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for the Course on

TEACHING ENVIRONMENTAL LAW IN THE UNIVERSITIES
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ASC Reading Materials for Environmental Law Training

H:ENVIRONMENTAL JUSTICE

CHAPTER 9

THE SILENT VALLEY CASE: AN ECOLOGICAL ASSESSMENT

M.K. Prasad

Lack of proper appreciation of environmental information may often lead to decisions going against the interest of the general public. Consequently, priority is given to developmental activities aimed at short term benefits over conservation oriented actions with a long term perspective of sustainable benefits. It is this unfortunate position that prompted the author to evaluate the judgment pronounced by the Kerala High Court on 2nd January 1980 in *Society for Protection of Silent Valley* v. *Union of India*[1]. The judgment was not reported. Hence I have given an extract in the appendix. Petitions were filed seeking a writ forbidding the State of Kerala from proceeding to construct a hydro-electric project at Silent Valley.[2] This venture was represented as fraught with adverse consequences deleterious to the environment. Experts including scientists attached to the Department of Science and Technology, Government of India had warned against the proposed construction. Environmentalists, great concern and joined the chorus denouncing the Silent Valley Hydro-Electric Project called SVHEP.

The adverse effects from the conversion of Silent Valley into a hydro-electric project, as listed in the judgment are—

(*i*) the deforestation was bound to affect the climatic conditions in the State and even outside by depriving the State of its legitimate share of rain during the monsoon.

(*ii*) the preservation of the forests was needed for conducting research in medicine, pest control, breeding of economic plants and a variety of purposes, and

(*iii*) the deforestation was bound to interfere with the balance of nature.

The petition had provided proof from available scientific, socio-economic and technical studies on the matter.[3] The judgment readily admitted that a 'project like the hydro-electric project, if sanctioned and set up would have its impact on environment'. However, the spirit of the judgment totally overlooks all those considerations and seems to have been guided by unscientific and anti-conservational arguments advanced by the State Government. The grounds on which the judgment was pronounced and the petitions were rejected are the following:

1. The question of ecological upset likely to result from the execution of the project was readily considered.
2. The location is ideal for a hydro-electric project, which would produce considerable amount of power at the cheapest rate.
3. The Legislature of Kerala was of the unanimous view that the project was of crucial importance to the State and a resolution was unanimously adopted on 18-8-1978 expressing anxiety on the continuing delay, besides an

1. O.P. Nos. 2949 and 3025 of 1979. The petitioners were:—(1) Society for Protection of Silent Valley (Regd.), represented by its Executive Secretary R.K. Ramesh, 2/4-A, Jayanthi Buildings, Calicut-1 and (2) Mr. M.K.N. Potty, Madathil, Kathirampathy, Agaly P.O. The respondents were (1) Union of India, represented by Secretary to Government, Ministry of Agriculture and Irrigation (Department of Agriculture), New Delhi, (2) State of Kerala represented by Chief Secretary to Government, Trivandrum and (3) Kerala Electricity Board, Trivandrum.

2. The petition pointed out that the Silent Valley in the district of Palghat contained one of India's largest tropical, evergreen forests and is the only vestige of virgin forest of the Western Ghats. It is estimated to have a continuous record of not less than 50 million years of evolutionary history, with diverse and complex flora and fauna. It is a unique vegetable food resource which contains mammals and birds in the valley. A number of endangered plants and animals live there. The forests perform very many important functions. They regulate water supply to the plains by retaining rain water in the soil, releasing it slowly down, maintaining the hydrological balance and averting floods and droughts in the plains. Soil erosion is prevented and the climatic condition of the whole area is regulated by the forests.

3. A techno-economic and socio-political assessment of the SVHEP published by the *Kerala Sastra Sahitya Parishad* in 1979 was produced as an exhibit. Copies of the letters sent by eminent scientists and resolutions adopted by international and national bodies also were produced.

on 7-4-1978.

4. The action taken to implement the seventeen safeguards recommended by the Task Force appointed by the National Committee on Environmental Planning and Co-ordination (NCEPC) shows clearly that the Governments' mind was addressed to the question of the ecological aspects involved in the execution of the project and its impact upon the same.

The judgment relied more on governmental position than on any other considerations. The Court went on :[4]

> But in this region we cannot substitute our judgment for that of the Government, on the question as to whether a national asset is to be more conveniently utilised as a hydro-electric project with prospects of greater power generation or retained in its pristine glory for preservation of forests and wildlife, prevention of soil erosion, and avoidance of other deleterious effects on the community.

This quotation itself is sufficient testimony for the very low priority of environmental issues in their minds. The sole purpose of approaching the High Court was to get justice in a case where the petitioners were convinced that the Government did not at all consider the question of ecological imbalance likely to result from the execution of the project and the Government considered to utilise such a national asset as a hydro-electric project rather than retain its pristine glory, to preserve forests and wildlife, to prevent soil erosion and to avoid other deleterious effects on the community. Coming to know of the move to build a hydro-electric project in the Silent Valley, many persons genuinely interested in the well-being of the country and the projection of the genetic heritage, represented before the authorities the injustice that would result from the proposed project. A detailed representation was made before the Chief Minister of

4. Para 4 of the Judgment (*see* the appendix).
5. Exhibit P-2, a representation signed by 35 scientists, 40 professors and research scholars, 150 post-graduate students of ecology and 180 citizens submitted to the Chief Minister on 26th February, 1978. A representation was submitted by the first petitioner to the Chairman, Indian Board for Wildlife, pointing out the catastrophic effect of the SVHEP (Ext. P-3).

(*contd. on next page*)

those. It exhibited its ecological illiteracy by submitting in the counter-affidavit that *the forests do not avert floods and droughts in the plains*. Under these circumstances one cannot say that the question of an ecological upset likely to result from the execution of the project was properly considered by the Government.

It is interesting to note what the chairman of the Task Force appointed by NCEPC to examine the project had said about the implementation of the safeguards. He wrote to the Government of Kerala that the Task Force was completely mistaken in recommending the safeguards. According to him, the safeguards will not prevent damage to this fragile ecosystem.[6] He clarified the real position that the Task Force had taken : in view of its unique ecological character, Silent Valley should not be touched at all. The chairman was of the firm view that the monitoring committee

(*contd. from previous page*)

The National Committee for Environmental Planning and Co-ordination submitted a report in 1976 pointing out the specific reason for not proceeding with the project. Copies of some of the letters sent by eminent scientists and resolutions adopted by international and national bodies were produced as Ext. P-4.

6. Letter by Mr. Zafar Futehally, the chairman to Mr. C.V. Swaminathan, Commissioner, Command Area Development and Special Secretary to Government (Electricity and Agriculture), Trivandrum dated 19th October, 1979. He said :

> "As Chairman of this Task Force I was largely responsible for suggesting ecological safeguards for Silent Valley if Government felt that the SVHEP could not be *abandoned for any reason* (emphasis supplied). I have been considering the developments subsequent to this report and I feel that, I and the Task Force, were completely mistaken in recommending these safeguards.
>
> These are my reasons :
>
> (a) Safeguards will neither prevent the submergence of a very vital portion of this area nor prevent critical damage through large scale human interference with this fragile ecosystem. In fact, Silent Valley will be mutilated to the point that it no longer remotely resembles the valuable biotype it represents today.
>
> (b) The recommendation of these safeguards has resulted in the negation of the Task Force's real position on the subject, namely, in view of its unique ecological character, Silent Valley should not be touched at all. It has only encouraged the Central and the State Governments to proceed with the project without considering viable alternatives.
>
> I feel that the Ordinance legalising the safeguards, and the creation of a Monitoring Committee cannot possibly achieve their ostensible objectives."

appointed by the Kerala Government to implement the safeguards would achieve their objectives.

The petitions and eventual affidavits reveal that sufficient proof was provided to show that the petitioners were not against additional power generation in the State and were not opposing other projects which were under construction or those which had completed investigation. Sufficient technical information was also provided to show that Silent Valley Hydro-Electric Project (SVHEP) was neither essential nor unavoidable. The unique nature of the forests of Silent Valley, substantiated by the findings of experts, was also brought to the notice of the court. This was blindly opposed by the State which went to the extent of saying that "Silent Valley is like any other forest in the Western Ghats, regenerated naturally and artificially". But the same Government, while declaring Silent Valley a National Park later said: "The area in question has a rich and unique heritage of rare and valuable flora and fauna requiring conservation and management for the benefit of the nation as a whole and posterity in general."[7] This shows how the State Government was hesitant to take up a definite stand on a matter of crucial importance.

The significance of conservation of forests and wildlife is not to be overemphasized. It is also known that SVHEP was not going to contribute much to the power requirements of the State. In such a situation it was ecologically unfair to pronounce a judgment that ratified the sacrifice of a national asset to be conveniently utilised as a hydro-electric project. This reminds one of Aldo Leopold who said, "Men too wise to tolerate hasty tinkering with our political constitution accept without a qualm the most radical amendment to our biotic constitution."[8]

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7. Kerala Gazette, Extraordinary, 26th December, 1980, Vol. XXV, No. 115.
8. Aldo Leopold (1941) as quoted in E.P. Odum, *Fundamentals of Ecology*, W.B. Saunders Co., (1971), p. 409.

1. There is, in the Palghat District of this State, 45 Kilometres to the north of *Mannarghadu*, a stretch of forest, nearly 8952 hectares in extent, known as the 'Silent Valley'. The name is apparently derived from the peace, quiet and serenity of the place. But, paradoxically enough, as was once remarked in the far past in the Madras Legislature, the valley has been creaking and squeaking loudly on many occasions. The present noise and bustle are over the hydro-electric project sought to be processed in this valley. These writ petitions, broadly stated, seek to forbid the State from proceeding with the project. As representatives of the arguments advanced, we may refer to O.P. No. 2949 of 1979. The Government of Kerala is proposing to deforest the Silent Valley and to construct a dam for processing a hydro-electric project for power generation and supply of electricity. It is said that the dam is to generate 120 M. Watts of power by 1985. (The learned Advocate-General rated the power generation much higher, viz., at 240 M. Watts.) This venture has been represented as fraught with adverse consequences deleterious to the public. Experts have warned against the proposed construction of the dam and processing of the project. Scientists and technologists have joined the chorus of denunciation of the project.

2. The adverse effects from the conversion of the Silent Valley into a hydro-electric project were listed thus : first, the deforestation was bound to affect the climatic conditions in the State and even outside, by depriving the State of its legitimate share of rain during the Monsoon ; second, that the preservation of the forests was needed for conducting research in medicine, pest control, breeding of economic plants and a variety of purposes ; and third that deforestation was bound to interfere with the balance of nature, as between the forest land on the one side and arable and other types of lands on the other.

3. The argument stressed that a project like the hydro-electric project, if sanctioned and set up, would have its impact on environment, and this has to be carefully considered. Copious citations were made from various treatises, reports, and publications, to show the importance of the environmental factor in industrial planning. The National Committee on Environmental

Planning and Co-ordination had appointed a Task Force in 1976 for ecological planning of the Western Ghats. Ext. P-10 is a Press Report in the *Mathrubhumi* dated 7th October, 1979 that the Prime Minister has demanded abandonment of the Silent Valley Project. Ext. P-1 is a complimentary copy of the techno-economic and socio-political assessment of the project by a committee of scientists. The members are: M.K. Prasad, Biologist, Government College, Calicut; M P. Parameswaran, Nuclear Engineer, formely of the Bhabha Atomic Research Centre, Bombay; V.K. Damodaran, Electrical Engineer, Regional Engineering College, Calicut; K.N. Syamasundaran Nair, Agricultural Scientist-Economist, State Planning Board, Trivandrum and K.P. Kannan, Economist, Centre for Development Studies, Trivandrum. The Report has recorded that the views reflected are their individual opinions and not those of the institutions or organisations they represent. At page 30 of the Report we get a reference to the need for preservation of the lion-tailed monkey to be found in this region, and which is threatened with extinction. The *Treatise on Environmental Law and Policy: Cases and Materials*, was referred to, and also the National Environment Policy Act, 1969. Many other Reports of a similar nature and treatises and materials were referred to. Copies were filed as Exts. P-1 to P-17. The application to receive Exts. P-2 to P-17 was filed only in the course of arguments.

4. The learned Advocate-General stressed the fact that the Project was sanctioned on 11-4-1973—vide Ext. P-1—by the Planning Commission, and that administrative sanction (Ext. R-2) was given to it in 1976. The question of ecological upset likely to result from the execution of the project was raised. This was considered. Paragraph 4 of the counter-affidavit has detailed the nature of the project, and its potentialities and has stressed that the location is ideal for a hydro-electric project, which would produce considerable amount of power at the cheapest rate. Paragraph 5 refers to revised working plan and the details therein regarding the Silent Valley Reserve. Paragraph 20 of the counter-affidavit has referred to the report of the Task Force for socio-logical planning in the Western Ghats. It has recommended that policy decision should be taken on seventeen recommendations prior to commencing the project work, if the Government felt

that the work cannot be abandoned for any reason. It is pointed out that the Legislature of Kerala was of the unanimous view that the project was of crucial importance to the State. A resolution was unanimously adopted on 22-8-1978 expressing anxiety on the continuing delay. An all-party delegation from Kerala visited the Prime Minister on 7-4-1978. The various steps and developments of a similar nature are detailed in paragraph 20. They show clearly that the Government's mind was addressed to the question of the ecological aspects involved in the execution of the project and its impact upon the same. We were taken through copious extracts from various works, reports and other materials regarding the technical feasibility of the project and the importance of ecological considerations in assessing the worth and utility of a proposed project. But in this region we cannot substitute our judgment for that of the Government, on the question as to whether a national asset is to be more conveniently utilised as a hydro-electric project with prospects of greater power generation, or retained in its pristine glory for preservation of forests and wild life, prevention of soil erosion, and avoidance of other deleterious effects on the community. The scope for interference with such policy decision of the Government, should, in the nature of things be limited. A wealth of material was cited and placed before us on the technical feasibility of the project and the impolitic decision to destroy the forest.

5. In O.P. No. 2949 of 1979 it was objected that the petitioner was a mere *pro bono publico*, having no *locus standi* to maintain the application. The decision in the *Rann of Cutch case* (AIR 1969 SC 783 para 22) and *Praga Tools Corporation case* (AIR 1969 SC 1306) were cited. We do not think it necessary to deal finally with this aspect of the case, as we are satisfied that on the merits the petition must fail.

6. Counsel for the petitioner stressed the national importance of forests as having been responsible for certain amendments in the Constitution. Reference was made to Article 48-A of the Constitution whereby the preservation of forests and wild life is one of the directive principles of State Policy. Article 49 was also stressed giving obligation to protect every monument or place or object of

artistic or historic interest, declared by Parliament to be of national importance, from destruction, removal etc.

7. Rich and worthy material of a variegated nature was placed before us in regard to the national policy and environmental considerations. We are by no means satisfied that these aspects have not been borne in mind by the Government in planning and processing the project. We are also not satisfied that the assessment of these considerations made by the Government and the policy decisions taken thereafter are liable to be reviewed by this Court in these proceedings. Even if they be open to review no grounds for such review have been disclosed.

8. As against the argument that by Ext. P-10 (equal to Ext. R-4) the Prime Minister of India had recommended that the project should be abandoned, it was argued that the counter-affidavit of the State had detailed the necessity for more electricity for the State. With the rapidly changing needs and requirements of the State, it is not as if a veto once by the Prime Minister, or an advice from the same high source once to drop the project, will arrest its development for all time.

9. There was then an argument that the Silent Valley Project conflicts with the Wild Life Preservation Act. It was also argued that the petitioners have the legal right to breathe pure air and drink pure water etc.; and that these would be vitally affected by the proposed deforestation of the Silent Valley. These were the arguments developed in O.P. No. 3025 of 1979. The protection of environment granted by various countries such as America, England etc., was stressed and reference was made to the Endangered Species Act, 1973 and the National Environmental Policy Act, 1969 in America, the Control of Pollution Act, 1974, the Countryside Act 1968, and the Clean Air Act, 1956 in England. The learned Advocate-General relied on Article 37 that it shall be the duty of the State to apply the directive principles in making laws. He referred to Ext. R-3 filed with the original counter-affidavit which shows the various reserved forests in the State. It was pointed out that there was no pleading as to environmental pollution or the danger resulting from the execution of the project. Administrative sanction was accorded to the project in 1973 before the 42nd Amendment and the work also started before the said amendment—vide counter-affidavit of the Electricity Board—Paragraph 8.

10. As for the danger of extinction of the lion-tailed monkey, the matter is dealt with in paragraph 8 of the counter-affidavit. We do not think it necessary to cover the entire gamut of the material—whether scientific, technical, technological or ecological—placed before us in great detail. It is not for us to evaluate these considerations again as against the evaluation already done by the Government. It is enough to state that we are satisfied that the relevant matters have received attention before the Government decided to launch the project. There has been no non-advertence of the mind to the silent aspects of the project. We are not to substitute our opinion and notions on these matters for those of the Government.

We find no reason to interfere. We dismiss these applications with no order as to costs.

Judicial Activism: Usurpation or Re-democratization?

Upendra Baxi

Introduction

At the very outset, it is worth recognizing the obvious. Adjudication, all said and done, is an aspect of *governance*. To be somewhat (and so rapidly) old-fashioned one might say, following Louis Althusser, that courts everywhere, at the end of the day, are strategic domains of both repressive and ideological state apparatus. No grand feats of political theory are, however, required to demonstrate all this! Victims of micro-fascism of power everywhere know this. So do, as it were, their next of kin: social action and human rights activists. They know well how the *rule of law* coexists and combines with the *reign of terror*.

Courts and justices wield the power of the state even as they are constituted by it. Citizens become *justices* when appointed by the executive of the day; therefore it is as unimaginable that a *naxal* would be elevated to the Indian Supreme Court as a 'capitalist roader' to the apex court in Cuba. Within this framework, of course, considerations of region, race, caste, gender play a distinctive role in converting citizens into justices. And in the exercise of the sovereign adjudicative power of the state justices and court can never be *passive*; they need, by definition, to be *active*.

States of emergency are not maintained by passivity of adjudicators; nor are draconian detention laws nor a regime of immunity for corruption in high places. Justices have to be active always in the preservation of structures-in-dominance. And they have to bring an unusual *insensitivity to injustice* as a mark of competence in adjudication.

The American Supreme Court offers a most instructive example. In the infamous *Dred Scott* decision it sustained slavery. For about a hundred years, it sustained *apartheid* at all levels of American social

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and political life. The judicial leadership for de-segregation which begins in early fifties with *Brown v Board of Education*, and still continues unfolding, also required the same order of activity. No one, as far as I know, criticized the American Supreme Court as being an *activist* court before *Brown*. Subsequent to *Brown* all kinds of questions concerning the legitimacy of judicial *activism* have been elegantly and elaborately raised in the United States; so they have been in India by way of *mimesis*. There is very little originality in Indian discourse on the nature of judicial process, providing a fulsome testimony to what Ranajit Guha in the context of colonial historiography refers to as the tradition of "mediocre liberalism." But this is another story.

How do we understand the distinction between an *active* judiciary and an *activist* one? Why is judiciary and adjudication as a whole, an ensemble of governance not considered *activist*? Our answer to this question must necessarily be that activism is a narrative of *ascription*; that is, only under certain zodiac justices in their self-images and by their fearsome critics gets *labeled as activists*. The narratives of ascription are accomplishments of changing political *milieux*. When adjudicatory power and process are or get deployed to interrogate or disorient structures of dominance (racist, patriarchal, capitalist or casteist) outcries of judicial activism happen. Servicing of dominant ideologies, interests, values and visions is not activism; any problematization of all this is.

Accordingly, no discourse concerning judicial activism can be considered in isolation from the field of forces that we name, for weal or woe, as politics. Naming or ascription is a performative political practice. If this is accepted then it must also be accepted, further, that what gets said concerning the nature and legitimacy of judicial process and power can only be fully understood in terms of the context of circumstances of politics, or of ordering the contingencies of power.

In what follows I suggest, though not comprehensively nor with as much theoretical stringency as I would have wished, how the notions of judicial *activism* have been constructed in different orders of contingencies of politics and how, increasingly, justices and courts have contributed to the politics of that construction. I do not essay here any evaluation of the impact of judicial activism which itself raises the questions of the constituencies, beneficiaries and victims of judicial activism. This

winners and losers of judicial activism enter the processes of evaluation of the significance of such activism and indeed at times in the very definitions of it. I hope, despite these limitations of scope, that a few generalized thematics below would assist more rigorous analysis of the role of judiciary in the processes of re-democratization of India.

Strange History of Ascription: The Nehru Era

In the formative period of Indian constitutionalism, many a strange thing happened. A most spectacular happening was the battle that Pandit Nehru waged against courts and judges, especially the Supreme Court of India. As early as 1951, Nehru complained that the "magnificent edifice" of the Constitution was being "purloined" by judges and lawyers! His ire was attracted by the Court's *zamindari* decisions where it insisted on payment of market value compensation for lands acquired by the abolition of this system. The Constitution that Nehru and Amebdkar wrote, however, provided for `just compensation.' Justices were only enacting their part; they *actively* asserted the sanctity of private property enshrined in the Constitution.

Strangely enough, Nehru perceived this as that order of judicial activism which amounted to *usurpation*! No matter what the Constitution *expressly* said, Nehru insisted that justices should place state legislations on agrarian reforms above the assurances of fundamental rights enshrined in the Constitution! Since they failed to do so, he enacted the First Amendment adding the notorious device of the Ninth Schedule under which laws listed in it were immunized from judicial scrutiny on the ground that they violated fundamental rights to equality or property! Of this amendment, Justice Hidyatullah was to say later that ours was the only constitution in the world that needed protection against itself!

