validity of government policy and resuming administrative powers to protect the environment aggressively has invited steadfast resistance from administrative branches. For example, in the Delhi Vehicular pollution case, the Court directions to convert all commercial vehicles into Compressed Natural Gas (CNG) has witnessed protest not only from the private companies but also from the Government of India and the Delhi state government. Steadfast resistance from the agencies responsible for enforcing the Court order has raised serious questions about the wisdom of this decision.⁷⁷ Many opponents have

disputed the reliability and practicality of CNG arguing that the technology is still in development, making the conversion both risky and costly. By disregarding the pleas of the Delhi government and insisting upon the implementation of its orders, the Court seems to be usurping the authority of the existing pollution control structures to execute their duties independently.⁷⁸ This raises both institutional and Constitutional questions, as the Court wrestles to determine which branch of government is best suited to handle pollution control matters.

Similarly, in the T.N. Godavarman Thirumulpad v. Union of India case, the Supreme Court has gone beyond the scope of its jurisprudence. In this ongoing case, the Supreme Court has extended the scope of the petition from a matter of ceasing illegal operations in Nilgiris forest land from deforestation by illegal timber operations into a reformation of the entire country's forest policy. The Court held that the meaning of 'forest' is to be as per dictionary definition irrespective of ownership and its orders are to apply to all lands entered in any government record as 'forest'. The paradox of this order has been a further centralisation of power over the country's forest lands in the hands of the same bureaucracy against whose mismanagement the original PIL was filed. This has seriously impacted millions of forest dwellers' customary as well as legal rights to forest lands and resources for their very survival.⁷⁹ One indication of the importance of forest lands in people's lives is the fact that more than 2,000 interlocutory applications (IAs) have been admitted in the case,⁸⁰ ranging from the North East to the Andamans to Madhya Pradesh.

As far as tribal rights over their customary resources as well as their self-governing institutions are concerned, the Constitution of India provides specific protection to tribal rights, particularly in

76 See Upendra Baxi, 'The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In] Justice', in K. Verma ed., *Fifty years of Supreme Court of India: Its Grasp and Reach* (New Delhi: Oxford University Press, 2000).

77 Kuldeep Mathur, *Battling for Clean Environment: Supreme Court, Technocrats and Popular Politics in India*, Working Paper/03-01 (New Delhi: Centre for the Study of Law and Governance, 2001).

78 Armin Rosencranz and Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 2003, available at http://www.cleanairnet.org/caiasia/1412/articles-69423_delhi_case.pdf.

79 See Sarain, note 63 above at 70.

80 See Forest Case Update, October 2007, available at <http://www.forestcaseindia.org/f14/Iss%2039%20Oct%2007.pdf>.

Schedule V and Schedule VI areas.⁸¹ Surprisingly, the Supreme Court has overlooked all these dimensions with its environmental activism governed by a vision of 'forests' existing in isolation and out of context. The Court's definition of 'forest' itself, and the assumption that forests are best managed by state bureaucracies, is highly problematic given the long history of forest degradation under state control and serious conflicts with forest dwelling tribal and other communities over access to forest resources for survival. It does not seem to have been brought to the notice of the Court that in states like Orissa, West Bengal and Jharkhand, villagers on their own initiative are regenerating and protecting their forests, often from corrupt forest officials and timber mafias, in several thousand villages. Even in its own judgment in the *Samatha v. State of Andhra Pradesh*,⁸² a five-judge bench of the Supreme Court recognised that for tribal, forests are their traditional source of sustenance. They have a historical right to minor forest produce and to communal residence on forest land. These rights of tribal have been neglected in the *Godavarman* orders.

These efforts of the Court are, without doubt, unprecedented. The measures appear to be an invasion over the administrative terrain. The Court, however, has denied any such usurpation. In its pronouncements, the Court has justified its action either under a statutory provision⁸³ or as an aspect of their inherent powers.⁸⁴ It is undeniable that the devices employed by the Court helped it to get detailed facts, understand complexities of social, economic and scientific issues revolving around environmental problems and accordingly arrive at a decision. But, environmental governance process has become more complex through such judicial intervention and innovations.

81 See N. K. Behura and Nilakantha Panigrahi, *Tribals and the Indian Constitution* (New Delhi: Rawat Publications, 2006).

82 *Samata v. State of Andhra Pradesh and Others*, Supreme Court of India, Judgment of 11 July 1997, 1997 (8) SCC 191.

83 The power to appoint commissioners in matters of civil nature is found in Order XXVI Civil Procedure Code and Order XLVI Supreme Court Rules, 1966.