What were the dominant ideologies, interests and values threatened by the judicial action on agrarian reform measures? As I have analyzed elsewhere (see my book *Courage, Craft and Contention*, 1985; Bombay, Tripathi), a possible answer to this question is that in displaying fidelity to a markedly bourgeois Constitution, the Supreme Court foiled not so much the nexus between property and polity as envisaged by the Constitution itself but the politics of images of a *socialist politics*. The judicial decisions betrayed political rhetoric. They said to the people of India, loud and clear, that the Constitution as drafted and adopted was not

This was both irritating and inconvenient. Even more so was the assertion of judicial power to invalidate legislations. The nationalists were, given their experience in the freedom struggle, suspicious of judicial power and autonomy; they prized, above all, parliamentary sovereignty. Of all the political personages, a charismatic and imperious Nehru was not going to accept judicial leadership over constitutional interpretation. The colonial legal liberalism of the first generation nationalist leaders of Independent India still harked back to the notions of British parliamentary sovereignty despite the Constitution they wrote.

That order of sovereignty was indeed accomplished by ensuring that the Supreme Court unquestionably accepted the power of Parliament to amend the Constitution. However, as it happened, the plenary power to amend did not reach the abolition of the right to private property till the late seventies. In the meantime, the politics of agrarian reform converted itself into a discourse concerning the *supremacy* of the power of Parliament over the powers of judicial review.

It is this period which provided politicians of all kinds with three related forms of power. First, the discursive power of an *alibi politics*; that is, it was the supreme judiciary which was acting as a roadblock to the redistribution of power and property relations to masses of people oppressed and exploited by the landlords. More than the power of the propriteriat, it was judicial power which needed to be confined and cribbed if the nation was to progress towards an egalitarian social order.

Second, the practices of political power tended to be *judiciary centered*, even *obsessed*. It seemed to be commonly assumed, in the Nehruvian era, that constitutional amendments were to be equated with good governance whereas, as is well known, the tasks of governance lay elsewhere.

Third, the Indian state managers learnt early enough the tricks of exercizing power without responsibility. They became specialists and pastmasters of decision-making which can only be characterized as *fly-now-pay-later rationality*. If the Supreme Court empowered itself with the burden of adjudging on the constitutional scope of amendments, this is a burden which will be returned to it with vengeance. The Constitution will continue to be amended and it would remain the task of the Supreme Court to do with it what they can. Perhaps, this strategy of

attrition was thought to be good enough to restore the future of executive supremacy over constitutional interpretation. When this did not succeed as expected, we gather another narrative of ascription.

The allegations of judicial usurpation were never made on *technical* grounds (that is, in this or that case, justices could have taken an equally cogent but a different view, tending towards 'distributive justice': to be sure, they could and ought to have) but on *political grounds*, implying that there was insufficient collaboration between the apex judiciary and the supreme executive of an order that sustains the legitimacy of the latter. The language of 'usurpation' had, then, in reality very little to do with meaningful implementation of agrarian reforms. It had a considerable lot to do with the nurturing of legitimation deficit of a political regime.

The Birth of Judicial Activism

The period between 1969 to 1973 marks the historic advent of judicial activism. It is during that period that the Supreme Court developed a new practice of judicial hegemony over the symbolic politics concerning the power to amend the Constitution. The story is well worn; we summate it briefly only with a view to highlight the struggle for ascendancy over power to determine the very nature of the Indian Constitution for all times to come.

From 1950 to 1967 the Supreme Court accepted the wide ranging assertion of Parliament's power to amend the Constitution even when it thoroughly deprived people of their fundamental rights to judicial remedies. However, while sustaining the validity of the seventeenth amendment, two justices, especially Hidyatuallah J., wondered aloud as to whether fundamental rights can be allowed to become the 'playthings' of a majority. This observation sowed the seeds of first the ruling in *Golak Nath* case that the amendatory powers of Parliament cannot extend to abrogation or repeal of fundamental rights; this was followed in 1973 by *Kesvananda Bharati* case where the Supreme Court ruled that Parliament's power to amend the Constitution was indeed plenary (it could rewrite the Constitution) but always subject to the implied limitations of the basic structure doctrine. The essential features of this structure may not be amended; if amended, these would be subject to judicial review. These features include: federalism, democracy, equality

before the law, rule of law, socialism and secularism. All this is rather well known to us now and a settled judicial doctrine.

But in 1973 the Court's ruling (decided by a wafer thin majority) caused political consternation. Under Indira Nehru Gandhi's leadership there emerged a political consensus among all parties that the judiciary had indeed usurped the constitutional powers of Parliament (till now identified with, and translatable as, the unquestionable supremacy of the Prime Minister of India).

The 'usurpation' was met with a crude display of executive power; three senior most justices who contributed to the majority formation in *Kesavananda* (all eligible, in turn, to be elevated to the Chief Justiceship of India) were superseded and A.N.Ray, who led the critique of the Court's opinion, was appointed as Chief Justice of India. This show of power was sought to be hegemonized in terms of the doctrine of 'committed judiciary.' So was the latter day supersession of Justice Khanna who dissented in the infamous *habeas corpus* case.

Our interest, for the present purposes, lies not so much in technical developments (important as they are and were to become) but in the provocation offered by the basic structure doctrine and the political response. No court in modern world had gone thus far; typically, judicial review extends to administrative acts and enacted laws when they can be shown to infringe the provisions of the Constitution. *What the court accomplished now was a unique assertion of judicial power under which it could negative an amendment to the Constitution duly passed by Parliament acting under the provisions of the Constitution.*

The language of 'committed judiciary' is of more than historical interest. Even today articulations critiquing judicial activism, though carefully avoiding this emergency-tainted rhetoric, resurrects the same notions concerning the legitimacy of executive hegemony over the ultimate constitutional interpretation.

Confronted by acute interrogation of the notion, Indira Nehru Gandhi was shrewd enough to say that all that was meant by 'commitment' was commitment to the Constitution of India! But surely the judicial oath of office already ensured this feat.

Although she never said it, wisely, in an explicit manner, the underlying text of power was clear and [illegible]

Constitution that justices ought to be, and remain, committed. But lurking beneath an extensively, and embarrassingly, *written* Constitution lay an *unwritten* one. The *unwritten constitution* embodies a series of *tacit understandings about protocols of collaboration by the supreme judiciary with the supreme executive.* On any view of governance, the supreme judiciary may not in fundamental matters override the maxim that it is, at the end of the day, the task of elected executive to govern. The supreme judiciary, to invoke the newly fangled computer language, is merely (and at best) a *cursor* correcting the script of power; it can never, and should never, aspire to be the *keyboard*, let alone the *programme*, for the overarching exercise of political power. To continue the metaphor, the hard disc of power is composed by social engineers, namely the practitioners of political power among whom justices and courts could scarcely be included.

"Commitment" also began to define the mark of being a `progressive' judge. A ` progressive' judge, in the vocabulary of governance, is a being who respects the need to *affirm the unwritten constitution when it conflicts with the written one.* Thus, justices who endowed executive with unbridled power to amend (even repeal) the Constitution were considered progressive and were `duly' rewarded.

The notion that the seniormost justice of the Supreme Court should be elevated as Chief Justice is an aspect of the *unwritten constitution.* Although. superficially, this notion is venerated by the Indian Bar as an assurance of the autonomy of the judiciary, in its deep structure that assurance gets converted into a *pattern of allegiance to the unwritten constitution.* Since 1973, each and every associate Justice of the Supreme Court must remain aware of the *probability and even the possibility of supersession.* That *libidinal* apprehension, in the absence of even a whisper of a suggestion that the Constitution should be amended to convert the rule of seniority from a *convention* into a *rule* governing political practice, is undoubtedly a real one and shapes many an adjudicatory practice.

The conversion of the Supreme Court of India into a continuing constituent assembly, as it were, is no *routine* act of *activism.* It is, indeed, a *foundational* act. From 1973 onwards, judicial review itself becomes an integral aspect of the unamendable basic structure of the [illegible]

remedies is beyond the pale of amendatory power excepting in the unimaginable situation wherein a *judicial hara-kiri* the Supreme Court would validate an amendment which abridges judicial process and power. In later decisions, the letter and sprit of *Kesavananda* would be invoked to sustain judicial supremacy in matters of appointment of justices and transfer of High Court justices as well as in the domain of conditions of service, as well as emoluments of the judiciary itself. There is simply no counterpart, in the annals of world judiciary, of the institutionalization of the *structural autonomy of judiciary by the very exertions of adjudicatory power*.

Thus, curiously (and I believe happily) in response to the assault of the notion of 'commitment' the Supreme Court created its own dynamic space for activism.

At the same time, in terms of *process*, that is, the maintenance of suzerainty of the *unwritten constitution over the written one*, the Court continued to yield in *domains which do not affect the structural autonomy of judicial power*.

Thus, the Court endorsed emergency excesses, unjustifiable impositions of President's Rule under Article 356, extraordinary powers under security laws, political immunity to corruption in high places, and many manifestations of arbitrary, even despotic exercises of public power. Books on constitutional law and administrative law are full of instances of judicial accommodation. But the best evidence of all this emanates from a comparison between exercises of adjudicatory power in the 80s and the 90s with the first three decades of Indian constitutional interpretation. From the vantage point of judicial activism, especially in the 90s, it is indeed hard to believe that the institution called the Supreme Court of India could ever have been otherwise.

The Rapture and the Rupture

The nature of judicial activism in the last decade and a half is indeed radical. As I have described the process in *Social Action* ("Law, Struggle and Activists..." 35; 118-31) and elsewhere in several versions of my article "Taking Suffering Seriously: Social Action Litigation Before the Supreme Court of India," the birth and growth of Social Action Litigation (SAL), still miscalled by Indian-Americans as Public Interest Litigation (PIL), indeed accomplished the transformation *of* the Supreme Court of India into Supreme Court *for* Indians.

The SAL achieved many things. First, it marked the advent of judicial populism; that is, the Supreme Court (in the memorable phrase of Justice Goswami) began to imagine itself as the "last resort of the bewildered and oppressed" Indians. Second, it marked a moment of *judicial catharsis*: apex Indian adjudicators began performing a judicial penance for their outrageous emergency decisions. It is no accident that Justice Bhagwati who offered a most articulate defense of suspension of *all fundamental rights* during the emergency became the founder of SAL (this does not belittle the contribution of other activist Justices).

Third, the Court *democratized access to judiciary as a collective right of the peoples of India*. It did so by a variety of approaches: it entertained letters written by NGOs and NGIs (non-governmental individuals) as if they were writ petitions (a process I have named as *epistolary jurisdiction*); it innovated new practices of fact finding (especially through the means of independent socio-economic commissions to ascertain the facts); it invested itself with continued jurisdiction over *extensive domains of state lawlessness* (in custodial institutions such as prisons, juvenile homes, protective homes for women) and fashioned all kinds of judicial intervention and remedies.

Fourth, the Supreme Court read words and formulae in the Constitution of 1950 in ways that recognized and created *new fundamental rights**. *A gradual erosion of the distinction between Part III and Part*

* Thus, starting initially, with reading into Article 21 the right to due process of law as including the right to bail, the right to privacy and dignity in the administration of criminal justice (the basic rights of undertrials and those punitively detained) the Supreme Court has *legislated new fundamental rights some of which were expressly, after deep deliberation, excluded from Part III by the constitution-makers. These rights include:*

- *the right to literacy and primary and secondary education*
- *the right to health*
- *the right to food, drinking water and integrity of environment*
- *the right to a minimum wage*
- *the right to information*
- *the rights to responsible affirmative action policies*
- *the right to compensation for torture, cruel, degrading and unusual punishment or treatment*
- *the right to speedy trial*
- *the right to enforce accountability of total institutions (juvenile homes, women's protective homes, psychiatric care institutions, prisons)*
- *the right to gender justice*
- *the collective right [illegible]*

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IV was thus accomplished; the social, economic and cultural rights guaranteed under the directive principles of state policy are continually made enforceable as integral aspects of declared fundamental rights.

Fifth, the Supreme Court assumed the role of a custodian of political morality. Areas not considered justiciable (like the imposition of President's rule under Article 356) were made so. The supreme executive discretion in regard to reservations in jobs and educational institutions for "other backward classes" and educationally and economically backward classes was brought under strict constitutional scrutiny to prevent runaway reservation quotas, which served more political convenience than constitutional conviction.

And the Court sustained the Election Commission decisions on establishing democratic norms within political parties by requiring them to hold elections and subjecting them to disclose their assets and accounts.

Sixth, and the most striking of all, the nineties witnessed, in full retreat from the *Antulay* decisions (Baxi, 1989), judicial activism enunciating the most fundamental of all fundamental rights of the Indian people: *the right of all citizens of India to immunity from acts of corruption by people in high places*. In exercizing constitutional judicial power, the Supreme Court cast itself into the role of an ombudsperson (which Indian Parliament has effectively denied to Indian people for five decades). Through technically unimpeachable decisions, invoking the doctrine of a *continuing mandamus*, the Supreme Court has virtually divested the supreme executive of its powers to control the operations of the Central Bureau of Investigation and taken over its day to day investigation of charges of corruption in high places, even to the point of now requiring approval of the Court for transfer of the head of this agency! Whether decimation of the ranks of corrupt politicians can be accomplished by judicial process alone is of course an issue which generates acute anxieties and controversies. But in a sense it must be acknowledged that when social activism in India has virtually abandoned the fight against corruption in high places, the judiciary acts as a true inheritor of the values, virtues and vision of lamented Jai Prakash Narain's aborted Total Revolution. Hopefully, public movements will now be nurtured to combat microfascism of power at local levels more effectively by these astonishingly wide range of integrity and rectitude initiatives of the apex court.

The activism of the late eighties and nineties maintains some continuity with the first two phases of judicial activism identified earlier. But it also marks a rupture in the sense that the judiciary has become a prime instrumentality of *re-democratizing the processes of governance and practices of politics. The contemporary patterns of judicial behaviour of the judiciary has transformed it from a mere apparatus of governance into an institutionalized social movement*. There is no precedent for this in contemporary world judicial history. And perhaps *activism* is scarcely a word, despite its protean attributes, which captures this transformation.

Dark Linings on a Silver Horizon

It should not detract one bit from the warmth of appreciation of the achievements of this new phase of judicial activism to acknowledge the nature and the magnitude of self-imposed limits that Justices have themselves sculpted on their constitutional power and *duty*. The flip side of contemporary judicial activism is its canon of judicial self-restraint in matters entailing violation of peoples' rights in the current phase of the globalization of India.

(a) *Catastrophic Judicial Process for the Bhopal Victims*

This is a complex story which cannot be narrated fully in this paper. But a few aspects may suggest the outlines of this agonizing narrative. The Bhopal settlement offers a mightily unjust prologue to this narrative, which I have described in detail elsewhere (Baxi & Paul, 1985; Baxi, 1986; Baxi & Dhandha, 1990). Not merely were the victims, not heard properly by the Court, when a close door settlement was devised and then ratified by two judicial orders but the Court annihilated the rule of law in India further when it conferred immunity from criminal process as a part of a civil settlement on the Union Carbide and its affiliates. It required a Herculean effort on the part of victims movement, and social action groups, to have the Court review this immunity. While the Court was enabled to restore dignity to judicial process by canceling this immunity, this was to turn out to be a pyrrhic victory for the victims because in 1997 the Court was to rule that charges of

and its Indian subsidiary). At the very most, if any criminal liability existed it was in the category of causing *simple hurt*!

In many an inversion which characterized the apex judiciary's performance in the Bhopal case, a mighty multinational was able to represent itself successfully as a *victim* of social action and judicial process! And the real victims were allowed to be presented, ultimately, as maligners, whose docile bodies became sites of contention as to the nature of injury suffered: in upholding the settlement amount ($ 470 million as against $3 billion claimed on behalf of the victims by the sovereign government of India) the Supreme Court was able initially to locate only a few victims as having suffered serious injury! After accomplishing that, the Court changed its estimate of the magnitude of the victimage! And the Supreme Court continued to allow Union Carbide to appear before it in relation to several matters including the formation of a trust to construct a hospital (still not done) despite the fact that the sessions court had declared the corporation as an 'absconder' for non-appearance in the criminal proceedings!

Altogether the Bhopal adjudication is a saga of judicial betrayal of the very activist enunciations offered through social action litigation. Somehow, the MIC had also entered the soul of Indian jurisprudence. The processes of adjudication constituted the recurrence of the Bhopal catastrophe initiated by Carbide's perfidious practices of power; the very articulate concern for the real victims of the Bhopal catastrophe were invoked by the Supreme Court to justify the settlement.

The Bhopal adjudication reveals investment of judicial talent and activism on the side of foreign investors and multinationals, no matter how horrendous is the nature and impact of sovereign power on hundreds of thousands of children, women and men who till this day continue to unfold the latent impacts of what was, in effect, a mass experimentation with human beings in the long term impact of exposure to heavy dosages of MIC, a lethal chemical that can only be tested under the law of informed consent on human beings and in very small doses on experimental animals. The de-sensitization of an otherwise summit court extends to aborting one of the very few examples in the Third World of criminal prosecution for manslaughter. The adjudicatory performance of the Court in Bhopal case suggests not merely the limits of judicial willingness and capability of delivering justice to victims of deliberately

planned mass disasters, it also, (and this is *alarming*), displays an unprecedented solicitude for the rights of global capital against and over the fundamental rights of the people of India, expansively affirmed by the Court itself in relation to the Indian state and civil society.

(b) *Constitutional versus Political Promises*

No summit court in the world can be *comprehensively activist*, even the Supreme Court of India. Nor ought one expect apex judiciary to perform 'revolutionary' agenda of social justice without detours, digression and serendipity. After all, courts and justices have to arrive at a mix of *activism and restraint*.

This having been said, it matters a very great deal where *activism* and *restraint* ought to find their place in adjudication. This has always been a matter of escalated judicial and juridical discursive complexity. Many judges and jurists take the view that it is appropriate for justices to be *activist*, in some sense or the other, in relation to civil and political rights but not in the domain of *developmental or economic policy decisions*. These matters of policy, it is argued, involve complex considerations not fit for adjudicatory justice; these rather belong to the realm of the rough and tumble of politics (establishment and opposition) and lately politics of new social movements or politics of resistance. Justices and courts, it is maintained, ought to leave the 'political' arena unhindered.

Even the super-activist Supreme Court of India has followed this orthodoxy against its own radical discourse on human rights in India. It converted the discourse on Narmada as an issue of rehabilitation (which is, of course, important second-best way of dealing with developmental decisions) from the issues as presented before the judiciary: the issue of *transparency and accountability of such developmental decisions, the issue of peoples' right to know and to participate in decisions affecting the future of environment and the future of the future generations* (affairs, as it were, of inter-generational justice) and (without being exhaustive) *the security of peoples' right to free speech and expression against the unworkable and unjustified collective representation of the state as a monopoly-holder on definitions of 'public interest'*.

At least Narmada allowed scope for raising these issues which

The redirection of social action litigation to activist-government dialogical practices in such situations when citizen groups are energized by the judicial rhetoric on human rights to activate the courts is, simply put, not consistent with the *promises of a people-oriented judiciary*. The subaltern masses of India are used to constant betrayal of *political promises*; they are numbed to incomprehension when even India's most activist Justices seem (and indeed from time to time *do*) betray *constitutional promises* which they themselves articulate from the High bench.

(c) *Forces of Globalization and Canons of Judicial Self-Restraint*

The conventional 'wisdom' on judicial self-restraint in advanced capitalist societies made its appearnace against the paradigm of *welfare state*. We all know, in one way or other, of the American Supreme Court's approach to New Deal reforms and the impact of President Roosevelt's Court-packing plan. But we do not always recall that the culture of judicial self-restraint in matters of economic policy in the United States developed primarily in relation to protection and promotion of rights of (as we still call them in India) weaker sections of society. No more will the Supreme Court of the United States strike down a Congressional statute providing for the rights of the labouring children or unorganized workers or minimum wage law.

In India the culture of judicial self-restraint developed around different issues. Despite high flown rhetoric of social justice, the first quarter century of Indian legislative activity witnessed no vigorous programme of law and policy concerning unorganized rural labour, gender equality, atrocities against untouchables and indigenous peoples, child labour, disabled and other vulnerable sections of Indian society. Outside of agrarian reforms, the courts have had very few occasions to invalidate welfare legislations. In fact, in the face of masterly legislative inactivity, in the famous *Stnavac Case* in the late sixties, the Supreme Court in effect wrote a law on contract labour which Parliament then enacted!

The Indian case presents an elaboration of doctrines of judicial self-restraint in two principal areas. The first is the expansion of discretionary powers of the state officials; the second, and related, is the area of economic regulation.

In the very first years of India's independence, the Supreme Court affirmed vast discretionary powers of the managers of the Indian state. They held that the fact or the probability of abuse of power is not a valid ground for denial to discretionary power to a regime. *Mala fide* exercise of discretionary powers may be challenged but of course the proof of such allegations is made so stringent that hardly any such attempt has been successful! Since the exercise of powers was discretionary, judiciary may not compel action; thus for example the power to make a reference of industrial disputes to labour adjudication under the Industrial Disputes Act could, and has, allowed the states to sit on matters, for as long as two decades, with enormous costs to working classes and their patterns of relations to law and politics. There are indeed very few modes by which agricultural labour may successfully seek implementation of the minimum wages law or the beneficiaries of the extended state anti-'poverty' programmes may seek fair implementation of the schemes, or draught or famine stricken people may seek, with judicial intervention, ameliorative action or compensation for executive acts of commission and omission. The vast edifice of 'administrative' law insisting on fair play in action remains primarily a jurisprudence of and for the urban middle classes (see my introduction to Massey, 1995).

Even if this observation is contested, it at least remains true that the notion of fair-play in administration (e.g., right of the affected parties to be heard, duty to give reasons, avoidance of bias in decision-making, etc.,) begins to be serviceable when governments exercise their discretionary power. When they avoid using it, canons of judicial self-restraint make judicial activism irrelevant for the disadvantaged, dispossessed, deprived and impoverished masses of India.

The second area where judicial self-restraint has institutionalized itself is that of economic or developmental decisions. Even today when courts deal with these, it is with utmost deference to the 'wisdom' of the executive (as seen in the discourse of mega-irrigation projects). Although embroidered with occasional anxieties for the rights of trade and industry, the Indian judiciary has sustained wide powers which the planned economy of India, till the recent epidemic of liberalization,

capital; it may nationalize sectors of industry; it may oversee corporate management on grounds of public accountability; it may regulate, and even prohibit in some areas, intrusion of foreign capital and entry of multinationals. The list is virtually endless. And although the broad picture is true, it is also true that the courts were asked to take regulation seriously at the bar of fundamental rights. Practically every major industrial house adorns law reports as a petitioner or appellant; there is not a single major law or policy on the regulation of the economy that has not been subjected to endless regime of stay orders and appeals. And almost all major doctrines of administrative law (fair play in action) stand embedded in the capital's combat against the Indian state planning and regulation.

Even if, and on balance, the state's power were sustained, this was achieved through adjudicatory processes which routinely problematized the *regulation* of the economy.

In this arena, judicial self-restraint was indeed a *masked performance of judicial activism*. It is unsurprising that the managers of Indian state planning did *not* complain as prolifically concerning judicial performance in this area as they did in the domain of agrarian reforms! The era of planning was also an era of collaboration between politics and industry. The managers of the Indian state were deeply imbricated in the struggle of fractions of Indian capitalist classes. They were at the same time *clients* and *controllers* of merchant, financial, and productive capital. As clients, they had to raise donations for political parties to finance elections and party activities, and as clients they had also to ensure a level of productivity of industry, and capital generally, which would sustain the satisfactions of growing Indian middle classes. As controllers, the Indian state managers needed and sought (and they accomplished through 'tricks' of planning) many a point of leverage over the capitalist class. It was also necessary for the Indian state to assume a growing role as a *finance capitalist state*, under the auspices of planned economy. This was accomplished superbly by nationalization of banks, insurance, resource industry (especially petroleum) and control over all public utilities as well as by capturing commanding heights of capital formation (through the Industrial Credit and Investment Corporation, and of course the Reserve Bank of India and foreign exchange controls).

The purpose of this necessarily generalized narrative is, in the present context, to illuminate the contexts of the formation of the culture of judicial self-restraint. There was simply no way in which the Indian judiciary could fail to reflect the deep ambivalence of Indian state managers towards Indian and foreign capital. There was only one way in which the courts could innovate about the Indian economy in terms of the constitutional notion of Indian development: only those policies and programmes of development are *just* which *have the intention and the impact of dis-proportionately benefiting India's impoverished masses*.

Since the nineties when India has embarked on a headlong and heedless process of economic liberalization (unconstitutional at its very core, given the constitutional conception of Indian development) the same culture of self-restraint has marked the Supreme Court's approach despite a radical change in the economic context. The changed context is fraught with a whole variety of perils for the Indian people (see Bhaduri & Nayyar, 1996).

Not merely has an otherwise activist Supreme Court of India taken judicial notice of the 'winds of change' (as did Justice Venkatchaliah in *Tomco*: 1995 Supp.1 SCC 499) but it has, broadly, sustained the triple D/s of *liberalization: disinvestment, denationalization and deregulation*. In the days of the planned state (now ludicrously described *ad nauseam* merely as the license quota Raj) the Supreme Court of India, and the High Courts, at least maintained *strict constitutional scrutiny* over nationalization and overall state regulation over economic activity. Since the nineties, barring a handful of exceptions, the judicial process seems to have altogether *surrendered* itself to the idolatry of globalization and liberalization. It has resolutely bypassed, barring a handful of situations, almost all of the following questions:

If 'regulation' and 'nationalization' were aptly probelmatized during the halcyon days of Indian planned state, should not the deregulation and privatization at least merit the same order of *prima facie constitutional scrutiny* in these halcyon days of economic liberalization?

If the judicial process was harnessed in the past to secure workers' rights against the overwhelming propaganda of productivity, should the courts now become active partners in the demise of the future of collective rights of workers in an era of globalization?

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If *transparency and accountability* are the new constitutional virtues to be enforced on Indian political establishment in the title of probity and reticence in the exercise of high public power, ought not the judicial process and power enforce these virtues, in an equal measure, in regard to *transparency* in international economic negotiations favouring manifestly unconstitutional trade negotiations by the supreme Indian executive? If indeed, as the two very eminent economists say, it is true that "genuine economic liberalization for development begins from transparency of negotiations"(Bhaduri & Nayyar:1996, 82) what *overwhelming reasons, aside from the well-manicured strategies, such as canons of judicial self-restraint, justify giving such a short shrift to social action* petitions seeking a review of India's accession to GATT/WTO agreements?

I do not wish to burden this paper by elaborating the list of such-like questions. No doubt, many more could be added such as the issue of legitimation of the repeal of regulations concerning prohibition on alienation/free marketization of tribal lands.

Towards a Conclusion

The very raising of such questions, however, points towards what I have been describing as a tendency towards a *structural adjustment of Indian judicial activism*. To some extent this tendency manifests a continuity in Indian jurisprudence. It is also, to an extent, *carefully contrived*. I have archived the details of not too imaginative a packaging of propaganda against judicial activism elsewhere (see my Capital Foundation Lecture on Globalization and Judicial Activism, 1996, published also in the *Mainstream*). The technique consists in exhorting the judiciary to remain anxious concerning the trajectory of its 'activism.' Not just the corporate Bar but even eminent civil liberties lawyers have publicly advised the Supreme Court that activism is an apt response to the misfortune of India's marginalized masses. Activism in this view is legitimate when it addresses issues of pollution and environmental degradation, the plight of backward classes and atrocities against untouchables, bonded and child labour, and gender rights. But activism is not an appropriate sphere of judicial oversight over issues of marco-economic policy or even over issues concerning developmental decisions (translate, please, as Bhopal, Enron, the mutlinationalization of Indian mining

and mineral industries, impoverishment-aggravating measures of structural adjustment).

Insofar as the judicial activists feel constrained to heed this gratuitous anti-people and anti-human rights advice, *structural adjustment of Indian judicial activism will be accomplished*. And this will determine in India of the next decade the fate of a 'million mutinies' against the anti-poor policies of Indian state managers in the grip of the processes of globalization, heartily supported and endorsed by the mediocre liberalism of Indian intellectuals and urban middle classes.

These processes, of course, need to be carefully understood. But the task, as per the Eleventh Thesis of Marx against Feuerbach, is *how to change the situation or the conjuncture. The agonies of Indian judicial activism are thus laid bare. If (and there is abundant evidence for this proposition*) the accomplishment of the people-oriented *judiciary was primarily a result of people's struggles, the task of future struggles is to save the Indian judiciary from self-imposed structural adjustment of judicial activism.*

On the issue of how this may be defined, and appropriate strategies evolved, one may not expect unanimity among Indian social and human rights activists. But even through active dissensus, this is a path of future struggles.

The crucial question before peoples' movements is how the most people-freindly of governance apparatus (namely, the judiciary) can be both enabled and empowered, in confrontation with the forces, managers and agents of Indian globalization, to serve the constitutionally envisioned paradigm of Indian development.

The celebration of the Golden jubilee of Indian constitutionalism inaugurates itself with this interrogation.

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14A

Order that Felled a City

The Supreme Court order directing closure of 8,378 industrial units in Delhi and their relocation elsewhere, on the grounds of pollution, does not locate the malaise of Delhi in proper perspective. The question of pollution needs to be addressed taking into account the entire range of factors causing it – from vehicles to waste-water discharge. Moreover, concerns of equity and justice should be part of pollution eradication so as to prevent easy victimisation of the toiling masses of the city.

ON March 24, 1995 the Supreme Court issued an order, on the writ petition # 4677\85 filed by M C Mehta, on pollution of the river Ganga, directing the Central Pollution Control Board (CPCB) to issue notices to 8,378 industries. These notices were to indicate the fact that they are polluting industries and are operating in non-conforming areas in violation of the Delhi Master Plan formulated under the Delhi Development Authority Act, 1957 and the Factories Act, 1948, and that these industries were therefore to stop functioning in the city of Delhi and be relocated elsewhere. The order seeks to relocate 168 industries categorised as 'H' under the Delhi Master Plan and held out the threat of the same for those operating in the "non-conforming areas". Similar judgments have been handed down on other neighbouring cities as such in Kanpur and Agra, and there is talk of shifting the Mathura refinery. Orders have already been passed in the recent past, in the context of some major industries in Mumbai and Calcutta.

In an earlier order issued on May 10, 1996 the judges maintained that "the most vital 'community' need at present is...to provide for the 'lung spaces'...[T]he totality of the land which is surrendered and dedicated to the community...should be used for development of green belts and open spaces". While the concern for quality of life in Delhi is commendable, the highest Court's orders place disproportionate responsibility on those people who sell their labour power in order to protect their life and personal liberty.

What was the impetus behind the urge to clear up a problem that has been in the making for decades? The question that springs to mind is, when, as long ago as 1962, the first Master Plan of Delhi called for the relocation of hazardous and polluting industries within three years, why was nothing done about it for over three decades? Why were no steps taken to control pollution in less polluting industries? Why has no comprehensive scheme been designed till today for the welfare of the workers employed in the industries which at that time were identified for relocation? And if for over three decades this situation was allowed to continue, what is the reason that makes it suddenly intolerable for even a few months more? The entire basis of Supreme Court's orders is that mandatory provisions under the Master Plan of Delhi (MPD) have not been implemented. However, Delhi's development, including its industrial development, did not have much to do with the rationale of zonal regulations worked out in the Master Plans. Moreover the Master Plans themselves cannot be taken as representing the interest of the bulk of Delhi's population. These Master Plans were approved without public debate and take no account of the needs and wants of working people and their families. Therefore to make them the basis of the Supreme Court orders is itself open to question. Ironically, the orders passed by the Supreme Court bring out the wilful connivance of officials and owners of industries in creating the current conditions.

The Master Plan Document 2001 (MPD 2001) admits that according to the then existing regulations, a large number of industrial units were non-conforming. This is in spite of the fact that Delhi at present has 28 conforming industrial zones. Also no relocation had taken place between 1962 when the first Master Plan was worked out, and 1981 when the second one followed. The 20 year period for relocation assigned by the first Master Plan ended in 1982, and the three year period granted by the second Master Plan ended in 1989. On the other hand, industries were allowed to come up all over the city in violation of regulations the city administrators themselves had worked out. The MPD 2001 estimated that there were 46,000 industrial units in 1981. It increased to 85,050 in 1991 and 93,000 in 1993. In 1995, there were 1,01,000 industrial units employing 9,09,000 people.

The indiscriminate growth of industries in residential and commercial use zones had a lot to do with the nature of those industries. MPD 2001 says that in 1981, 77 per cent of the 46,000 industrial units had less than 10 workers, and 16 per cent with workers numbering 10 to 20. The CPCB estimate is that in 1993-94 that only 10,000 of the 93,000 units in Delhi have been given environmental clearance. The rest of the industries function without any environmental clearance. It has been brought out in a recent survey that many Delhi industries are without licences for the goods they produce because getting an environmental clearance is not easy. They settle for a 'proxy' licence which gets renewed every year. For this state of affairs the Supreme Court blamed "the officers/officials who have been wholly remiss and negligent in the performance of the statutory duties entrusted to them under the Master Plans". But the Court merely advocated that the chief secretary of the Delhi administration should "hold an inquiry and fix responsibility". Which is as good as saying not much will come out of this. Significantly, Supreme Court's intervention was originally sought in view of the evidence of official neglect and indifference of employers. The industrial units received licences, sales and excise tax registration, government subsidies, bank loans and other facilities. But no care is taken to ensure they fulfil their statutory obligations under Factories Act, Industrial Disputes Act and other labour legislations. Yet nowhere do the orders pass any strictures on them. Instead, the orders are replete with attempts to enable the industries and the administration to undertake the transition as comfortably as possible. Relocation is in fact made a lucrative proposition by allowing the land vacated by industries to be sold at market price.

The land use ordered by the Court from the industries shifted/relocated is the following:

(a) up to 0.2 ha to be developed by the owner in accordance with zoning regulations of the Master Plan;
(b) 0.2-5 ha: 57 per cent to be surrendered and 43 per cent developed by the owner;
(c) 5-10 ha: 65 per cent to be surrendered and 35 per cent developed by the owner; and
(d) over 10 ha: 68 per cent to be surrendered and 32 per cent to be developed by the owner.

The Court ordered that industries which shift "shall be given incentives in terms of the provisions of the Master Plan and also incentives which are normally extended to new industries in new industrial estates". That is, land at subsidised rates, easy bank loan repayment schemes, etc. The Court reminded the industries that "In view of the huge increase of prices of land in Delhi the reuse of the vacant land is bound to bring a lot of money which can meet the cost of relocation". In short all this adds up to making relocation or closure a lucrative proposition for industries. Of course, smaller units feel threatened by these orders, and their owners have in fact organised some highly visible protests in the city. They have become a handy tool for unscrupulous managements and industrialists to justify closing down factories, retrenching workers, and diverting capital into more profitable industries. For instance, the Birla Textile Mill, which had long been trying to divert capital and shut down present operations, found in these orders an easy way out and shut down all operations on the midnight of November 30,

1996, ostensibly, in compliance with the Court's orders. Similar was the case with Sriram Foods and Fertilisers and DCM Silk, located in west Delhi. The fact that these industries had already purchased land – in Himachal Pradesh (Birla Mills), Rajpura in Punjab (Sriram Foods) and Rajasthan (DCM Silk), beyond the National Capital Region, – showed that they had planned their moves well in advance, even at the time of the earlier order, which had clearly insisted on relocation within the NCR. It was also clear that the owners were not interested in the workers taking the relocation option and they were only too happy to get rid of them with a paltry compensation of one year's wages. It was only after the revised order of December 4, that some of these plans had to be modified.

Workers' rights have been a casualty even in the 168 industries which are large and which have national trade unions and therefore are relatively better placed to tackle the problems arising out of the Supreme Court order. The order issued on July 8, 1996 and the clarification issued on December 4, 1996, lay down the norms for paying compensation to the workers. Workers "shall have continuity of employment" and will be considered in "active employment" while the industry is being relocated. They are in addition to be paid one year's wages as "shifting bonus" to help them "settle at the new location". Workers employed in industries that "fail to relocate", that is industries which close down, are to be paid six years' wages. And "the workmen who are not willing to shift" will be paid compensation in terms of Section 25F(b) of the Industrial Disputes Act, 1947, that is, will be paid one years wages as additional compensation. The Act lays down that for "every completed year of service" workers will be paid retrenchment compensation equivalent to fifteen days average pay. The Supreme Court also made it abundantly clear that workers entitled to compensation must have been in "continuous service" under Section 25B of the Industrial Disputes Act, 1947. This means employment for a period of not less than twelve calendar months in which period the worker should have worked for a minimum of 240 days.

Only permanent workers will be entitled to these benefits and contract workers will be left high and dry. This is why the government and trade unions came up with different figures for those who will be rendered jobless in the first group of 168 industries. The government claimed that 15,000 workers would be affected while the unions' figure was 35,000. For instance, there are only 654 permanent employees in Spiram Food and Fertiliser Industries, whereas the number of contract labour is 650 (Interview with Hardwar Dube, general secretary, Krantikari Mazdoor Union, SFFI). Thus, even for the industries which are large and medium scale which have national trade unions to fight for their cause, the bulk of the workforce is being denied all rights.

As for the method of paying compensation – it is seen as a matter between the owners of industries and individual workers. In case of non-payment, delay, or any other dispute the worker has to seek the help of the law courts. In this unequal battle it is the worker who stands to lose. Indeed, even if the compensation requirements are met, the industrialists will make huge profits. The Joint Action Committee of the Textile Workers has calculated that Birla Textiles stands to make Rs 340 cr, DCM Silks and Swantantra Bharat Mills Rs 700 cr and Ajudhia Textile Mills Rs 225 cr. It should be remembered that when land was acquired by DDA they did so in the name of "public interest" from the villagers who were paid on an average Rs 2.72 per sq metre. Some of the lands so acquired were developed as industrial estates and were sold at subsidised rates. Now the same land today can be sold at the contemporary astronomical market value – from this the industrialists are to pay compensation to the workers, a paltry outflow.

If owners are entitled to profit because they own the land, workers too must be entitled to a more reasonable share than a meagre 5-6 per cent share of the total if the unit relocates and only 20 per cent if the company closes down. What makes it worse is that because of the closure of large units in Delhi a number of small units which are more or less like ancillary units too will close down, rendering another large group of workers jobless. Even those entitled to receive compensation are only slightly better off because not all units pay them even minimum wages as per the law. In Delhi an unskilled worker is to receive Rs 1,677, semi-skilled Rs 1,844 and skilled Rs 2,105. Delhi has had long struggles for implementation of minimum wages. Such struggles have shown the reluctance of the industrialists to meet even their statutory commitments. It is therefore difficult to believe that they will dutifully pay the compensation without delay. In any case, workers will not receive compensation for their houses which many of them have built with a lifetime's savings. Urban life being tough and precarious, even a shanty house has a value higher than its appearance.

Planning for Profit

In 1956, Delhi was declared a state for administrative purposes, while in 1955 itself a provisional Delhi Development Authority (DDA) was set up by the central government, "to check the haphazard and unplanned growth of Delhi...with its sprawling residential colonies, without proper layouts and without the conveniences of life..." (Master Plan of Delhi 1962, p i). The Town Planning Organisation (TPO) had meanwhile been set up by the ministry of health – partly in response to the outbreak of jaundice – and, in 1956, it produced the Interim General Plan for Delhi. In 1957, the DDA was constituted by an act of parliament, "to promote and secure the development of Delhi according to plan" (ibid). In co-operation with experts from the TPO and Ford Foundation, the DDA prepared a Master Plan and released it in 1960, inviting objections and suggestions. An outline in English, Hindi and Urdu was also published for wider dissemination. Even though only three months were given for filing objections, DDA received 600 of them "from the public, co-operative housebuilding societies, associations of industrialists, local bodies, Delhi administrations and various ministries and departments of the government of India" (ibid).

By 1971, however, Delhi's population had already crossed the 40 lakh mark and things were clearly getting out of hand. In 1973, the Town and Country Planning Organisation (TCPO) undertook a mid-term review and suggested a new plan. But this was never made public as its report was very critical of the role of the DDA and the Union government, in implementation of the plan. In 1974, the TCPO prepared the National Capital Region (NCR) plan but this too, was disregarded as no statutory body was set up for its implementation until 1985. Things were getting so bad that the Lt Governor of Delhi, Jagmohan, decided to make use of the Emergency to implement one of the provisions of the Master Plan. In the name of the health of the "citizens" of Delhi, almost seven lakh of them were relocated mainly on the east bank of the river, where 60,000 units of 21 square metres each were allotted in low-lying, flood-prone areas. By 1977, the NOIDA industrial estate was also set up in the east, ostensibly to provide employment to these relocated people. All these efforts were of no use. By 1981, the population of Delhi had grown to 62 lakhs, far exceeding the 50 lakhs provided for in MPD-62. It was not that this excess population came to Delhi because there were no "decentralising" mechanisms. In fact, the ring towns grew even faster than Delhi and the NCR population was 52 per cent higher than projected. Even the One lakh families evicted in 1977 were back in the city – the squatter population crossed the seven lakh mark and the slum population was estimated at 18 lakhs. Clearly, the MPD-62 had missed the mark completely. The squatter/slum population had been completely disregarded in the planning process. One of the indications to this is that in 1961, there were about 17,000 industrial units with an employment of about 1.4 lakhs. By 1981 this had shot up to roughly 50,000 with a work-force of 4.6 lakhs. Similarly, the number of workers in the public sector offices and the trade and commerce sector also tripled during this period. There was no provision in MPD-62 for housing this work-force. Only 5 per cent of the residential areas had been set aside for service personnel, who increased from 5 per cent to 25 per cent, and even the

demarcated low income groups were far too expensive for them. Even the servicing needs of the population were changing. The water requirements of the middle classes were growing along with the consequent sewerage, while the supply to the slums remained uncertain and irregular. The per capita consumption of electricity was rapidly growing (almost four-fold), while the squatter population had little or no access to electricity connections. MPD-62 had planned the road and parking requirements based on surveys in government offices which suggested that 60 per cent were commuting by cycle, 30 per cent by bus, and only 2 per cent by two wheelers. But by 1981, two-wheelers had grown five-fold, while 50 per cent were travelling by bus and both road and parking space were getting exhausted. Finally, four years behind schedule, the DDA published the Perspective Development Plan (PDP) in April 1985, for inviting objections and suggestions. Unlike MPD-62, the PDP was not circulated nor were summaries prepared in Hindi and Urdu. In April itself, a workshop was convened of 35 eminent "architects, planners, engineers and advisors of the Delhi Urban Arts Commision (DUAC) to help formulate recommendations and suggestions". Thus, without any public debate, a set of proposals was submitted to the government.

In August 1985, the central government had the sense to acknowledge that the "Master Plan is conceptually defective" (Conceptual Plan Delhi-2001, p 1) and asked the DUAC to set up a multi-disciplinary Expert Group to prepare a perspective plan within three months. Despite its brief, however, the bias of the Expert Group was shown in its merely finding fault with the implementation of the Master Plan: "the plahning concept and objectives...were sound but the major shortcomings were in proper implementation" (ibid p 4) The Expert Group made the following main observations:

(1) Only three out of 15 proposed district centres had been developed and these were not located in the context of the transport system.

(2) No detailed plans had been made for residential areas and 5 per cent housing for weaker sections was inadequate.

(3) The road network was inadequate and none of the proposed cycle tracks had been built wlfile old ones had been encroached on by roads.

(4) The 8,000 industrial units to be shifted in 1961 had grown to 24,000, and only one of the 23 sites marked for flatted factories had been developed.

(5) 34 per cent of the green area had been lost and the physical infrastructure of terminals, bridges, and flyovers, etc had not been built at all.

(6) A single agency (DDA) being nominated for acquisition, development and disposal of land had delayed the whole process and increased both land prices as well as encroachment.