84 Inherent power of the Supreme Court under Article 32 and of the High Courts under Article 226 of the Constitution.

3.2 Implementation of Court Directions

In any given case, as a general rule, once the judgment is passed it is left to the administration to implement the judgment so as to give effect to it. In the judgment, though the Court issues directions to the agencies of the state as to how its decision has to be implemented, it will not be there to oversee its actual implementation. Nor would the Court examine the extent of its implementation and the nature of its impact. The enforcement agencies, in a number of instances that involve public interest, are found to have taken advantage by postponing or not implementing decisions, under one excuse or another. For example, the judicial directions to give drinking water without any cost to the affected villages, remediation of the tanks, and health facility to all the affected villages, to carry wastewater from Patancheru to Amberpet by constructing a pipeline of 18 km before January 2001 have not been implemented thus far.⁸⁵ The Court directions in the Ganga river pollution case have also not been implemented. The tanneries continue to operate even though strict action has been ordered by the Court against the polluted industries both in the case of the Kanpur and Calcutta tanneries.⁸⁶

In the Oleum Gas Leak case, the Court has evolved the doctrine of absolute liability, clarifying the principle of strict liability which was developed in *Ryland v. Fletcher*.⁸⁷ It has also developed the principle of claiming compensation under the writ jurisdiction by evolving the public remedy. But ultimately, the victims of gas leak have been left to the ordinary relief of filing suits for damages. In the *Bichhri* case,⁸⁸ regarding the contamination of ground water, the Court, after analysing all the provisions of law rightly found that compensation can be recovered under the provisions of

85 Information was collected in November 2002 through personal visit to Patancheru.

86 See Praveen Singh, 'Bridging the Ganga Action Plan: Monitoring Failure at Kanpur', 41(7) *Economic and Political Weekly* 590 (2006).

87 *Rylands v. Fletcher* (1868) is a landmark English legal case in which the Court of the Exchequer Chamber first applied the doctrine of strict liability for inherently dangerous activities.

88 See *Godavarman*, note 19 above at 243.

Environment Protection Act. However, the assessment of compensation, its payment and the remedial measures have still not been complied with.

In the case of *S. Jagannath*,⁸⁹ concerning destruction of coastal ecology by intensive and extensive shrimp farming, the Court has directed closure of shrimp farms and payment of compensation on polluter pays principle as well as cost of remedial measures to be borne by the industries. But after the judgment, firstly the Court itself stayed its own directions in review and thereafter, the Parliament has brought a legislation overruling the directions given in the said judgment. Therefore, neither any compensation has been paid to the farmers and the people who lost their livelihood nor the damage done to the environment has been remedied. Similarly, in the Delhi industrial relocation case,⁹⁰ the Court while giving directions to close down industries or to locate outside Delhi has made it clear that the workers should get whatever compensation they deserve according to law and industries must be relocated from Delhi. The direction of the Court, however, has not been implemented by the government on the ground of non-availability of land to shift the industries and also workers' right to compensation appeal has not been given due attention in the subsequent Court hearings.⁹¹

Referring to the non-implementation of Supreme Court directions Justice S.P. Bharucha⁹² pointed out that 'This Court must refrain from passing orders that cannot be enforced, whatever the fundamental right may be and however good the cause. It serves no purpose to issue some high profile mandamus or declaration that can remain only on paper. It is counter productive to have people say, the Supreme Court has not been able to do anything or worse. It is of cardinal importance to the confidence that people have in the Court that its orders are implicitly and promptly obeyed and it is, therefore, of cardinal importance that orders that are incapable of obedience and enforcement are not made'.

⁸⁹ See *Jagannath*, note 49 above at 87.

⁹⁰ *M.C. Mehta v. Union of India and Others*, Supreme Court of India, Judgement of 30 December 1996, AIR 1996 SC 2231.

⁹¹ For more details, see Nandini Dasgupta, 'Tall Blunders', *Down To Earth*, 30 September 1998, page 22.

⁹² Justice S.P. Bharucha's Inaugural lecture of Supreme Court Bar Association's Golden Jubilee's Lecture Series (2001) on Supreme Court on Public Interest Litigation.

So, while the judgment on a number of litigations in public interest were hailed as path-breaking, the misery and suffering of people, to ameliorate which the Court was approached, continued unabated. Complacency, indifference and casual approach to environment and human problems continued without much perceivable change, notwithstanding great judgment. This promoted the Court in recent times, to come up with yet another innovation: *continuing mandamus*.⁹³ The application of this tool suggests that instead of passing a judgment and closing the case, the Court would issue a series of directions to the administration, to implement within a time-frame, and report back to Court from time to time about the progress in implementation. This, in a way, is an attempt to ensure the implementation of Court orders.