Without going into the reasons behind non-implementation, the Expert Group proposed that:

(a) the population be restricted to 112 lakhs by 2001;

(b) there be a focus on deindustrialisation of Delhi to restrict employment;

(c) counter magnets be developed at Meerut, Rewari, Khurja, Rohtak and Panipat, to decentralise Delhi's growth.

(d) plan for providing services in Delhi to 112 lakh people, including the integrated development of new settlements, augmenting water and sewerage facilites, a new traffic and transportation infrastructure, and channelisation of the Yamuna.

All these recommendations were incorporated into the new Master Plan (MPD-2001) and public debate on the Plan was bypassed on the plea that it was merely a "revision" of MPD-62. The plan conveniently ignored all the earlier flaws and the questions that arose from them. Thus, there was no analysis of why the earlier ring towns had not ben able to slow down Delhi's growth. In fact, a recent study on the NCR sponsored by Union ministry of environmnet and forests and co-ordinated by National Environmental Engineering Research Institute (NEERI), has found that NCR towns like Ghaziabad, Faridabad, Panipat and Meerut are suffering from excessive air, water and noise pollution. These towns fall in the dangerous category. Is displacement of workers to NCR the solution to Delhi's polluting industries? Isn't it tantamount to throwing workers from the frying pan into the fire?

Further, MPD-2001 failed to appreciate the industrial and fiscal policies that underlay Delhi's attraction as a major node for expansion. The lower sales tax rates, the financial incentives, low industrial power tariffs, the opening of new government offices, the easy availability of markets and infrastructure, the profits in land speculation, and the major expansion of construction through events such as the Asian Games in 1982 – all these were never even considered. Consequently, even MPD-2001 has not been able to make any dent in the city's growth. The 1991 census shows that the population had already grown to 95 lakhs and if the same trend continues, would reach 144 lakhs by 2001. Out of 95 lakhs, 31.5 per cent of the population was working in industry, trade and commerce, and services. The squatter population in the migrants coming to Delhi in search of work was almost 60 per cent. While the density in the NMDC area had remained constant over three decades, that in the industrial and commercial centres had gone up three or four times. In these areas there were 2-6 lakh jhuggi dwellers living in over 900 clusters. By virtue of a court order, none of them are eligible for any form of regularisation. In 1991, it was estimated that 33 per cent of the workers lived in slums.

Logically speaking, if the city has to be made healthier for its citizens then it is the interests of those who constitute 70 per cent of its population which should be kept in mind – those who are forced to live in sub-standard housing. Equally logically, if the pollution is to be reduced then those responsible for the bulk of pollution should be prosecuted. That would include those sewered households who get upwards of 200 litres of water per person per day and account for 96 per cent of the MCD flow in the drains which spill into the Yamuna; those who own cars and two-wheelers and contribute 63 per cent of air pollutants; and those regulatory and executive authorities who have permitted all this to happen through faulty planning and even more faulty implementation. But the Supreme Court, like the Master Planners, chooses to blindfold its eyes as it tips the scales of justice to favour the elite citizens of Delhi. The question might be raised – if the life of the poor in Delhi is so inhuman would it not be better for them to be relocated into less congested areas? Why fight to keep them in this city in such appalling conditions?

Politics of Displacement

Look at the record of the government on resettlement. If we consider the case of the refugees who entered Delhi after the partition, we find a depressing picture. An estimated one lakh persons had left Delhi permanently, while 4.8 lakh refugees entered Delhi between 1947-51. The population of the city at that time was 17 lakh. To resettle these uprooted people the government of India set up a ministry of rehabilitation. A refugee reaching Delhi could settle almost anywhere in the city and people squatted wherever they could find space. But despite this leniency and with virtually the entire state machinery at work it still took a decade and a half before the compensation and resettlement cases of most of these 4.8 lakh people could be settled.

Now, the judgment on polluting industries maintains a deathly silence on how the workers – and not just the unionised, oragnised workers – would be compensated and resettled. What will happen to their present dwelling units when the workers are displaced? Would they be provided with similar dwelling units at the place they will be relocated to? Why is the judiciary ordering the mass displacement of workers virtually at gun point when it sets a time limit of one year for the eventual re-opening of the closed factories/industries? On parliamentary records the figure of workers likely to be displaced is seven lakh and the process is to be finished in a year or so. The only time when about seven lakh residents of Delhi were resettled in one year was during the Emergency period. Are the workers going to relive the trauma this time around with an undeclared Emergency?

While the first Master Plan, 1962 was quoted as a pretext to displace seven lakh squatters, the provisions of the same Master

Plan had been systematically violated one by one by the authorities through a grand design as illustrated below. "Most of these resettlement colonies were located in what were clearly designated as 'green and marshy' and 'unsuitable for habitation' land in the Master Plan. Not only was the land not earmarked for housing but it was in a thousand hectare stretch that was 10 – 12 feet lower than the adjoining river Yamuna. In the face of recommendations against using this area for resettling the uprooted slum-dwellers the DDA went ahead and spent Rs 13 crores for land-filling so that the poor people could be literally dumped over the garbage there. The experts had pointed out with the aid of Survey of India maps, that drainage of sewage, sullage and rain water would be impossible. But the objections were overruled for political considerations. The drains in the area were dug in a zig-zag manner so that the contents seep into the ground water – the very ground water that was lifted up through shallow hand pumps and caused the cholera epidemic. These pumps of death had been installed by the civic authorities. While the initial resettlement colonies had plot size of 80 sq yards, later, plots of only 25 sq yards were developed. The residents of these ill-ventilated, ill-lit and over-crowded tenements are under constant psychological tension and suffer from innumerable diseases" (ibid). Ironically while the Supreme Court is issuing directions to de-congest the city in the name of pollution and the health hazards posed by it, the government is officially allotting plots of 20.9 sq mts, 18.8 sq mts and even 10.45 sq mts to the displaced 'quatters' families. The dangers posed by the over-crowded dwelling units of the toilers is conveniently over looked by the apex court. By accepted medical standards these families are living in unhealthy conditions. The history of 46 resettlement colonies of Delhi with a population of over 20 lakhs and the 1988 cholera epidemic bear out well the skewed political priorities of our rulers where the welfare of human beings is the last concern.

Demolition of jhuggies without even a prior notice has been going on a large scale since the days of the Emergency. Such demolitions were however provided the sanction of law in May 1984 when the Parliament passed the four Delhi anti-encroachment bills. The bills (in the form of amendments or changes in existing laws) were actually an instrument to criminalise lakhs of working people forced to live in unlawful settlements.

Barely a few days after the Supreme Court ordered the closure of polluting industries in December 1996, a two-judge bench of the same court comprising Justice Kuldip Singh and Justice Saghir Ahmed issued notice to the central government on a public interest petition filed by B L Wadhera. The judges observed that before issuing orders on the rehabilitation of slum-dwellers, it would like to hear the Union of India. The judges observed that in a country where only 30 per cent of people are above the poverty line, the problem of jhuggi-bastis is natural. The Division Bench perused the report on the work done /undertaken by both the Delhi as well as the central government to improve the living conditions of the slum-dwellers and the future plans to rehabilitate them. The ministry of urban affairs and development was ordered to prepare a comprehensive plan with time-bound programme for the rehabilitation of slum-dwellers. All this has generated a lot of resentment and uncertainty amongst the slum-dwellers who number around 25 lakh and are housed in 5 lakh jhuggies spread over 1,080 jhuggi bastis. Of these, 15 lakh dwellers are daily wage workers who are not covered by any social security schemes. If uprooted they stand to lose their livelihood and face an uncertain future. The union urban affairs minister made it clear in the parliament on December 10, 1996 that the current policy formulation on un authorised colonies was linked to the Supreme Court order on illegally-sited industries. In other words, if these industries are to be re-located elsewhere then the residents of the unauthorised colonies, too, would stand to be displaced elsewhere. It becomes increasingly clear that the aim of the Regional Plan-2001 to deflect 20 lakh population from Delhi would victimise primarily factory/industry workers as also the slum-dwellers and residents of unauthorised colonies.

Many of these factories/small scale industries are housed in unauthorised colonies on rented premises with both the owners and workers living nearby. Interestingly the day the Supreme Court issued notice to the Union of India on the public interest litigation regarding the issue of slum-dwellers, the high court bench of Justice Y K Sabherwal and D K Jain ordered the Union of India to form a high-powered committee within a fortnight and decide within three months on every aspect of the long-pending issues of unauthorised colonies in Delhi. This order was passed on a petition filed around mid-1993 by H D Shourie of Common Cause which had said that it was monstrous for the government to simply regulate these colonies. The H C had earlier stayed the regulations, however, the stay was relaxed in 1995 to allow the civic agencies to provide basic amenities to the inhabitants of the colonies who otherwise were leading a hellish life.

In 1977 all of the 607 unauthorised colonies existing at the time were declared eligible for regulation. In the last two decades another 1073 such colonies have come into existence. Both the governments, central and city, have failed to take a decision on the issue in the last few years. Even the judges remarked that they were tired of being told for the last three years that the matter was "being examined". The bench added that problem of un-authorised colonies required to be "dealt with at a war footing lest it may go absolutely beyond control". They ordered the identification of colonies which cannot be regularised and asked for suggestions for setting up townships around Delhi for shifting such colonies, along with details of amenities which need to be provided in these colonies.

Conclusion

The entire issue of pollution, while being vitally important for the health of the city, needs to be tackled in a radically different way. First, the question of pollution needs to be tackled as part of a larger, long-term plan for the city, taking into account the entire range of factors causing it – from vehicles to waste-water discharge. The whole series of questions, from strengthening the public transport system to the efficient and more productive use of waste, to the ways of tackling effluents and municipal discharge into the river – all these must be seen in the larger context, as part of a single comprehensive plan. Second, the issue of pollution must be made an inextricable part of concerns of equity and justice, and the new comprehensive plan must see to it that those who toil to build the city are not deprived of a voice, as they are deprived of access to the levers of power.

The whole question of formulating an alternative plan for the city then revolves around the question: who is a citizen of Delhi? Is it only the privileged person who has access to various kinds of power, who can build pressure through access to and control over the media? What about the interests of the working people who carry the burden of the city on their shoulders?

The responsibility for the current state of affairs rests therefore, squarely on the central government which has been directly presiding over Delhi's affairs over the decades. It is unfortunate however, that neither the Supreme Court, nor the Delhi administration and Delhi government have tried to rectify this situation. The Supreme Court has, in fact, endorsed the monstrosity of this failure of town planning by basing its orders on a patently unjust plan document – one that violates all canons of natural justice. The exercise of urban planning needs to be made a public concern and cannot be seen as a merely bureaucratic business. Trade unions, citizen's groups and other organisations of the people need to be given formal representation in the planning of the city's future. This means that the current Master Plan, which is being treated as the gospel by the bureaucrats and judiciary alike, needs to be completely reworked.

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THE BHOPAL CASE AND THE DEVELOPMENT OF ENVIRONMENTAL LAW IN INDIA

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I INTRODUCTION

INDIA'S quest for industrialisation and ambition to compete with other industrialised nations of the world prompted it to welcome readily many multinational enterprises. This contributed considerably to the planned economic development of the country by saving foreign exchange; for many this meant jobs and money.[1] Union Carbide of India Limited ("UCIL") was one of those companies established in India. The company is a subsidiary of the American multinational Union Carbide Corporation ("UCC"), which has its head office in Connecticut in the United States. UCIL manufactured a number of pesticides for which there was a rising domestic demand due to the "Green Revolution" in India. Among the products of UCIL was a pesticide called Sevin, the main ingredient of which was methyl isocynate ("MIC"), a highly toxic substance. MIC is an extremely hazardous chemical, a poison against which "stringent precaution must be observed to eliminate any possibility of human contact".[2]

The night of 2–3 December 1984 saw the residents of Bhopal caught up in the world's worst industrial disaster. MIC leaked from the high-tech factory of UCIL in Bhopal, killing over 2,500 and leaving more than 200,000 people maimed for life.[3] Most of those killed and badly injured were the poor dwellers who had made their homes around the plant. Among the injured were pregnant women, who had abortions,

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1. For an insight into India's planned economic development, see Francine R. Frankel, *India's Political Economy 1947–1977* (1978); also Lloyd I. Rudolph and Susanne Hoeber Rudolph, *In Pursuit of Lakshmi—The Political Economy of the Indian State* (1987).

2. *The State of India's Environment: 1984–85: The Second Citizens' Report* (1985), Centre for Sciences and Environment, New Delhi, p.208.

3. The number of deaths caused by MIC had risen to 2,850 by August 1987. See "MIC Deaths up to 2,850". *Hindustan Times*, 22 Aug. 1987, p.7.

premature deliveries and foetal deformities.[4] Research in toxicology has shown adverse effects of the gas on the immune system and has indicated the possibility of the gas being potentially mutagenic and carcinogenic.[5] The long-term effects to the human life system or to the ecosystem are yet unknown and there can be no guarantee that future complications will not arise. Even after several years, an intensive medical check-up showed an alarmingly high level of chemicals in the urine of a large number of MIC victims, indicating that the poisonous elements of the gas have a tendency to remain deposited in the human kidney, causing permanent injury.[6] Since these ill-effects could continue to affect generation after generation, the Bhopal disaster has been described by a leading scientist of India as "a disaster for generations", with no end in sight or any known scientific means to contain the injurious effects on the human genetic system.[7]

The world's worst industrial disaster led to the biggest ever resort to litigation for damages. Immediately after the disaster more than 145 cases were brought against UCC by American lawyers in different courts in the United States on behalf of thousands of victims. These cases were joined and assigned to the District Court of the Southern District of New York, where the individual complaints were superseded by a consolidated complaint. The Union of India filed a separate complaint before that court on 29 June 1985 pursuant to the Bhopal Gas Leak Disaster (Processing of Claims) Act 1985 (the "Bhopal Act"), which provided it with the right to represent the Indian plaintiffs. On 12 May 1986 United States District Judge John F. Keenan dismissed the American actions on the ground that a United States court was not an appropriate forum for the determination of the legal issues involved. This decision was then affirmed on 14 January 1987 by the United States Court of Appeals before the Second Circuit. A writ of certiorari against the appellate court's order was denied by the United States Supreme Court on 5 October 1987.

After this the legal drama moved back to India. The Union of India brought the case before the Madhya Pradesh District Court in Bhopal

4. According to a study on the effects of the Bhopal gas leak on women's reproductive health, conducted in Bhopal by a group of doctors. See "Women Bear the Brunt", *Statesman*, 22 Nov. 1987, p.1; also "Four-fold Rise in Bhopal Abortions", *Times of India*, 22 Nov. 1987, p.8.

5. According to research conducted by Industrial Toxicology Research Centre, Delhi and also studies conducted by the Cancer Research Institute, Bombay.

6. According to findings established by investigators of the Department of Endocrinology and Metabolism at the All India Institute of Medical Sciences, New Delhi. See "Bhopal Survivors Carry Toxins", *Statesman*, 28 Oct. 1987, p.4; also "High Level Thiosulphate in Gas Victims' Urine", *Hindustan Times*, 1 Oct. 1987, p.5.

7. According to Dr C. S. Krishnamurthy, Chairman of the Scientists Commission appointed by the central government to investigate the Bhopal gas disaster. See "A Disaster for Generations", *Hindustan Times*, 24 Sept. 1987, p.5.

pursuant to the Bhopal Act, which gave exclusive rights to the Union to represent all claims against UCC. This action stayed all proceedings in about 800 cases which had already been filed pending further proceedings. The District Judge of Bhopal, M. W. Deo, introduced an unprecedented legal development when he made an order for interim relief of 3,500 million rupees (equivalent to US$270 million) on 17 December 1987. UCC appealed to the Madhya Pradesh High Court to revise this order. On 4 April 1988 the High Court partly allowed the revision and ordered a reduced amount of 2,500 million rupees (US$195 million) as interim compensation, but nonetheless fixed the liability of UCC to compensate the victims. The High Court's order for interim payment of damages appeared to settle the issue, and seemed to leave little scope for further prevarication. UCC challenged this order before the Supreme Court of India, while fresh negotiations began for a settlement. While the matter was before the Supreme Court of India, UCC and the Union of India agreed a settlement figure of US$470 million (about 7,150 million rupees or £274 million) by way of full compensation. On 14 and 15 February 1989 the Supreme Court of India made orders for payment of this amount.[8]

The earlier government of Rajiv Gandhi faced considerable criticism for agreeing to dispose of all claims past, present and future for civil and criminal proceedings against UCC.[9] Several petitions were filed before the Supreme Court to review the settlement. The Supreme Court then ordered that both UCC and the Union of India would continue to be subject to the jurisdiction of the courts in India until further orders.[10] On 22 December 1989 the Supreme Court held the Bhopal Act constitutionally valid.[11] Consequently, the new government of V. P. Singh had decided to support the several review petitions filed before the Supreme Court against the settlement. The present Prime Minister, Chandrashekhar, who replaced V. P. Singh in November 1990, is maintaining the same stance, which would certainly seem to introduce further complications into the situation.[12]

The Bhopal case caught the attention of the legal world for its magnitude, and has left many comparative lawyers questioning the manner in which the Indian judiciary is handling this matter with its unusual turn of

8. *Union Carbide Corporation* v. *Union of India* (1989) 1 SCC 674.

9. Coomi Kapoor, "Bhopal Settlement: Delhi Criticised for 'Giving up' ", *The Times*, 16 Feb. 1989, p. 11.

10. *Union Carbide Corporation* v. *Union of India* (1989) 2 SCC 540. Also see "Bhopal Gas Victims—A Long Haul Ahead", *India Today*, 31 Mar. 1989, p. 56.

11. "Bhopal Gas Leak Act Upheld", *The Statesman Weekly*, 30 Dec. 1989. Also see "Bhopal Gas: SC Upholds Central Act", *The Hindu* (int. edn), 30 Dec. 1989. See also *Charan Lal Sahu* v. *Union of India* (1990) 1 SCC 613.

12. "India Scraps Bhopal Deal Gandhi Tried to Force on Gas Victims", *The Times*, London, 15 Jan. 1990.

events. This article seeks to show some of the intricacies of the Indian legal system and the significant approach adopted by the Indian judiciary for the development of environmental law in India. Sections II and III of this article trace the events related to the case from its inception in the United States courts to the present situation. Sections IV and V discuss the Indian legal system and the legal developments related to environmental protection.

II. THE CASE BEFORE THE AMERICAN COURTS

A. *The Complaints against Union Carbide*

On 7 December 1984 Melvin Belli, a top United States personal injury lawyer, filed a US$15 billion class action for compensation against UCC on behalf of two families.[13] Soon 145 cases had been brought against UCC in different United States federal courts on behalf of thousands of Indians. Most of them were class action complaints.[14] The allegation in most of these actions involved common questions of law and fact which can be summarised as follows:

(1) whether the defendant was negligent in relation to an MIC storage facility and its safety system;
(2) whether the defendant was strictly liable for the damage caused;
(3) whether the defendant knew of or acted recklessly, wilfully and wantonly with regard to the dangerous conditions which existed in the MIC plant in Bhopal.

The damages sought in these cases varied from US$5 billion to 50 billion, in addition to punitive damages and costs.

On 8 April 1985, exercising its rights and duties under the Bhopal Act, the Union of India filed a complaint as *parens patriae* on behalf of all the victims of the disaster, before the United States District Court, Southern District, New York.[15] This action was for recovery of damages for any and all claims, present and future, arising out of the disaster. A

13. "$15 Billion Suit Filed in United States Court", *Hindu*, 9 Dec. 1984, p. 1. also see "Union Carbide Suit Is Filed", *Wisconsin State Journal*, 8 Dec. 1984, p. 2.

14. The jurisdiction of US district courts was invoked pursuant to 28 U.S.C. s.1332(a)(2) in that complete diversity of citizenship existed between the plaintiffs who were citizens of India and the defendant who was a citizen of the State of Connecticut. See e.g. "the Complaint" in *Mohammed Naeem Khan* v. *Union Carbide*, filed before the US District for Northern District of Illinois Eastern Division, 8 Feb. 1985, Case No. 85 C012585 filed by Leonard M. Ring and Associates, Chicago.

15. S.3 of the Bhopal Act provides that the government of India has the exclusive right to represent persons who have made or are entitled to claim arising out of the Bhopal disaster.

consolidated action was then brought before the same court on 26 June 1985.

Union Carbide, before opposing the action brought against it on various grounds, sought to dismiss these actions on grounds of *forum non conveniens*.[16]

B. The Union of India's Opposition to UCC's Motion

The Union of India opposed UCC's motion on the basis of the following arguments:

(1) UCC had failed to establish that justice would be served by granting dismissal on grounds of *forum non conveniens*.
(2) The courts in India were not an alternative forum in which the litigation might be resolved, for the following reasons:
   (a) the delays inherent in the Indian court system would lead to an unconscionable delay in the resolution of the cases in India;
   (b) India's court system lacked the procedural and practicable capability to handle the litigation;
   (c) a judgment rendered by an Indian court could not be enforced without resort to United States courts;
   (d) UCC's *forum non conveniens* motion was nothing more than forum shopping.
(3) The private interests of the litigants favoured retention of jurisdiction by the court for the following reasons:
   (a) retention of jurisdiction by that court would lead to an efficient, expeditious and convenient resolution of the cases;
   (b) the private-interest analysis involved more than a "head count" of witnesses as asserted by UCC;
   (c) UCC had attempted to inflate the count of witnesses in India by proposing spurious issues.

16. The term "*forum non conveniens*" simply means an inconvenient forum. This doctrine originated in Scotland and is recognised by its law. The essence of this doctrine is that a court, even though it possesses proper jurisdiction over the parties and subject matter, may in its discretion decline or relinquish jurisdiction in a case when it is of the opinion that the ends of justice would be better served by trial of a case in another forum. Also see Soli J. Sorabji, "Keenan Decision—Recognising Merits of our System", *Times of India*, 23 June 1986, p.8.

17. "Memorandum of Law in Opposition to Union Carbide Corporation's Motion to Dismiss These Actions on the Grounds of Forum Non-Conveniens", *In Re: Union Carbide Corporation Gas Plant at Bhopal, India, December 1984*, MDL Docket No.626, Misc. No.21-38 (JFK) 85 Civ. 2696 (JFK), all cases filed by the plaintiff's executive committee, Michael V. Ciresi, Stanley M. Chesley, F. Lee Bailey, 6 Dec. 1985.

(4) The public interest of both the United States and India favoured the retention of jurisdiction by the court.

C. Judge Keenan's Decision

Judge Keenan delivered his order and opinion on 12 May 1986.[18] He based his decision to dismiss the case on the grounds of *forum non conveniens* upon the United States Supreme Court's decisions in *Gilbert*[19] and *Piper Aircraft*.[20] According to these decisions the court had to determine first whether the proposed alternative forum was adequate, and had then to consider the relevant public and private interest factors in order to determine whether dismissal was favoured. On the question of adequacy of the Indian legal system, Judge Keenan accepted the affidavits of Palkhivala and Dadachanji, who had long years of experience as Senior Advocates in the Supreme Court of India. He found the affidavit of Professor Marc Galanter far less persuasive in spite of its academic value.[21] In the process of deciding the application, Judge Keenan appreciated the courts in India and found them to have proven capacity to mete out fair and equal justice. Having come to the conclusion that India had an adequate forum and the capability to deal with the case, Judge Keenan found that the private interest factors, such as access to witnesses, sources of proof and possibility of view, weighed greatly in favour of dismissal on grounds of *forum non conveniens*. The court also favoured dismissal of the case on public interest concerns, such as administrative difficulties, the interest of India and the United States, and the applicable law. The following conditions, however, were laid down:[22]

1. Union Carbide must consent to submit to the jurisdiction of the courts of India and shall continue to waive defences based upon the statute of limitations.
2. Union Carbide must agree to satisfy any judgment rendered by an Indian court, and if applicable, upheld by an appellate court in that country, where such judgment and affirmance conform with minimal requirements of due process.
3. Union Carbide must be subject to discovery under the model of the US Federal Rules of Civil Procedure after an appropriate demand by plaintiffs.

18. Opinion and Order of John F. Keenan, US District Judge, *In Re: Union Carbide Corporation Gas Leak Disaster at Bhopal, India, December 1984*, *op. cit. supra* n.17, dated 12 May 1986, New York.
19. *Gulf Oil Corporation* v. *Gilbert* 330 U.S. 501 (1947).
20. *Piper Aircraft Co.* v. *Reyno* 454 U.S. 235 (1981).
21. Opinion and Order, *supra* n.18, at para.8.
22. *Idem*, p.69.

D. The Court of Appeals and the Supreme Court Decisions

Appeals and cross-appeals were brought against the district court's order. Judge Mansfield, sitting as a circuit judge with two other judges in the United States Court of Appeals for the Second Circuit, modified the three conditions laid down by Judge Keenan in his decision of 14 January 1987.[23] Out of the three conditions laid down by Judge Keenan, the Court of Appeals found that the first condition was not unusual. As regards the second condition, the Court of Appeals found that a judgment of a foreign country that is final, conclusive and enforceable must be recognised and will be enforced in the United States under Article 53 of the Civil Practice Rules on Recognition of Foreign Country Money Judgments, which are based upon the Uniform Foreign Money-Judgments Recognition Act.[24] In order to recover judgment money, a new application has to be filed in the United States court under that Article. As regards UCC's suggestion that the United States court should protect it against denial of due process, which it feared would occur in India, the appellate court found the concept of shared jurisdiction both unrealistic and illusory. It suggested that the question of due process could be raised as a defence when it was sought to enforce the resulting judgment against UCC in the United States. The third condition, regarding discovery, was held by the appellate court to be erroneous: it was found that both sides must have equal access to the evidence in the possession or control of the other and that both parties would be bound by the rules of discovery practised in the Indian courts. Subject to the above-mentioned modifications, the appellate court affirmed the order of dismissal by Judge Keenan on grounds of *forum non conveniens*. On 5 October 1987 the Supreme Court denied writs of certiorari against the Court of Appeals on petitions by the Union of India and others. The Supreme Court reports do not show the reasons for this decision.[25]

E. The Paradox of the Inconvenient Forum

In its sojourn in the American courts the Bhopal case brings out two peculiar dimensions, one focusing upon the American lawyers and the other highlighting the Indian legal system in an ironical manner. The ambulance-chasing lawyers who rushed to Bhopal immediately after the disaster have been severely criticised by the world press.

23. *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984* in the US Court of Appeals for the second circuit, Docket Nos.86–7517, 86–7589, 86–7637, decided on 14 Jan. 1987, 809 F2d 195 (1987).

24. Art.53, Recognition of Foreign Country Money Judgments, 7 BNY Civ-Prac. L. & R., s.5301–09 (McKinney 1978). This Art.53 is based upon the Uniform Foreign Money-Judgments Recognition Act, see 13 U.L.A. 263 (1962), which has been adopted by 15 States in addition to New York. In States that have not adopted the Act, foreign judgments may be recognised according to the principles of comity. See *Hulton* v. *Guyot* 159 U.S. 113 (1895).

25. *Union of India, Petitioners* v. *Union Carbide Corporation, et al.* US Supreme Court Reports 98 L Ed. 2d 150.

The other significant aspect of the Bhopal case in the American forum is the irony of the strategies respectively adopted by the parties. The plaintiffs in their struggle to retain the American forum projected the defects of the Indian legal system through the affidavits of Professor Galanter. This move, coming from the Union of India, was highly polemical as it amounted to tarnishing and lowering the image of the Indian judiciary and the Indian bar. Ironically, UCC, in order to counter the Union's move, highlighted the uniqueness of the Indian legal system, its developments and innovations. The reference to the *M. C. Mehta* case in the Palkhivala affidavit has its own paradoxical significance, because in the later development of the case in India, the Indian courts found UCC bound by the rule of strict liability without exception, as laid down in that case.[26]

In the United States courts the Bhopal litigation, with all its labyrinthine developments, bristled with extraordinary inversions.[27] Although the Union of India lost the cases because of its dismissal on grounds of *forum non conveniens*, the overall outcome has been that, in fact, the American courts recognised the Indian legal system as adequately developed to deal with such mass tort litigation.[28]

III. THE CASE BACK IN INDIA

A. The Background

Although the Bhopal case focused initially on the cases that were filed in the United States by the American lawyers, about 800 individual suits for damages were also initially filed by individual plaintiffs in the Bhopal District Court, claiming damages totalling 1,620 million rupees (about US$125 million). One representative suit has been filed in which damages of 12,500 million rupees (about US$1 billion) have been claimed. Pursuant to the Bhopal Act, the government of India assumed the exclusive right to represent the victims and impleaded itself as plaintiff in all the suits filed in India.[29] All earlier suits were stayed pending

26. *Infra* Section V.

27. Rajeev Dhavan, "For Whom? And for What? Reflection on the Legal Aftermath of Bhopal" (1985) 20 Tex. I.L.J. 297. Also see Upendra Baxi, "Introduction", in *Inconvenient Forum and Convenient Catastrophe—The Bhopal Case*, p.1.

28. Soli J. Sorabjee, "The Keenan Decision I—Recognising Merits of Our Systems", *Times of India*, 23 June 1986, p.8. Also "II—Judiciary Can Rise to the Challenge", *idem*, 24 June 1986. Also refer to Louise Weinberg, "Insights and Ironies, the American Bhopal Case" (1985) 20 Tex. I.L.J. 309.

29. *Infra* n.135.

further proceedings and the Union of India filed a fresh case before the District Court of Bhopal on 9 September 1986.[30] This latest case before the Bhopal District Court was beset with many hurdles for more than two and a half years, with no relief in sight.[31] The first judge, who began hearing the case in the Bhopal District Court, was promoted to the High Court, necessitating a fresh start by a second judge, who had to withdraw when it was revealed that he was himself one of the claimants. The third judge met with an accident and died after holding the first hearing. M. W. Deo was the fourth judge to begin hearing the case. But the progress of the case was much delayed by raising the hopes of an out-of-court settlement.

Negotiations for an out-of-court settlement were pursued by the Union of India even before any suit was filed in the United States. It was also reported that UCC had "active discussions" for a "concrete proposal" for settlement to the Indian Parliament.[32] The offer made by UCC initially was for US$200 million, an amount reportedly equal to UCC's insurance cover,[33] and it was reported that India's then Prime Minister, Rajiv Gandhi, rejected UCC's offer as insufficient.[34] From the very beginning the proceedings were stopped on several occasions to allow the parties to come to a settlement. Once Judge Keenan reacted sharply in open court when he felt that his earnest efforts to bring about a settlement were subjected to criticism for dilatoriness.[35] An out-of-court settlement resumed greater impetus when the case came before the Indian courts. Both the Union of India's Attorney-General and UCC's counsel were reported to be making "genuine" efforts[36] and at one stage a settlement appeared imminent.[37] However, these negotiations again broke down, and on 27 November 1987 both sides submitted to the court that they would proceed with the case. The fact that an agreement did not emerge at that time was probably due to the uproar the negotiations had caused in Parliament, and a "sell out" sentiment was voiced in the press and among the victims.[38]

30. *Union of India v. Union Carbide Corporation*, in the court of the district judge, Bhopal Gas Claim Case No 113 of 1986.

31. Kamalendran Kanwar, "No Succour in Sight", *Indian Express*, 1 July 1987.

32. "Settlement Broached", *New York Times*, 11 Mar. 1985, p.29; also see "Union Carbide Holds Talks with Indians in Bid to Settle Bhopal-Linked Lawsuits", *Wall Street Journal*, 19 Mar. 1985, p.4. Also "India Expels Bhopal Offer", *New York Times*, 26 Mar. 1985, p.39.

33. Ranii and Lauter, "Next Bhopal Step Remains Unclear", *National Law Journal*, 25 Mar. 1985, p.3.

34. "$200 Million for Bhopal Rejected", *Wisconsin State Journal*, 6 Apr. 1985, p.1–3. Also see "Kings of Catastrophe", *Times*, 22 Apr. 1985, p.80.

35. See "Transcript of Chamber Hearing", 20 May 1986, extracted in Baxi, *op. cit. supra* n.27, at p.319.

36. "Out of Court Carbide Accord?", *Hindustan Times*, 15 Sept. 1987.

37. "India, Carbide Close to Settlement", *Times of India*, 4 Nov. 1987, p.8. This was based on the *Wall Street Journal*'s report of 3 Nov. 1987, that Union Carbide and the Indian government appeared to be near a settlement on the basis of $500–600 million.

B. *The Interim Order of the Bhopal District Court*

On 2 April 1987 M. W. Deo, judge of the Bhopal District Court, made an order proposing reconciliatory interim relief. Both the Union of India and UCC initially responded with proposals for an out-of-court settlement, but when their attempts failed the court proceeded to hear both parties on the matter for interim relief on its *suo moto* proposal. Then, on 17 December 1987, Judge Deo issued the order for substantial interim compensation in the sum of 3,500 million rupees (about US$270 million).

Judge Deo's order made unprecedented use of the courts' inherent power to render justice. The judge based his decision entirely on the exercise of the court's jurisdiction under section 151 of the Code of Civil Procedure,[39] taken together with section 94(e) of the Code.[40] The use of these provisions was justified by Judge Deo by the paramount need for justice in the case. He questioned the very basis of the forensic praxis:[41]

> Can the gas victims survive until the tangible data with meticulous exactitude is collected and proved and adjudicated in fine forensic style for working out the final amount of compensation with precision of quality and quantity? Will it not be prudent to order payment of a relative sum bearing in mind all the progress in the case so far, the facts and figures (though not undisputed), which have come on record and the material furnished during settlement efforts made by Judge Keenan?

As to the arguments of UCC's counsel, F. S. Nariman, against the exercise of the court's jurisdiction under section 151 of the Code for grant of interim relief, Judge Deo stated: "The inherent powers have not been conferred upon the courts. It is a power inherent in the court by virtue of its duty to do justice between the parties before it."[42] He followed the law laid down by the Supreme Court in *Manohar Lal*[43] on this aspect and went further in adding:[44]

38. See "Settlement Drama", *India Today*, 15 Dec. 1987, p.16; Praful Badwai, "No Settlement with Carbide", *Times of India*, 23 Nov. 1987, p.8; "Government Committed to Fair Settlement", *National Herald*, 25 Nov. 1987, p.1.

39. S.151 of the Code of Civil Procedure 1976 says that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the court to make orders necessary for the ends of justice.

40. S.94 CPC provides for making such interlocutory order as may be just and convenient.

41. *Supra* n.30, at p.15.

42. *Idem*, p.6.

43. *Manohar Lal v. Seth Hiralal* AIR 1962, SC 527.

44. *Supra* n.30, at p.7.

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> inherent powers are born with the creation of the court, like the pulsating life coming with a child, born into the world. Without inherent powers, the court will be like a stillborn child. The powers invested in the court after its creation are like many other acquisitions of faculties which the child acquires after birth during its life. Thus inherent powers are of primordial nature. They are almost plenary except for the restriction that they shall not be exercised in conflict with any express provision to the contrary.

He also found that the power under residuary section 94(e) of the Code is again somewhat of the same nature in relation to the interlocutory stages of the suit. Section 94 provides for making such interlocutory order as may appear to be just and convenient, and no provision is expressed or implied prohibiting such an order in a suit for pecuniary damages. Although he was aware that such an order had not so far been shown to have been made formally in a suit in a civil court, he nevertheless held: "The principle under section 94 of the CPC is to recognise and grant powers to the court to make an interlocutory order of the same nature as that of the main claim in the suit."[45] He also relied upon the law declared by the Supreme Court in *M. C. Mehta*[46] for the limited principle that in an action for tortious liability a grant of interim compensation is permissible.[47] He pointed out that UCC had relied upon this case through the affidavits of Palkhivala and Dadachanji before Judge Keenan to obtain a judgment on *forum non conveniens* and should be bound by it.[48]

He held: "On a perspective of the above it seems clear to me that section 94(e) of the CPC coupled with section 151 CPC amply provides jurisdiction to the court which can exercise it, if not directly in conflict with any other express provision preventing such exercise of jurisdiction."[49] Judge Deo felt that there was no need for him to go into the legal point of "lifting the corporate veil" as he was dealing with the matter only at an interlocutory level. He nevertheless referred to two cases, *DHN*[50] and *Escorts*,[51] and accepted the submission of the Union's Attorney-General that the admitted fact of UCC owning 50.9 per cent of UCIL's shares was enough to show that UCC always had the power and the capacity to control the working of UCIL. A sum of 3,500 million rupees was ordered by him as "substantial measures" for the gas victims.[52]

45. *Idem*, p.8.
46. *M. C. Mehta* v. *Union of India* AIR 1987 SC 965. *Infra* Section V.
47. *Supra* n.30, at p.10.
48. See The Paradox of the Inconvenient Forum, *supra* Section II.E.
49. *Supra* n.30, at p.10.
50. [1976] 3 All E.R. 462.
51. AIR 1986, SC 1370.
52. *Supra* n.30, at p.16.

This, according to the order, was without prejudice to the rights and defence of the parties to the suit and counterclaim that might be finally adjudicated.

C. *The Judgment of the Madhya Pradesh High Court*

A civil revision petition was filed by UCC against the order of the district judge, before the Madhya Pradesh High Court. On 4 April 1988 Judge Seth of the High Court partly allowed the revision by reducing the amount of the interim payment. But he nonetheless upheld the liability of the defendant UCC to make interim payment to the plaintiff, the Union of India.[53] In his elaborate order, of 101 pages, he held that the payment was not a payment of interim relief without reference to the merits of the case, as held by the trial court, but was a payment as interim damages under the substantive law of torts on the basis of a more than *prima facie* case having been made out in favour of the plaintiff to receive such payment from the defendant. The amount of interim payment was reduced from the 3,500 million rupees ordered by the district court to 2,500 rupees (about US$195 million).

In his unusually elaborate and lengthy order, Judge Seth gave vent to his expression of shock concerning the unbecoming stand taken by the Union of India before the United States courts, and its underrating of its own judiciary.[54] According to Judge Seth, his order took into account the facts which were not disputed by UCC in its written statement. On the fact that UCC held more than half of the equity ownership of UCIL, he assessed the design transfer agreement and the technical service agreement entered between UCIL and UCC. This, according to him, gave a clear picture of the position of UCC *vis-a-vis* UCIL and also the role of the Union and the Madhya Pradesh government. He then went into the main pleadings of the plaintiff and that of the defendant, UCC, including its counterclaim and set-off, which led to the passing of the impugned order of interim payment by the district court.

Judge Seth rejected the first ground raised by UCC, that the suit was not properly constituted, by relying upon the provisions of the Bhopal Act.[55] The second ground raised by UCC was that the district court had no jurisdiction to award an interim payment in exercise of its inherent powers under section 151 of the Code of Civil Procedure, when the right to claim damages was itself the dispute before it. This was the most significant and pertinent ground for the whole case. Upon an elaborate and

53. *Union Carbide Corporation* v. *Union of India*, in the Madhya Pradesh High Court, Civil Revision Petition No.26 of 1988.
54. *Idem*, p.9.
55. Bhopal Act, ss.3, 6(1) and also the scheme framed under the Act.

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detailed analysis of the case law on this point, Judge Seth was of the view that[56]

> the Supreme Court's decisions in *Padam Sen*[57] and *Manohar Lal*[58] settle the law that howsoever wide the ambit of inherent powers of the court under section 151 CPC may be, the said powers relate to the procedure to be followed by the court in deciding the cause before it and they are not powers over the substantive rights which any litigant possesses.

In this regard he was not persuaded by the public interest law case[59] decided by the Supreme Court as pleaded by the Attorney-General of India. He came to the conclusion that the inherent power under section 151 of the Code cannot be exercised with respect to matters affecting substantive rights. However, he went on to hold that under the substantive law of torts it is permissible to grant the relief of an interim payment.

Concerning whether the substantive law of torts permits the court to grant an interim payment, Judge Seth gave a detailed account of the development of tort law in India, culminating in the principle of absolute liability without exception as laid down by the Supreme Court in *M. C. Mehta*.[60] Following this ruling, he held the defendant UCC liable to pay damages to the gas victims in accordance with the rule of absolute liability without exceptions. Having ascertained the principle of law governing this case, Judge Seth resorted to the Rules of the Supreme Court made pursuant to the Administration of Justice Act 1969 in England to show that interim payment was permissible in England and held that that principle could also be applied in the present case. He then went into the concept of "lifting the corporate veil" and was satisfied that it was the defendant UCC that had the real control over the enterprise. It not only controlled the composition of the board of directors, but also had full control over the management of the Indian company.

Finally, he went on to hold that the district judge erred in leaving the question of utilisation of the amount of interim payment to the commissioner functioning under the Bhopal Act and the scheme framed thereunder. He stated that:[61]

> the amount of interim payment of damages payable by the defendant UCC will be:
> (a) Rs. 100,000 in each case of death;
> (b) Rs. 100,000 in each case of total permanent disablement;
> (c) Rs. 50,000 in each case of permanent partial disablement; and

56. *Supra* n.55, at p.62.
57. *Padam Sen* v. *State of U.P.* AIR 1961, SC 218.
58. *Supra* n.43.
59. *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984, SC 802.
60. *M. C. Mehta* v. *Union of India* (1984) 3 SCC 161.
61. *Supra* n.30, at p.98.

> (d) Rs. 25,000 in each case of temporary partial disablement.

He fixed the total amount at 2,500 million rupees and said that UCC must pay the above amount by way of interim payment and that this decision was final and conclusive. Thus Judge Seth partly allowed the revision brought by UCC and at the same time upheld the defendant's liability to make an interim payment to the victims.

D. An Evaluation of the District and High Court Orders

In spite of the shift from New York to Bhopal the case has continued to be replete with superlatives. The world's worst industrial disaster leading to the biggest ever damage suit produced the highest interim relief ever ordered by a court with Judge Deo's award of 3,500 million rupees.[62] This historic verdict was hailed as "Justice at Last", giving "Hope for Bhopal".[63] However, the initial euphoria over the award to the victims gave way to less cheerful thoughts when UCC reacted sharply to Judge Deo's order. UCC issued a statement from its Danbury headquarters in the United States: "The ruling amounts to damages without trial, a practice that runs counter to the laws of India and other democracies."[64] Judge Deo's order was regarded as "bad in law" by some jurists for the reason that interim relief or compensation is not generally ordered under the Indian law of torts.[65]

Judge Deo's order for an interim payment was unprecedented and was motivated by the paramount need for justice. This order was passed three years after the disaster, when several attempts for an overall settlement had failed. Although the proposal came *suo moto* from the court, he made it clear that the court, in recognition of the principle of an adversarial system, afforded opportunity to both parties on the matter to argue the merits of interim relief. He found: "In these circumstances this court as a result of judicial reaction thought it fit in the interest of justice and fair play to hear the parties on the matter of interim relief."[66] As to UCC's submission to the effect that "the court should not drop the mantle of the judge and assume the robe of an advocate",[67] Judge Deo quoted Lord Denning, who had observed that "a judge is not a mere umpire", there to answer the question "'How's that?' The

62. Chinu Panchal, "Bhopal Gas Victims to Get Rs 350 Crores as IR" *Times of India*, 18 Dec. 1987, p.1.
63. Editorials in *Times of India*, 19 Dec. 1987, p.8, and *The Economic Times*, New Delhi, 19 Dec. 1987, p.5, respectively.
64. "Ruling Without Trial, says Carbide", *Statesman*, 18 Dec. 1987, p.7. See also "Novel Ruling", *India Today*, 15 Jan. 1988.
65. Jyoti Punwani, "Verdict on Bhopal Tragedy Bad in Law", *The Indian Post*, Bombay, 19 Dec. 1987.
66. *Supra* n.30, at pp.1–2.
67. *Idem*, p.2. UCC probably drew upon the observation of Lord Denning in *John* v. *National Coal Board* [1957] 3 All E.R. 155.