The case on point is the one concerning forest conservation in the *T.N. Godavarman v. Union of India*. It started in 1996 as a case seeking directions from the apex Court for stopping felling of trees in Nilgiris forest and to regulate indiscriminate cutting of timbers in the Nilgiris Forest. The case is yet to be finally decided. Instead, a series of orders passed by the Supreme Court that concern protecting forest, wildlife, preserving biodiversity, national parks, evicting encroachers including tribal, is still in different stages of implementation.⁹⁴ The Court

⁹³ In *Vineet Narrain v. Union of India and Others*, Supreme Court of India, Judgement of 18 December 1997, 1997 (7) SCALE 656, popularly known as the Hawala case, the Supreme Court adopted this technique which enabled it to closely monitor investigations by Government agencies, in respect of serious accusation made against prominent personalities. According to the Court, the innovation was a procedure within the Constitutional scheme of judicial review to permit intervention by the Court on the complaint of interia by the Central Bureau of Investigation and to find solution to the problems.

⁹⁴ Some of the significant orders issued by the Court are the followings: the Order of 12.12.96 clarified certain provisions of the Forest (Conservation) Act, 1980 and also extended the scope of the Act. The Court held that the word 'forest' must be understood according to the dictionary meaning; all ongoing activity within any forest in any state throughout the country, without the prior approval of the Central Government, must cease forthwith; the Court order of 9 May 2002 constituted an Authority at the national level called the Central Empowered Committee and assigned it the task to monitor the implementation of the Court orders, removal of encroachment, implementations of working plan, compensatory afforestation plantations and other conservation issues.

adopted a novel method in making the administration work. It made the government create a think tank like Central Empowered Committee, make preparations for implementation of directions and report at every stage the progress made in achieving the objective. It was indeed an effort by the Court to assist, partner and guide the administration in protecting the forest across the country and present a model for the rest of the country to emulate. It is another matter that the Court, in its enthusiasm to present such a model, got itself mired in the complexities of a problem that was at once managed by the bureaucracy, local institutions and through traditional form of forest management.⁹⁵

4 CONCLUSION

The examination of the implications of Supreme Court's innovations for environmental jurisprudence reveals that the application of innovative methods to resolve environmental disputes and implement Court orders is certainly a deviation from the usual adjudication function of the Court. While the procedural innovations have widened the scope for environmental justice through recognition of citizens' right to healthy environment, entertaining petitions on behalf of affected people and inanimate objects and creative thinking of judges to arrive at a decision by making spot visit, substantive innovations have redefined the role of Court in the decision-making process through application of environmental principles and expanding the scope of environmental jurisprudence.

Given the crisis within the executive and legislature in discharging their Constitutional duties, the Supreme Court's innovative methods have

attempted to arrest the dysfunctional trend of other organs and enable the effective enforcement of environmental laws. However, in reminding other organs about their Constitutional duties and enforcing fundamental right of citizens, the Supreme Court has at times, crossed its boundaries and started interfering in the very basic affairs of environmental management. In resolving more than 100 environmental cases since 1980, the Supreme Court has continuously engaged itself in the management and resolution of environmental conflicts and thereby increased the country's dependence on the Court for environmental protection. This dependence on a judicial institution that has already exceeded the boundaries of its responsibilities has been further complicated by the lack of monitoring of the Supreme Court's orders and the vagueness of the legislative and executive roles regarding environmental issues. With its intervention in the interpretation of environmental policy and implementation process, the potential for resolving environmental conflict is hardly over. The review of environmental cases shows that there has been no uniform cooperation from the implementing agencies to effectively implement the Court directions. It is also observed that most of the innovative methods introduced by the Court have neither been followed consistently nor been institutionalised to make a long term impact for the environmental jurisprudence process. In such a situation, how long will the Supreme Court monitor the implementation of its decisions? As the opposition to judicial intervention in the affairs of other organs increase, what will happen if the implementing agencies and people disobey Court decision for the protection of environment? It remains to be seen whether the Court can protect the environment through innovations if there is steadfast resistance from implementing agency or whether it can continue to intervene in the absence of public support. More importantly, it remains to be seen whether peoples' faith in the Court's attempts to protect environment through innovative methods will be belied.

⁹⁵ For a more detailed analysis of the case, see Armin Rosencranz, Edward Boenig and Brinda Dutta, *The Godavarman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests* (Washington DC: Environmental Law Institute, 2007).

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