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object above all is to find out the truth and to do justice according to law."[68] Having emphasised the need to render justice in this case, Judge Deo went on to justify his order by resorting to the legal provisions regarding the use of judicial discretion. The inherent power under section 151 of the Code was obviously a safe resort which is frequently used by lawyers and judges to justify the exercise of discretion.

Judge Seth's order goes much further in judicial innovation in holding that the substantive law of torts provides such interim compensation. Although he did not accept the justification relied on by Judge Deo based on the inherent power of the court under section 151 of the Code, Judge Seth went in a different direction, resorting to the Rules of the Supreme Court in England to justify this. This was again an unprecedented and innovative approach for the purpose of rendering justice to the victims, which remains the inarticulated major premise of his judgment, as in the case of Judge Deo. The problem that no earlier case can be found in which this path has been followed was addressed by quoting the eloquent dictum of Lord Denning in *Packer* v. *Packer*:[69]

> What is the argument on the other side? Only this, that no case has been found in which it has been done before. This argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still, whilst the rest of the world goes on and that will be bad for both

The opinion of Judge Seth was thus a most extraordinary opinion in a revision petition over an interim order. Although the order failed to cheer the local gas victims because of the reduced amount,[70] it unambiguously held the transnational company absolutely liable. Ironically it was UCC which had appealed to the High Court against the decision of the Bhopal District Court.

E *The Settlement and the Supreme Court Orders*

On 14 and 15 February 1989 the Supreme Court of India made orders for payment of US$470 million (about 7,150 million rupees or £274 million) by UCC to the Union of India in full settlement of all claims. The Court took into consideration the different proposals that UCC and the Union had offered for a settlement and found the case pre-eminently fit for an overall settlement solely because of the "enormity of human suffering" occasioned by the disaster and the pressing urgency to

68. *Idem*, p. 3.
69. Lord Denning's dictum quoted by Judge Deo in his order, *supra* n. 30, at p. 27. See also Lord Denning, *The Discipline of Law* (1979), at the opening page.
70. Chinu Panchal, "Court Order Fails to Cheer Gas-Hit", *Times of India*, 8 Apr. 1988, p. 10.

provide immediate and substantial relief to the victims. On that basis the Court held it "just, equitable and reasonable" to order UCC to pay that sum in full settlement of all claims including the quashing of all criminal proceedings.[71]

The Supreme Court orders appear quite unusual in the sense that they seem to lack the expected judicial discourse and elaborate reasoning required in disposing of such an important case by the highest court. In other words, the Court justified them entirely on humanitarian considerations. Several petitions were filed before the Supreme Court to review the settlement orders. Thereupon the Supreme Court ordered that both UCC and the Union of India would continue to be subject to the jurisdiction of the courts in India until further orders.[72] On 4 May 1989 the Court gave the reasoning for its orders of 14 and 15 February 1989, reiterating the compelling duty, both judicial and humane, to secure immediate relief to the victims.[73] The Court observed that "the compulsions of the need for immediate relief to tens of thousands of suffering victims could not, in our opinion, wait till these questions, vital though they may be, are resolved in the course of judicial proceedings".[74]

On 22 December 1989 the Supreme Court of India upheld the constitutional validity of the Bhopal Act.[75] Its judicial discourse adjudging the Bhopal Act valid is again surprisingly unusual. The Court heard this challenge only after giving orders for a full and final settlement, which meant that an invalidation of the Act would unsettle the earlier settlement. In judging the validity of the Act, the Court bore in mind the settlement and the subsequent events. The Court found that the victims were not given the right to be heard before the settlement and that it was wrong. Yet, Chief Justice Mukharji justified that with the judicious rhetoric that "To do a great right", after all, it is permissible "to do a little wrong".[76] Subsequently, the present government decided to support the review petitions filed before the Supreme Court against the settlement. This would certainly seem to introduce further complications into the situation.[77] The hearings on the review petitions which began in April 1990 have had to be reheard owing to the sudden demise of Chief Justice Mukharji: the Supreme Court of India has yet to reach its decision.

71. (1989) 1 SCC 674, 675.
72. (1989) 2 SCC 540.
73. (1989) 3 SCC 38.
74. *Idem*, para. 7.
75. (1990) 1 SCC 613.
76. *Idem*, p. 705.
77. Upendra Baxi, "The Bhopal Victims in the Labyrinth of the Law: An Introduction", in Baxi (Ed.), *Valiant Victims and Lethal Litigation. The Bhopal Case* (1990).

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IV UNDERSTANDING THE INDIAN LEGAL SYSTEM

A. *The Colonial Heritage and the Common Law in India*

Within days of the Bhopal disaster and immediately after the first few cases were filed in the United States courts, the *Wall Street Journal* in its editorial had commented on the Indian legal system: "Justice can be done in Indian courts. India is not Ruritania. The British left behind a perfectly good legal system—better, in fact than the US system. Indian courts will make sure the company compensates the victims."[78]

The present legal system in India is formed, for all practical purposes, on the basis of the English common law brought into India by the British. From the eighteenth century, the British colonial rulers, who were eager to have a legal system that would maintain law and order and secure property rights, gradually imposed on India a general system of law. The foundation of this Anglo-Indian judicial system was laid by the Judicial Plan of 1772 adopted by Warren Hastings on which later administrations built a superstructure.[79] In the second half of the nineteenth century the Indian legal system was virtually revolutionised, with a spate of over-legislation, which was influenced by a desire to introduce English law and to shape that system from an English lawyer's viewpoint.[80] The structure and powers of the court, the roles of judges and lawyers, the adversarial system of trial, the reliance on judicial precedent and the shared funds of concepts and techniques, brought the Indian legal system into the mainstream of the common law systems. It is said that the common law in India, in the widest meaning of the expression, would include not only what in England is known strictly as the common law but also its traditions and some of the principles underlying English statute law, the equitable principles developed in England in order to mitigate the rigours of the common law and even the attitudes and methods pervading the English system of administration of justice.[81]

Although it is generally assumed that India is a common law country, the elements of its legal system are blended with its own traditional notions of law.[82] These notions of law permeate Indian society in all its conceivable aspects but are eclipsed as the ideological basis of law within the Indian legal system. It has been stated that traditional law, whether absorbed into the official system or displaced from it, has been

78. "Non-causus Belli" (editorial), *Wall Street Journal*, 12 Dec. 1984, p.30.
79. M. P. Jain, *Outlines of Indian Legal History* (3rd edn, 1972), p.77.
80. A. C. Banerjee, *English Law in India* (1984), p.189.
81. M. C. Setalvad, *Common Law in India* (1960), p.3.
82. Rene David, and John E. C. Brierly, *Major Legal Systems in the World Today* (3rd edn, 1985), pp.470–472.

transformed along the lines of the official model.[83] Today, all these aspects compel one to perceive the system as an incomprehensibly complex one, or perceive it as an open system taking in everything which is most suitable to its needs.[84] At the same time, one could argue that in the Indian legal system lie the seeds of a unified eclectic order which, as was remarked a decade ago, may soon mature.[85] Indeed, as we shall see, many legal developments have taken place since then.

Much has been written and many conflicting opinions have been expressed concerning the present state of the law and the functioning of the courts in India. Some years back it was said that the official system was basically an import, a transplant, which acclimatised in a manner that its importers would never have wished; inadequate to perform the task required of it, yet only too adequate in creating problems not expected of it.[86] The Indian legal system has also been criticised as a common law system that has only partly emerged from the heritage of colonial rule and that its colonial past has only burdened the operation of the system. There were too many laws introducing too many changes which paid little attention to local views and feelings. This necessarily affected both the quality of the law and its social communication, diffusion, acceptance and effectivity, and has led to criticism and talk of "crisis".[87] In addition to this, the system has been criticised for other characteristics which could also be attributed to its colonial heritage. In its operation the Indian legal system is criticised generally for the massive backlog of cases causing enormous delays in the resolution of civil disputes.[88] The problem of the law's delays has been a perennial one in the Indian judicial sphere and it has engaged attention from time to time.[89] An appalling backlog of cases has unfortunately become the normal feature of nearly all the courts in the country and though this problem has been of great concern to many law commissions, the problem has persisted and has attained gigantic proportions.[90]

The system existed—and to a great extent exists even today—in a manner unsuitable to meet the needs of the Indian people, most of

83. Marc S. Galanter, "The Aborted Restoration of Indigenous Law in India", *14 Comparative Studies in Society and History* (1972), p.65. Galanter's essays are now collected in *Law and Society in South Asia* (1989).
84. V. S. Deshpande, "Nature of Indian Legal System", in Indian Law Institute, *The Indian Legal System* (1978), p.1.
85. Joseph Minattur, "Introduction" to *The Indian Legal System*, *idem*, p.XI.
86. J. D. M. Derrett, "Indian Cultural Traditions and the Law of India", in Ram Autar Sharma (Ed.), *Justice and Social Order in India* (1984), p.11.
87. Upendra Baxi, *The Crisis of the Indian Legal System* (1982), pp.41–51.
88. *Idem*, pp.74–75. Also see R. Dhavan, *The Supreme Court Under Strain: The Challenge of Arrears* (1979).
89. M. P. Jain, *Outlines of Indian Legal History* (4th edn, 1981), p.254.
90. See *Law Commission of India, Fourteenth Report* (1958), *Twenty-seventh Report* (1964), *Seventy-seventh Report* (1978), Ministry of Law, New Delhi.

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whom are economically very poor, apathetic to their own lot and quite uninformed of the intricacies of the system. The court system adhered to an adjudicatory approach where people's interests appeared merely as narrow issues, argued arcanely by lawyers and decided within the mystery and mystique of the inherited common law model of the judicial process.[91] To some extent the limitations upon people's access to justice, resulting from adherence to the colonial status quo, have been radically modified in the last decade through a process of judicial activism and social action litigation.[92]

The rise and development of social action litigation, an indigenous version of public interest litigation, in the late 1970s and in the 1980s have brought about a cultural change to the Indian legal system.[93] Social action litigation is slowly but perceptibly restructuring Indian judicial discourse and its development "calls for ideological reorientation of adjudication towards a jurisprudence of emancipation".[94] Recent social analysis shows how the genesis of this growing legal culture of "positive criticality" is likely to have a strong impact upon the state of things to come in Indian society.[95] The practice of judicial activism is evidenced in the variety of techniques adopted by the Supreme Court, to an extent unprecedented in Indian legal history, "converting much of the constitutional litigation into public interest litigation calculated to bring social justice within the reach of the common man".[96] The phenomenology of this new legal philosophy can be summed up in the words of the well-known "activist" former judge of the Supreme Court of India, Justice Krishna Iyer: "If law must serve life—the life of the million masses . . . —the crucifixion of the Indo-Anglican system and the resurrection of the Indian system is an imperative of independence."[97]

B. *The Present State of Tort Law in India*

The early charters, which established the courts in India under the British rule, required the judges to act according to "Justice, Equity and

91. Upendra Baxi, "Taking Sufferings Seriously, Social Action Litigation in the Supreme Court of India", in R. Dhavan, S. Sudersan and S. Khurshid (Eds.), *Judges and the Judicial Power* (1985), p.289. Also refer to M. Capelleti and B. Garth (Eds.), *Access to Justice* (1979), Vol.3.

92. P. N. Bhagwati, "Judicial Activism and Public Interest Litigation" (1985) 23 Col. J. Trans. L. 561.

93. See generally S. K. Agarwala, *Public Interest Litigation: A Critique* (1985); P. K. Gandhi (Ed.), *Social Action Through Law* (1985); G. L. Peiris "Public Interest Litigation in the Indian Subcontinent: Current Dimensions", (1991) 40 I.C.L.Q. 66.

94. Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* (1985) pp 1–20.

95. J. S. Gandhi, *Sociology of Legal Profession, Law and Legal System—The Indian Setting* (1987) pp 130–156.

96. Bhagwati, *op. cit. supra* n.92, at p.567, and also Baxi, *loc. cit. supra* n.91.

97. V. R. Krishna Iyer, *Indian Justice* (1984), pp.6–7.

Good Conscience" in deciding civil disputes if no source of law was identifiable.[98] In the historical development of civil laws in India by English judges and lawyers, the notion of justice, equity and good conscience, as understood and applied by the then Indian courts, was basically in line with the development of English common law. The English-made law used to dominate all major areas of civil laws in India, which mostly took the form of a codified legal order. The origin of the justice, equity and good conscience formula could be traced to the Romano-Canonical juridical philosophy of the sixteenth-century English jurists.[99] This formula was adopted in India to smooth out discrepancies between the two systems of law and to introduce concepts which strongly resemble the character of English law but, in effect, this formula also involved consultation of various other systems of law according to the context.[100]

The law of torts in India, which remained uncodified, followed the English law in almost all aspects in its field.[101] The law was modified and departed from the English law only when the peculiar conditions that prevailed in India required this.[102] The coming into existence of the Republic of India has not, however, much altered the state of the law of torts,[103] although some aspects of the law of torts in India have already been codified in the form of special statutes.[104] In principle, the law of torts in India is, in order to meet the ends of justice, based on a broader foundation because the guiding spirit of the English legacy of justice, equity and good conscience itself provided the motivation to adapt the system to any challenging situations.[105] While today the Indian courts still follow the English law of torts, this ideological foundation has

98. See generally J. D. M. Derrett, *Essays in Classical and Modern Hindu Law* (1976), Vol.3; also, S. C. Thanvi, "Law of Torts", in Indian Law Institute, *op. cit. supra* n.84, at p.590.

99. J. D. M. Derrett, "Justice, Equity and Good Conscience", in J. N. D. Anderson (Ed.), *Changing Law in Developing Countries* (1963), p.114.

100. *Idem*, pp.143, 150.

101. Iyer Ramaswamy, *The Law of Torts* (7th edn, 1975, S. K. Desai and Kumund Desai (Eds.)), p.22. See also, Anand and Sastri, *The Law of Torts* (3rd edn. 1967, revd. C. Kamsewara Rao), p.32.

102. *Infra* n.105.

103. Art.372(1) of the Constitution of India states: "Notwithstanding the repeal of this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws 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 legislature or other competent authority."

104. E.g. refer to relevant provisions under Motor Vehicles Act 1939, Workmen's Compensation Act 1933, Employers' Liability Act 1938, The Indian Railways Act 1890, The Indian Carriage by Air Act 1934, and The Carriage of Goods by Sea Act 1925.

105. Some examples where the courts in India have based their decisions on justice, equity and good conscience (JEGC) are as follows: in *Wagheha Rasangi v. Shekh Masludin* 1887 14 I.A. 89 (PC) it was held that "JEGC" mean rules of English law so far as they are applicable to India; in *Supt. & Legal Remembrancer v. Corporation of Calcutta* (1967)

permitted to some extent innovation and development that are necessary to meet new challenges, as this present article shows.

Yet, the situation in India today is such that there is a great paucity of tort litigation, which makes the ideological credibility of Indian tort law a debatable issue. Several reasons could be given for the scanty litigation in India in this field:[106]

(1) the institutional character of the legal system fails to encourage the pursuit of remedies of a civil nature for reducing interpersonal tensions in the community;
(2) the very technical approach adopted by judges and lawyers without taking into account the growing needs of Indian society;[107]
(3) the tendency, noticed in most eastern societies in general, to prefer the process of mediation to that of the judicial process;[108]
(4) the prohibitive cost of a lawsuit, the time, labour and money expended at every stage of litigation;
(5) the delays attendant on litigation;[109]
(6) the unsatisfactory condition of the substantive law on certain topics, for example the liability of the State for torts of its servants;
(7) the anomalies created in the minds of litigants by the co-existence of several statutory provisions;
(8) the low level of legal awareness among the general public;
(9) the difficulty of gaining access to law, since a large portion of the tort law remains uncodified;
(10) the bureaucratic attitude of government officers dissuading legitimate claims of citizens even though they are legally enforceable.

In the light of such hurdles, which obstruct the natural growth of tort

2 S.C.R. 7, the Supreme Court held that the principles embodied in the common law were invoked in appropriate cases on grounds of "JEGC", in *Bar Council of Delhi* v. *Bar Council of India* AIR 1975, Del. 200 it was held "that part of common law which has been received in India as rules of justice, equity and good conscience is suited to the genius of the country", in *Ratan Lal* v. *Vardesh Chander* AIR 1976, SC 588 it was held "the [JEGC] phrase has to be given a connotation consonant with Indian conditions". Refer Anand and Sastri, *loc. cit. supra* n.101.

106. B. M. Gandhi, *Law of Tort* (1987), pp.63–69.

107. See generally Indian Law Institute, *Annual Survey of Indian Law* (1979), Vol.XV, pp.189–194, (1980), Vol XVI, pp.339–340.

108. Gandhi, *op. cit. supra* n.106, at p.64. Also see Northrop, *The Taming of Nations* (1954) referred to by Gandhi.

109. R. Ramamurthy, "Difficulties of Tort Litigation in India" in (1970) 12 Jo. Ind. L. Inst. XVII.

law in India, the recent development in combining tort law with the constitutional right to personal liberty and its remedy through compensation has only to be welcomed.[110] The present state of the law of torts in India is characterised by rapid recent developments within the public law domain that have also perceptibly created a new legal framework for environmental protection in India.

V THE LEGAL FRAMEWORK OF ENVIRONMENTAL PROTECTION IN INDIA

A. *Environmentalism in India*

Law for environmental protection is not a new phenomenon in India, although the terms "environment" and "pollution" are of recent origin. *Dharma*, the fundamental Indian concept of law, is itself based on a recognition of the importance of harmonising human activities with Nature in order to maintain a universal order. The duty to maintain a clean environment can be found in various provisions in the ancient laws of India. Kautilya in his *Arthasastra* laid down "environmental" precepts for city administration and prescribed penalties for anyone making the city dirty.[111] We also find relevant provisions in the prescription of punishment of public offences in other ancient Hindu works on legal matters.[112]

The environmental consciousness which we find in India today is to a great extent an import of the Western culture concerning such issues. The present environmental consciousness of the West, which could be traced as an emergent culture of the mid-1960s in the United States, followed the publication of *Silent Spring*, the book by Rachel Carson, in 1962. The doctrinal roots of modern environmental law could be based on the law of nuisance: nuisance actions could challenge every major industrial and municipal activity which is today a subject of comprehensive environmental legislation.[113] The law of nuisance can be divided into public nuisance and private nuisance; public nuisance, which could encompass most environmental issues, falls mainly in the purview of the criminal law.

In India the offence of public nuisance is contained in Chapter XIV of the Indian Penal Code of 1860.[114] Specific provisions prescribing

110. See *Rudul Shah* v. *State of Bihar* AIR 1983, SC 1086; *Bhim Singh* v. *State of Kashmir* (1985) 4 SCC 677.

111. R. P. Kangle, *The Kautilya Arthasastra* (2nd edn. 1970).

112. M. K. Sharma, *Court Procedure in Ancient India* (1978), pp.221–222.

113. William H. Rodgers, Jr., *Handbook on Environmental Law* (1977), p.100.

114. Act No.XLV of 1860.

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punishment for fouling water and air are contained in sections 277 and 278.[115] However, the Code of Criminal Procedure of 1973, which is based on several earlier codes since 1861, contains in section 133 specific provisions empowering a magistrate to make orders to abate public nuisance.[116] The significance of these provisions in relation to pollution control is seen in *Ratlam Municipality*,[117] an important case which is discussed below.

The move towards effective legal control came about in 1976 by the 42nd Amendment of the Constitution of India. This amendment incorporated a new article in Part IV of the Constitution, Article 48A, as a Directive Principle of State Policy.[118] So also, a specific provision in Article 51A(g) was provided in the newly added Part IV.A, incorporating Fundamental Duties.[119]

The new legal policy towards environmental protection is also seen in the 1976 amendment to the Code of Civil Procedure 1902 facilitating easier access to courts in lawsuits for public nuisance. A suit based on public nuisance as a civil wrong is contemplated in section 91 of the Code, which, after the 1976 amendment, facilitates an easier procedure for pollution cases.[120]

B Pollution Control Legislation in India

The Stockholm Conference of 1972[121] gave impetus for the new development of environmental law as far as India is concerned. It prompted India to initiate legislation in line with developed countries to deal specifically with environmental pollution caused by industries. The Water (Prevention and Control of Pollution) Act 1974 ("Water Act") was India's pioneer legislation to deal with industrial pollution.[122] The Water Act contains elaborate provisions for the constitution of administrative agencies both at the national and State level. It empowered the State government to make rules prescribing conditions and standards to control water pollution. The control of water pollution was sought to be achieved through a "consent" system of administration; the Act itself did not initially bring about any changes in the state of the environment. The Water Act more or less remained dormant, apart from the creation of a bureaucratic agency. Many inherent defects, apart from various other reasons, rendered this legislation inefficient and mostly unenforceable.[123]

The 1980s saw continuous changes in all the branches of the government in achieving the objectives resolved in the Stockholm Conference Declaration of Principles Concerning the Human Environment.[124] A separate Department of Environment under the new Ministry of Environment was set up as a focal administrative agency to plan, promote and co-ordinate environmental programmes. In 1981 the Air (Prevention and Control of Pollution) Act ("Air Act") was enacted to combat air pollution.[125] This Act was a corresponding enactment to the Water Act passed earlier. It also contained elaborate provisions for constituting administrative bodies and empowering them to make rules for the purpose of controlling air pollution.[126] The Act also empowered the State government to designate air pollution control areas and the type of fuel to be used in those areas. Section 21 of the Act provides that no person may operate certain kinds of industries without the consent of the State Board. In due course the administrative agencies established under the Air Act merged with the functionaries established under the Water Act to form the Pollution Control Boards at the central and State

115. S.277 of the Indian Penal Code 1860 reads as follows: "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 three months, or with a fine which may extend to 500 - Rupees or with both."

S.278 is as follows: "Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with a fine which may extend to 500 – Rupees."

116. Act 2 of 1974, as amended by Acts 38 and 45 of 1978, is based on the first code of 1861. S.133 of the CrPC empowers the magistrate to issue conditional orders for removal of nuisance.

117. *Municipal Council, Ratlam* v. *Vardhichand* AIR 1980, SC 1622.

118. Art.48A reads as follows: "The State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country."

119. Art.51A reads as follows: "[It shall be the duty of every citizen of India] (g) . . . to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures."

120. S.91 of the Code of Civil Procedure 1908 allowed suits against public nuisance only by or with the sanction of the Advocate General. The 1976 amendment of the CPC made it easier for the general public to sue "with the leave of the court", in cases of public nuisance and other wrongful acts affecting the public.

121. UN Conference on the Human Environment in Stockholm, Sweden, Summer 1972. UN Doc A CONF 48.14.

122. Act No.6 of 1974. For the text see 1974 AIR (Acts) 59.

123. For a critical analysis see C. M. Abraham and Armin Rosencranz, "An Evaluation of Pollution Control Legislation in India" (1986) 11 Col. J. Env. L. 101.

124. Institutional changes during this period also reflect the growing importance of the environment as a political issue. A special committee headed by the Deputy Chairman of the Indian Planning Commission, N. D. Tiwari, recommended additional legislative and administrative measures for environmental protection. See *Report of the Committee for Recommending Legislative Measures and Administrative Machinery for Ensuring Environmental Protection*, Department of Science and Technology, Government of India, 150, Sept. 1980.

125. Act No.14 of 1981. For text see S. Jain and V. Jain, *Environmental Laws in India* (1984).

126. Refer *supra* n.123 and also Ramakrishna Kilaparti, "The Emergence of Environmental Law in the Developing Countries: A Case Study of India" (1985) 12 Ecology L.Q. 922. For a detailed analysis of the Water and Air Acts see *Lal's Commentaries on Water and Air Pollution Laws* (1986).

levels. After the establishment of the Department of Environment, these Boards were brought under it and the responsibilities for implementing both the Air and Water Acts by the respective Boards continued as before. Although the Water and Air Acts seem to provide the requisite law to tackle the water and air pollution problems of India, they were in fact neither readily enforceable nor effectively implemented. Both these Acts in their administration were found deficient in many areas, such as the consent administration system, structure of the Boards, setting of standards and in the procedural hurdles to judicial recourse.[127] In the early years the implementation of these laws was impaired, mainly because of the lack of initiatives by the administration. The Boards could have accomplished the objectives of the legislation if they had had greater resolve, but that could be brought about only by more public pressure and through greater environmental awareness.

C. *The Environment (Protection) Act 1986*

After the accident at Bhopal, the Department of Environment came under considerable pressure from both the Prime Minister's office and the general public to decide on "comprehensive legislation" for controlling toxic and hazardous substances. A new umbrella statute, the Environment (Protection) Act, was enacted in May 1986.[128] Only the broad outlines of the law can now be discussed here, since the work on implementing the rules has not been completed to date. The basic thrust of the Act is to empower the central government to correct deficiencies of policy-making and enforcement in the States through action not specifically permitted under earlier laws. New powers were conferred on the central government to set standards for pollution emitted or discharged into the environment and also to regulate the handling of hazardous substances. The Act established environmental laboratories responsible for analysing air and water samples collected by the enforcement authorities, and substantially strengthened the government's capacity to penalise polluters. Even though the Act has closed some of the loopholes in the earlier laws, it is too early to say how effectively the environmental policies will be implemented through this legislation.[129]

A meeting of experts convened by the Consumer Education and Research Centre and the Indian Law Institute on 22–24 August 1986 considered the ways in which the Act might be effectively implemented.[130] The experts expressed apprehension concerning the skeletal nature of the Act, but welcomed its definition of "environment".[131] Although the Act created a radical modification to the rule of *locus standi*, some criticisms have been voiced regarding the provision requiring a 60-day notice period to the authorities since, in effect, it gives enough time for an offender to escape liability under the Act.[132]

D. *The Bhopal Act 1985*

Apart from the early statutory modification brought about in the field of personal injury law,[133] a major legislative breakthrough was achieved through the Bhopal Act 1985. The Bhopal Act was an immediate legislative reaction to the Bhopal disaster. The Act replaced an earlier Ordinance[134] that had been promulgated as an urgent measure to meet an unprecedented situation created by the filing of individual suits by American lawyers. Under the Bhopal Act the government of India assumed the role of *parens patriae*,[135] which gave to the Union government considerable powers to deal with the legal and administrative problems created by the disaster. The Bhopal Act was initially assessed by many as an executive manoeuvre that not only enabled the government to participate in the United States litigation but also avoided any litigation in India.[136] It empowers the government to interpose an administrative compensation process as the exclusive primary resort of victims. The Bhopal Act gives exclusive rights of representation to the

127. C. M. Abraham, "For Better Enforcement of Our Pollution Laws" (1984) Cochin Univ. L. Rev. 223.

128. Act No. 29 of 1986.

129. Shyam Divan and Sheila Lasanoff, "Managing India's Environment" (1986) 26 Environment (Oct.)

130. See "Environment Protection Act: An Agenda for Implementation", prepared by Upendra Baxi under the auspices of the Indian Law Institute, New Delhi, Tripathi, Bombay.

131. *Idem*, pp. 1 and 5. See s.2a of the Act, which reads: "In this Act, unless the context otherwise requires: (a) 'environment' includes water, air and land and the interrelationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property."

132. V. S. Chitnis, "The Environment (Protection) Act, 1986: A Critique" in Paras Diwan (Ed.), *Environment Protection* (1987), p. 155. Sixty days' notice is found in s. 19 of the Act, which reads: "No court shall take cognisance of any offence under this Act except on a complaint made by: (a) the Central Government or any authority or officer authorised in this behalf by that Government, or (b) any person who has given notice of not less than 60 days, in the manner prescribed, of the alleged offence and of his intention to make a complaint to the Central Government or the authority or officer authorised as aforesaid."

133. *Supra* n. 104.

134. The Bhopal Gas Leak Disaster (Processing of Claims) Ordinance 1985.

135. See s.3 of the Bhopal Act, which gave the central government: "the exclusive right to represent and act in place of whether [within or outside India] every person who has made, or is entitled to make a claim for all purposes connected with such claim in the same manner and to the same effect as such persons."

136. Marc S. Galanter, "Legal Torpor: Why so Little Has Happened in India after the Bhopal Tragedy" (1985) 20 Tex. I.L.J. 273. See also P. J. Machlinski, "The Bhopal Case: Controlling Ultrahazardous Industrial Activities Undertaken by Foreign Investors" (1987) 50 M.L.R. 545.

central government in all claims arising out of the disaster as well as powers of review and investigation and the framing of a scheme for the registration, processing and enforcement of claims, including the creation and administration of a fund to meet the costs of the scheme.

Initially fears were expressed over the constitutionality of this statute, until it was upheld by the Indian Supreme Court.[137] The Bhopal Act represents further evidence of the ability of the Indian legal system to respond effectively to the new challenges posed by mass disasters of the kind that occurred in Bhopal.[138] The Act has been considered as the only realistic method of protecting the victims' rights of action. When a large number of claims cannot be handled effectively by what is generally acknowledged to be a slow legal system, a statutory claim and compensation scheme may provide a faster remedy. The Bhopal Act enables the government to take the required steps to administer and distribute the large sums of money involved either through litigation or an out-of-court settlement or through any other form of contribution.

E. The Judicial Response

From the beginning of this decade the judiciary, especially the Supreme Court of India, has shown a keen sense of commitment to the social and political needs of the country.[139] Some judges responded through judicial activism and with creative innovation to develop environmental law in India. The beginning of this judicial response can be seen in the *Ratlam Municipality*[140] case, in which Judge Krishna Iyer highlighted the need for environmental consciousness *vis-à-vis* the magistrate's power to abate public nuisance under the procedural law.

In this case the Supreme Court expanded the scope of section 133 of the Code of Criminal Procedure to uphold a magistrate's order directing the municipality to carry out its duty to its residents.[141] The magistrate ordered the municipality to remove the nuisance caused to the residents of a locality by the existence of open drains and of public refuse from nearby slum dwellers. The case highlighted the need for a great concern for a clean environment in all its aspects. The judge observed: "Public

137. (1990) 1 SCC 613.

138. Refer to V. S. Deshpande, "The Bhopal Gas Leak Disaster Act, 1985" in *Journal of Indian Law Institute* (1985), Vol.27, p.23. Also refer to the writ petitions, *Nasrin Bi and Others* v. *Union of India and Others* on 8 Apr. 1985, and *Rakesh Shrouti* v. *Union of India* W.P. 164 of 1986.

139. Muchlinski, *op. cit. supra* n.136, at p.552; Upendra Baxi, *The Indian Supreme Court and Politics* (1980); Rajeev Dhavan, *The Supreme Court of India: A Socio-Legal Critique of the Justice Techniques* (1977); George H. Gadbois Jr., "The Supreme Court of India as a Political Institution", in Dhavan, Sudershan and Khurshid (Eds.), *Judges and the Judicial Power* (1985).

140. *Supra* n.117.

141. Refer *supra* n.116.

nuisance, because of pollutants being discharged by big factories to the detriment of the poorer sections is a challenge to the social justice component of the rule of law."[142] Concerning the provisions under the Indian Penal Code and Code of Criminal Procedure, the Court observed that: "Although these two Codes are of ancient vintage the new social justice orientation imparted to them by the Constitution of India makes it a remedial weapon of versatile use."[143] The Court also sounded a futuristic note towards a new development of tort law when it observed that: "The dynamics of the judicial process has new 'enforcement' dimensions not merely through some of the provisions of the Code of Criminal Procedure (as here), but also through activated tort consciousness."[144]

The Supreme Court was approached in 1985 to decide directly on environmental and ecological issues in *R. L. & E. Kendra* v. *State of Uttar Pradesh*.[145] In this case two writ petitions, brought before the Supreme Court under Article 32[146] of the Constitution of India as public interest litigation, sought to abate pollution caused by limestone quarries in the Doon Valley in the Mussoorie Hills of the Himalayas. The Court appointed several inspecting committees and on the basis of their reports ordered the closing down of several mines. In its reasoning, reported separately, the Court observed that:[147]

> Preservation of the environment and to keep the ecological balance unaffected is a task not only governments but every citizen must undertake. It is a social obligation and let us remind every Indian citizen that it is his fundamental duty as enshrined in Article 51A(g) of the Constitution.

This judicial attitude towards promoting a clean environment gained momentum throughout the country over the past few years. Thus, in *Janki* v. *Sardar Nagar Municipality*[148] the High Court of Gujarat entertained a writ petition under Article 226 of the Constitution in a public interest case.[149] The Court in its recently developed participatory role was able to persuade the municipality and the State government to provide sewerage and drainage systems for the residents of that area, who had petitioned the Court.

142. *Ratlam* v. *Vardhichand*, *supra* n.117, at p.1629.

143. *Idem*, p.1628.

144. *Idem*, p.1631.

145. (1985) 2 SCC 431.

146. Art.32 of the Constitution of India confers the right to move the Supreme Court for enforcement of the fundamental rights and it also empowers the Supreme Court to grant appropriate remedies for the same.

147. AIR 1987, SC 354, 359.

148. *Janki* v. *Sardarnagar Municipality* AIR 1986, Guj. 49.

149. Art.226 of the Constitution of India confers on the High Courts the power to grant appropriate remedies for the enforcement of the fundamental rights conferred by the Constitution.

In *T. Damodhar Rao* v. *S. O. Municipal Corporation Hyderabad*[150] the Andhra Pradesh High Court allowed a petition forbidding the construction of houses for government organisations on land allocated for a recreational park. Judge Choudary gave an emphatic human rights approach to his exposition of the law of ecology and environment. According to him, the law on environmental protection gains priority as a right to life and personal liberty over and above the common law theory of ownership of land: "Under the powerful impact of the nascent but vigorously growing law of environment, the unbridled right of the owner to enjoy his piece of land granted under the common law doctrine of ownership is substantially curtailed."[151] He resorted to the constitutional mandates under Articles 48A and 51A(g) to support this reasoning and went to the extent of stating that environmental pollution would be a violation of the fundamental right to life and personal liberty as enshrined in Article 21 of the Constitution.[152]

The recent decisions in the *M. C. Mehta* cases[153] are of great significance in the development of environmental law in India. There are to date five cases reported under this name in India. The first case, decided in early 1986, was on a public interest writ petition filed before the Supreme Court under Article 32 of the Constitution, for orders against the reopening of certain plants which were closed following a major leakage of oleum gas from one of the units of the Shriram Food and Fertilizer Corp., an industry engaged in the manufacture of caustic chloride chemicals. The Court, after considering the reports of expert committees appointed by the government and also by the Court, permitted the plants to be restarted, but imposed strict observance of conditions laid down by the Court. In this case the judicial concern for environmental protection was to a great extent influenced by the Bhopal disaster. The Court expressed concern for developing the law to control corporations employing hazardous technology and producing toxic or dangerous substances. The Court also raised the question as to the extent of liability of such corporations and remedies that can be devised for enforcing such liability with a view to securing payment of damages to the persons affected by such leakage of liquid or gas.

The application for compensation for persons who had suffered harm on account of the escape of oleum gas raised significant questions in both the tort law as well as in constitutional law. It was heard by a bench

150. AIR 1987 A.P. 171.
151. *Idem*, p. 180.
152. *Idem*, p. 181.
153. To date there are five reported cases of *M. C. Mehta* v. *Union of India*, decided by the Supreme Court of India: (1986) 2 SCC 176; (1986) 2 SCC 325; (1987) 1 SCC 395; [illegible] 4 SCC 463; (1988) 1 SCC 471.

of five judges and was decided on 20 December 1986.[154] These applications were filed under Article 32 of the Constitution as if they were for enforcement of the fundamental right to life enshrined under Article 21 of the Constitution. Such a procedure is now possible following the rule established in earlier public interest law cases. In *Bandhua Mukti Morcha* v. *Union of India* the Court had endorsed the true scope and ambit of Article 32 of the Constitution and had held:[155]

> it may now be taken as well settled that Article 32 does not merely confer power on this Court to issue a direction, order or writ for the enforcement of the fundamental rights but it also lays a constitutional obligation on the Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce fundamental rights.

In *Bandhua Mukti Morcha* the Court went further in adding that the power of the courts to give remedial relief may include the power to grant compensation in appropriate cases. Although ordinarily a petition under Article 32 was not used as a substitute for enforcement of the right through the ordinary process of a civil court, compensation was awarded in exceptional cases in petitions under Article 32. In two earlier cases, *Rudul Shah* v. *State of Bihar*[156] and *Bhim Singh* v. *State of Jammu and Kashmir*,[157] the Supreme Court had found it permissible to award compensatory relief under this constitutional provision.

Whether or not the application of this rule could be extended to private corporations was not the subject of any final and definite pronouncement by the Court. The Court nevertheless observed that the purpose of such extension was not to destroy the *raison d'être* of creating corporations but to advance the human rights jurisprudence, primarily to inject respect for human rights and social conscience in our corporate structure. The *Mehta* case did, however, settle the law on the measure of liability of an enterprise which is engaged in hazardous or inherently dangerous industry, if, by reason of an accident occurring in such industry, persons die or are injured.

The court also considered the rule in *Rylands* v. *Fletcher*[158] to see whether that rule has any application or whether there is any other principle on which the liability can be determined. The rule in *Rylands* v. *Fletcher*, laid down in 1866 by English courts, deals with a person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes; he must keep it at his peril

154. *M. C. Mehta* v. *Union of India* (1987) 1 SCC 395.
155. (1984) 3 SCC 161.
156. *Rudul Shah* v. *State of Bihar* AIR 1983, SC 1086.
157. *Bhim Singh* v. *State of Jammu and Kashmir* (1985) 4 SCC 677.
158. *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.

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and if he fails to do so he is *prima facie* liable for damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without the person's wilful act, default or neglect or even that he had no knowledge of its existence. Considerable English case law has developed this tortious liability rule to apply only to non-natural uses of land and it does not apply to things naturally on the land or where the thing which escaped is present by the consent of the person injured or where, in certain cases, there is statutory authority. The Supreme Court found that this rule cannot afford any guidance in evolving standards of liability consistent with the constitutional norms and the needs of the present-day economy and social structure.[159] Therefore, the Court held:[160]

> that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any exceptions which operate *vis-à-vis* the tortious principle of strict liability under the rule in *Rylands* v. *Fletcher*.

Thus, the above case established a rule of absolute liability without exceptions, as a constitutional law mandate controlling hazardous industrial activities; which rule soon found application in the Bhopal case.

On 22 September 1987 the Supreme Court decided in another *M. C. Mehta* v. *Union of India*,[161] which again gave significant development to the law on environmental protection. This case was brought as a public interest petition to stop the discharge of trade effluents by tanneries in Kanpur into the river Ganga. The Court ordered the closure of about 30 tanneries which had failed to take minimum steps required for the primary treatment of industrial effluents, and the government was directed to enforce the standards required under law on more than 100 other tanneries in Kanpur. On 12 January 1988 the Supreme Court decided yet another public interest case brought before it concerning abatement of Ganga water pollution, *M. C. Mehta (II)* v. *Union of India*.[162] The Court asserted the importance of Articles 48A and 51A(g) of the Constitution and issued directions to the Kanpur municipality and to all other municipalities having jurisdiction over the areas through which the Ganga flows. It also directed the High Courts to grant sparingly orders of stay in criminal proceedings taken up against polluters of the river Ganga.

159 *Supra* n. 154 at p. 420.
160 *Idem*, p. 421.
161 *M. C. Mehta* v. *Union of India* (1987) 4 SCC 463.
162 *M. C. Mehta (II)* v. *Union of India* (1988) 1 SCC 471.

VI. CONCLUSION

Thus we find the Supreme Court is now in the process of broadly laying down the legal framework for environmental protection in India. All doubts and criticisms about the lack of environmental consciousness of the Indian judiciary have to be reviewed in the light of the developments occurring in the last few years. A public law realm, based on the Constitution of India, has brought about great inroads into the civil and criminal laws of the country within the last decade or so. These new developments in India by the extraordinary exercise of judicial power have to be perceived as just one of the many ways to meet the social and political needs of the country. However, since the victims of the Bhopal disaster have not received adequate redress even now, one cannot assert that modern India's impressive schemes for the legal protection of the environment and for the protection of citizens from pollution and its threats to life have worked out entirely satisfactorily.

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1

Human Rights Approaches to Environmental Protection: An Overview

MICHAEL R. ANDERSON*

The late twentieth century has witnessed an unprecedented increase in legal claims for both human rights and environmental goods. Never before have so many people raised so many demands relating to such a wide range of environmental and human matters. And never before have legal remedies stood so squarely in the centre of wider social movements for human and environmental protection. It is likely that legal historians writing in the twenty-first century will look back on the last quarter of this century as the period in which both environmental law and human rights reached a kind of maturity and omnipresence. In recent years law-making activities in these areas, at both the international and domestic level, have been marked not only by speed and proliferation, but also by remarkable innovation. Like human rights, environmental law houses a hidden imperial ambition; both potentially touch upon all spheres of human activity, and claim to override or trump other considerations.

In addressing the link between human rights and the environment, this volume aims to evaluate the role of environmental rights in the overall landscape of environmental protection and human rights. In particular, it seeks to survey the current state of affairs, analyse emerging trends and problems, and gesture toward future developments. It was motivated by a concern to investigate a cluster of closely related questions: how are human rights and the environment related; to what extent are environmental rights recognized in existing legal arrangements; how are environmental rights defined, justified, and applied; and what are the advantages and disadvantages of approaching environmental issues through a rights framework? It is fortuitous that this volume appears after the important Final Report of the UN Sub-Commission on Human Rights and the Environment, prepared by Mrs Ksentini, the Special Rapporteur.[1] This Report not only explores the relationship between human rights and the environment, but also proposes the adoption of Principles on Human Rights and the Environment. These are set out in the Appendix to Chapter 3.

The chapters in the present collection draw in part upon a conference on

* I am grateful to Alan Boyle for important substantive contributions and to an anonymous reviewer for helpful comments on an earlier draft of this chapter.

[1] UN Doc E/CN.4/Sub.2/1994/9 (6 July 1994).

Studies Law Department and the Commonwealth Institute.[2] The first half of the volume addresses environmental rights in the international context. The chapters by Merrills, Redgwell, and Boyle concentrate on conceptual aspects, while the contributions from Churchill, Cameron and Mackenzie, and Douglas-Scott focus upon the current legal developments. The second half of the collection examines emerging trends in the application of environmental rights in domestic law. While du Bois considers problems of judicial application from a jurisprudential perspective, he also compares the contrasting practice of US and Indian courts. The remaining chapters focus upon specific jurisdictions, including South Africa (Glazewski), Malaysia (Harding), India (Anderson), Brazil (Fernandes), Ecuador (Fabra), and Pakistan (Lau). The equal emphasis on international and domestic law is deliberate. While much of the current legal debate occurs at the international level, the detailed experience of environmental rights in domestic jurisdictions offers rich instruction, simultaneously showing promising ways forward as well as examples of mistakes to be avoided. The explicit integration of international and domestic law is particularly appropriate in the case of environmental rights, since neither the incidence of environmental degradation nor the aspiration for human rights is delimited by national boundaries. It should not be assumed, however, that the protection of environmental rights in national and international law is or should be co-extensive. The collection as a whole suggests that there may be good reasons for taking a more cautious view of the role of international law in this regard. Problems of cross-cultural application, varying socio-economic circumstances, and fundamental differences in justiciability and application all point to the conclusion that international human rights law may be best confined to a general and supervisory role, while rights developed in national law may well evolve into crucial tools for everyday environmental management, as the Indian case shows. Yet both national and international systems face common conceptual problems, and for these reasons a dialogue of shared experience can only enhance the possibility of robust solutions.

1. RELATIONSHIP BETWEEN HUMAN RIGHTS AND THE ENVIRONMENT

There is an increasing tendency for environmentalists and human rights activists to work together toward common goals. At the international level, there is a natural affinity between organizations such as Greenpeace and Amnesty International, since both aim to reduce the reserved domain of domestic jurisdiction protected under Article 2(7) of the United Nations Charter. Similarly, at the domestic level, both groups aim to restrain the exercise of unaccountable power by governments and private actors, and despite their dependence upon

[2] See Roderick (ed.), *Conference Report: Human Rights Approaches to Environmental Protection in the Commonwealth and Beyond* (London, 1993).

local movements and issues, both groups are nevertheless international in scope and activism. For these reasons, one might expect spontaneous co-operation between the two movements. Yet tensions exist. Environmentalists may distrust the priority which human rights activists are likely to accord to the human being over other species and ecological processes. If the established human rights to life, health, property, culture, and decent living conditions are to be fulfilled for the majority of the global population rather than just a minority, and if those rights are realized in the pursuit of affluence rather than moderation, then a rapid depletion of natural resources is a likely consequence. An environmentalist may suspect that there is a structural contradiction between fulfilling existing rights for a growing population and effective protection of limited environmental goods. In contrast, some human rights activists have criticized the environmental movement for disregarding immediate human needs in the quest to protect biota, finite natural resources, and the basic needs of future generations. Observers have commented, for example, on the anxiety of the affluent to protect the Amazonian rain forests without full consideration of the human lives which may depend upon the forests. For people vulnerable to torture or chronic hunger, the urgent problems of immediate survival are likely to displace concern for long-term ecological integrity. Such tensions cannot be wished away, despite the fashionable view that human rights and environmental protection are interdependent, complementary, and indivisible. While the interdependence argument obviously works in many circumstances, it sometimes serves as a moral comforter which temporarily cloaks the extremely difficult questions which must be faced.

Upon closer inspection, the precise relationship between human rights and environmental protection is far from clear. The relationship may be conceived in two main ways. First, environmental protection may be cast as a means to the end of fulfilling human rights standards. Since degraded physical environments contribute directly to infringements of the human rights to life, health, and livelihood, acts leading to environmental degradation may constitute an immediate violation of internationally recognized human rights. The creation of a reliable and effective system of environmental protection would help ensure the well-being of future generations as well as the survival of those persons, often including indigenous or economically marginalized groups, who depend immediately upon natural resources for their livelihoods.

In the second approach, the legal protection of human rights is an effective means to achieving the ends of conservation and environmental protection. Thus the full realization of a broad spectrum of first and second generation rights would constitute a society and a political order in which claims for environmental protection are more likely to be respected. A more ambitious variant of this view provides that there is and should be an inalienable human right to a satisfactory environment, and that legal means should exist to enforce this right in a consistent and effective manner. Put in these terms, it is no longer the impact of the environment on other human rights which is the law's focus, but

jurisprudence is the most ambitious in this regard, similar developments are apparent in international law. As Boyle explains, the Ksentini Report is mainly concerned with 'greening' existing human rights law so that environmental protection arises as a logical corollary of human rights protection. Many of the Report's draft Principles on Human Rights and the Environment reformulate existing rights such as life and health so as to develop their environmental dimensions.

If the Indian jurisprudence and the Ksentini Report represent the high water marks of reformulated rights, it is clear from a number of chapters in this volume that further scope for development exists elsewhere. Apart from the rights to life and health, which other settled rights might lead to direct environmental protection? Several candidates emerge. First, the right to equality may be read widely to include the right to equal access to, and protection of, environmental resources. As the chapters by Glazewski and Fernandes suggest, a profound inequality of exposure to environmental degradation is a consequence of economic and political inequalities. Affluence and poverty create different environmental problems, and it is sometimes the case that only the problems of affluence are addressed in state policy. An effective right to procedural equality would help in such circumstances, but some judicial enforcement of a right to substantive equality, as has occurred in India, holds far greater potential. Secondly, the right to freedom of speech may easily be extended to encompass the right to voice objections to environmental damage, as Harding's discussion of the Penang Hill affair in Malaysia shows. Thirdly, although the right to property has conventionally been conceived mainly in terms of political and economic protection, it is amenable to a thoroughgoing environmental reinterpretation. Douglas-Scott notes developments on this front, but Harding warns that the right to property may be a two-edged sword since, although it may be used to protect customary land rights and the environmental quality of land in general, it may also be used by private developers to inhibit the creation of national parks and conservation areas. It is precisely for this reason that a full reinterpretation of the right, rather than a mere mobilization of it, is necessary for environmental protection. Fourthly, religious rights may have an environmental dimension. Harding points to the right to religious practice and profession as a possible vehicle for the expression of environmental concerns in Malaysia, while Lau underscores the role of Islam in expanding the right to environmental justice in Pakistan.

(c) New Human Rights to Environmental Protection

Although existing human rights, if fully mobilized, may offer a great deal to global and local environmental protection, there are good reasons to suspect that they will fall short of meeting desired ends. Established human rights standards approach environmental questions obliquely, and lacking precision, provide clumsy tools for urgent environmental tasks. It may be argued that a comprehensive norm, which relates directly to environmental goods, is required. Although the matter is discussed at a theoretical level by Merrills, several approaches to the actual content of new environmental rights may be seen in the various chapters. Some contributions, including those by du Bois, Glazewski, Anderson, Fabra, and Lau, are more optimistic about the role of special rights in environmental protection, while those by Harding, Boyle and Redgwell are more cautious. Most notably, the authors are divided on whether new environmental rights, if desirable, should be mainly procedural or substantive in character.

(i) *Procedural rights*

One view, espoused by Boyle, Douglas-Scott, and Cameron and Mackenzie, advocates that effective environmental rights should be principally procedural in character. Likewise, Harding, who does not advocate new rights but rather the effective use of existing arrangements, looks mainly to procedural remedies, recalling Dicey's dictum that a practical procedure is worth a thousand pious pronouncements of principle.

Several chapters, including particularly those by Douglas-Scott and Cameron and Mackenzie, identify a range of procedural rights at both the international and domestic levels which are relevant to environmental protection. These include: the right to information, including the right to be informed in advance of environmental risks; the right to participate in decision-making on environmental issues at both the domestic and international level; the right to environmental impact assessment; the right to legal redress, including expanded *locus standi* to facilitate public interest litigation; and the right to effective remedies in case of environmental damage.

A procedural or participatory approach promises environmental protection essentially by way of democracy and informed debate. The enthymeme in this argument is that democratic decision-making will lead to environmentally friendly policies. The point remains to be demonstrated, but one argument in its favour is that in creating legal gateways for participation, it is possible to redress the unequal distribution of environmental costs and benefits. Thus marginalized groups who currently suffer the most deleterious effects of environmental degradation—including women, the dispossessed, and communities closely dependent upon natural resources for their livelihood—can be included in the social determination of environmental change. If the people who make the decisions are the same as those who pay for and live by the consequences of the decisions, then we go a long way toward protecting the environment.

There is another argument in favour of a procedural right, rather than a substantive right, which is this: because the desired quality of the environment is a value judgement which is difficult to codify in legal language, and which will vary across cultures and communities, it is very difficult to arrive at a single precise formulation of a substantive right to a decent environment. Therefore, the more flexible, honest, and context-sensitive approach is to endow people with

robust procedural rights which will foster open and thoroughgoing debate on the matter. Much the same argument applies to the pursuit of sustainable development.

(ii) *Substantive rights*

Yet even if the virtues of procedural rights are acknowledged, they may not provide adequate protection of environmental goods. If we take this view, then an argument for a substantive right to a satisfactory environment may emerge. As Anderson's discussion of India suggests, a substantive right can provide more effective protection, and may play a role in defining and mobilizing support for environmental issues. Advocates of substantive environmental rights may not trust procedural rights alone for the simple reason that even if procedural or participatory rights are fully realized, and perfectly distributed throughout civil society, it is entirely possible that a participatory and accountable polity may opt for short-term affluence rather than long-term environmental protection. Democracies are entirely capable of environmental destruction, and may even be structurally predisposed to unfettered consumption. Indeed, the industrial democracies of the North, with their liberal rights-based legal systems, are disproportionately responsible for much environmental damage, including the consumption of finite resources and the emission of greenhouse gases. The point is that procedures alone cannot guarantee environmental protection. But if substantive rights are contemplated, then urgent questions of definition and application arise. These are considered in the next section.

3. ENVIRONMENTAL RIGHTS IN THEORY AND PRACTICE

(a) Definition and scope

Many of the chapters consider the issues associated with defining new environmental rights. The problem of defining such rights so as to satisfy diverse ethical criteria is complicated by the need to make them operate in a legal context. To secure effective implementation, Merrills notes, rights must be determinate in scope and consistent in formulation. But how should a substantive environmental right be defined? Which dimensions of the environment are to be protected and what degree of environmental change is permissible? In a survey of existing constitutional and statutory provisions relating to environmental quality, one finds a series of adjectives attached to the word 'environment' to describe what is actually being protected. References are made to a 'clean', 'healthy', 'decent', 'viable', 'satisfactory', 'ecologically balanced', or 'sustainable' environment. Environments 'free from contamination' (Constitution of Ecuador), or 'suitable for the development of the person' (Constitution of Portugal) are also envisaged. The African Charter of Human and Peoples' Rights delineates the right to: 'a general satisfactory environment favourable to their [the peoples'] development' (Article 24). Does this require that environmental protection and economic development should be balanced off against each other, or rather that the right to a satisfactory environment may only be claimed where it will not infringe the requirements of social and economic development? As Churchill notes, the African Commission has interpreted the provision narrowly to refer mainly to pollution abatement, but a range of interpretations could easily be offered. Similarly, the Indian case law reveals a wide range of inconsistent and overlapping judicial interpretations of an environmental right. As Anderson notes, these include the right to a healthy environment, a pollution-free environment, and an environment in ecological balance. But such definitions often do little definitional work, and end up begging the question.

Why is the exercise of defining so difficult? One reason is that precise qualitative and quantitative dimensions of environmental protection are not readily translated into legal terms. Moreover, technical measures of environmental quality are more easily incorporated within regulatory instruments than in a human rights provision of general application. Boyle notes that a substantive right may even be incapable of definition. But the problem is not merely one of conveying environmental standards, it is also one of agreeing to them. As du Bois points out, difficult ethical decisions are at stake: are we to protect human health and livelihood, or ecological sustainability, or the aesthetic value of existing natural endowments? Underlying such questions, du Bois suggests, are different conceptions of the good life, involving moral choices of the most profound nature. Even where a precise and comprehensive textual definition of a right may be agreed upon, moral choices will still lie in its interpretation. The enforcing body, whether a judge at the domestic level or a supervisory committee at the international level, will necessarily be involved in evaluating competing moral claims.

Even with such definitional questions set aside for the moment, other issues will arise. For example, do environmental rights entail a right to the prevention of environmental harm or rather the right to remedy where such harm has already occurred? The Indian and Pakistani case law would suggest that both aspects are recognized, but most of the relevant constitutions and international instruments are silent on the matter. If the right does extend to prevention of environmental damage, which standards should apply in the context of imperfect knowledge and scientific uncertainty? The Supreme Court of Pakistan and the European Union have both adopted the precautionary principle, but a similar stance is absent in most formulations of environmental rights.

One way out of the definitional muddle is to ask what, exactly, constitutes a violation of the right in a particular context. The question is of jurisprudential interest, but it is also a matter of urgent concern among individuals and businesses who may be subject to litigation in jurisdictions such as India. One of the problems with legal developments in India is that the precise scope of environmental rights is vague, thus leaving both businesses and environmentalists uncertain how far their rights and duties extend. Vague and poorly-defined

obligations not only lead to extensive litigation, they also make it difficult for businesses or community groups to make plans for the future.

For this reason, detailed textual definitions are helpful in so far as they help social actors to anticipate precise obligations. In this vein, Glazewski argues that the best formulation of an environmental right in South Africa would draw upon the existing concepts of environmental regulation. In particular, he advocates an environmental right which relates explicitly to the topics of resource use, pollution control, and land development. The drafting of an environmental right should further draw upon established environmental law principles, including sustainable resource management, the polluter pays principle, the precautionary principle, and environmental impact assessment.

If environmental rights are to exist, then the question of identifying the rights-holders becomes urgent. Do environmental rights extend only to individuals or also to groups? While the African Charter on Human and Peoples' Rights vests the right to a general satisfactory environment in 'all peoples', the predominant formulation in domestic law has been in terms of individuals. What of unborn persons and future generations? May they be regarded as rights-holders? Merrills considers these questions, and prefers investing rights in individuals rather than in groups, noting that whatever rights may be theoretically bestowed upon groups, (as well as future generations, animals, or inanimate objects), the practical exercise of any right can only take place among those individual humans currently alive. However, many of the chapters are favourably disposed toward granting procedural rights (especially *locus standi* in judicial review) to non-governmental organizations. In particular the chapters by Cameron and Mackenzie, Harding, and Anderson point to many instances in which the participatory rights of NGOs have augmented environmental protection.

(b) Jurisprudential basis

Running parallel to the question of how environmental rights may be defined, there is the question of how they may be justified in human belief systems, especially moral and legal philosophy. As Glazewski notes, the notion of an environmental right has strong historical precursors in the Roman law maxim of *sic utere tuo ut alienum non laedas* (use of one's property may not harm another—which has also been taken up in international law) and the common law doctrine of public nuisance. Where there are clear historical and philosophical precursors of a human aspiration for environmental protection, it may be treated as a moral right even where it is not recognized as a legally enforceable right. To a lawyer this may seem a proposition with little practical value, but it often is very useful for individuals engaged in political struggle to endorse the notion of a human right as an unrealized manifesto. A moral right, as opposed to an enforceable legal right, provides a stance from which arguments can be made and claims justified. Often, the real value of a human right is that it is available as a moral

trump card precisely when legal arrangements fail. But is the argument for environmental rights strong enough to warrant a translation of moral rights into legally enforceable rights?

This is a theme taken up by Merrills, who asks whether rights are really necessary in an international environmental regime. Admitting that environmental protection can be seen as a human good, and may be held as a strong preference for many people, he queries whether this is sufficient to raise it to the plane of a fundamental human right. The answer, he suggests, lies in examining the role of the environment in the realization of human autonomy and self-realization, with close attention to the impact of rights on actual social behaviour. Following this argument, he advances a cautious endorsement of environmental rights on the grounds of their role in human well-being. The virtue of Merrills' argument is not that it resolves the question in a definitive way, but that it sets out a framework whereby the question may be addressed rigorously.

Whatever the outcome of such moral arguments, it is clear that environmental rights are proliferating, particularly at the level of national constitutions, and that this may provide a jurisprudential basis for more generally applied environmental rights, particularly at the international level. Examining the basis for an environmental right at the international level, it is possible to distinguish four basic positions: i) the right to a viable environment is a natural law norm immanent within existing moral systems, and should be treated as a rule of *jus cogens* in international law; ii) it is a logical outcome of existing human rights norms such as life and health which contain implicit guarantees of environmental quality; iii) it is emerging as a customary norm in international law evidenced in treaty obligations such as Article 24 of the African Charter on Human and Peoples' Rights and state practice including constitutional and statutory provisions guaranteeing environmental rights; iv) there is no human right to environmental protection at the moment, but that it would be desirable to create one by way of international treaty, protocol, or declaration.

Arguments for an international right to environmental protection raise problems of cross-cultural validity which do not necessarily arise in national constitutions. The value attached to the physical environment has varied significantly over history and across societies. Perceptions of the environment are culturally informed, and even similar ecological settings may give rise to different economic and social uses, as Fabra shows. Likewise, Lau reminds us that some Islamic scholars are hostile to the very notion of human rights in general, much less the specific human entitlement to environmental goods.

It is precisely these social and cultural differences which may explain why greater progress has been made in making environmental rights an explicit part of national legal systems rather than a component of international law. If, as du Bois suggests, questions of substantive environmental quality are inherently relative, value-based, and capable of determination only in competition with other values such as economic development and inter-generational equity, then it will

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of the jurisprudence of both the European Court of Justice following the *Francovich* decision and the European Court of Human Rights with the *Lopez Ostra* case. As Anderson notes, a tendency to make monetary awards for the violation of environmental rights takes human rights implementation into the area traditionally reserved for tort law, and may ultimately require legal technologies for assessing causation and quantum of damages similar to those which occur in tort or delict.

(f) National or International Law?

The final question concerning legal application of environmental rights relates to the appropriate jurisdiction, since an argument can be made for the recognition of environmental rights in both domestic and international law. In some ways, a national and an international right are very different entities since national rights are often capable of immediate enforcement in court, and are much more likely to be caught up in the everyday business of environmental management, while international rights exist mainly as aspirations, instruments of general supervision, and ultimate safety nets. National constitutions are often highly detailed and can express local particularities, while international instruments must be drafted at levels of generality and abstraction required to secure multilateral agreement. Yet these differences create complementary rather than competing legal regimes, and the dialogue between the two is beneficial. Recent years have brought such an explosive growth in the volume of international regulation that national legal systems are increasingly interpellated within a network of global standards, including those relating to trade, finance, labour, and environmental protection. In these circumstances, the interdependence of national and international rights is perhaps unavoidable.

The coexistence of national and international norms may be an important advantage for activists. As Fabra shows, the mere existence of an environmental right in the Ecuador Constitution did not provide the Hourani people with an effective remedy against economic and environmental depredation. The procedural right to take their case to the Inter-American Commission on Human Rights provided an important back-up mechanism when domestic law failed. More generally, she argues, closer co-operation between international and domestic law will maximize the effectiveness of both legal systems. Similarly, Cameron and Mackenzie show that the growing role for environmental NGOs stems in part from their role in bringing local concerns to international fora while communicating international standards and remedies back to the local level. The experience of groups such as Amnesty International or Anti-Slavery International is that the most effective implementation results when distinct but complementary campaigns are mounted at the local, national, and international levels simultaneously. Both agenda setting and the development of suitable standards occur within a comparative and international context. This is apparent in

Lau's discussion of the Pakistani decision in which the Precautionary Principle embodied in the Rio Declaration was incorporated into Pakistan's constitutional jurisprudence. Remembering that the Precautionary Principle originated in the domestic law of the Federal Republic of Germany, the growing cross-fertilization of domestic and international environmental law is obvious.

However, problems of variable standards suggest that overly zealous standard-setting at the international level may not only be inappropriate, but might actually impede the freedom of states to produce detailed, culturally sensitive and ecologically appropriate standards at the national level. The European Union principle of subsidiarity—whereby standard-setting and decision-making are devolved to the lowest practicable level—may offer instruction in this regard. Where local groups object to the formulation or indeed the very idea of environmental rights, as the chapters on Malaysia, Ecuador, and Pakistan suggest, there may be an argument for advancing environmental protection through other legal idioms.

4. EFFECTIVE ENFORCEMENT

The greatest challenge for both human rights standards and environmental regulation is surely the problem of effective enforcement. And to compound the problem, in these days of fiscal stringency, enforcement must be available at a viable cost. In part, these questions are matters of administrative organization and political culture, but they also bear directly upon the varieties of procedures and remedies which are available to concerned parties.

There is no reason why environmental rights cannot be enforced at the international level in the same way as other human rights. The right to environmental impact assessment could be implemented in a manner similar to other political rights while a right to a healthy environment could easily be implemented as an extension of the right to health. For international human rights, there is a well-established set of procedural mechanisms available for implementation. These include reporting procedures, arrangements for fact-finding bodies, political supervision, complaints procedures, judicial supervision, and non-judicial dispute resolution. The established supervisory procedures are suited to implementing a broad range of rights, although not always with equal efficacy. It is entirely possible to conceive of an environmental right linked, for example, with a reporting procedure requiring states to submit reports on environmental conditions and policies. Yet as both Boyle and Redgwell suggest, international supervision may be clumsy with respect to environmental rights, particularly if cast in substantive rather than procedural language. The commissions, committees, and courts charged with supervising international human rights are frequently overworked with more conventional human rights issues, and it is not clear that they possess either the technical competence or the

required to address often complex environmental questions. Boyle notes that international law is already replete with rules, principles, and criteria for ensuring environmental quality, and that the most important environmental treaties already possess sophisticated supervisory institutions, often with more enforcement power than analogous human rights bodies. Proposals for international environmental rights run the risk of conflicting with, or at least duplicating, the supervisory institutions established under environmental treaties.

Despite such arguments, the enforceability of an environmental right may not be assessed with reference to supervisory procedures alone. Indeed, it is one of the attractions of a human rights approach that it fosters multiple enforcement strategies. The global campaign against torture, for example, draws upon both national and international legal procedures, but it also operates through aid conditionality, mass demonstrations, publicity drives, education programmes, investigative journalism, letter-writing tactics, and artistic expression. Of course some of these devices are also used to promote the enforcement of international environmental law, but their affinity with human rights standards has a strong history.

At the national level, the question of enforcement naturally focuses more closely on the role of the judiciary. Effective implementation receives a fillip where the enshrined right is clearly defined, with explicit and accessible procedures delineated, and is accompanied by a wide range of flexible and effective remedies. But even where rights are made explicit, they will not necessarily be enforced. As Douglas-Scott notes, the Hungarian Constitution provides for a right to a healthy environment, and all citizens are accorded a statutory right to participate in environmental protection, but neither of these has been much utilized. Similarly, Fernandes' discussion of Brazil and Fabra's analysis of Ecuador show how explicit constitutional rights to environmental protection can lie dormant unless they are actively seized by environmentalists and lawyers. These examples, where rights were bestowed from above on paper, contrast sharply with the Indian case, where environmental rights were seized from below by activist lawyers who prompted the judiciary to find environmental rights which did not even formally exist on paper. The comparison suggests that it is environmental movements and activism, rather than generous legal drafting, which leads to effective implementation. As a number of the case studies show, a key factor in successful implementation of legal standards is the non-legal strategies adopted by activists and NGOs. These include campaigning and lobbying, gathering information, mounting public protests, assisting local communities in voicing complaints, and so on.

Perhaps the most celebrated method of enforcing environmental rights is public interest litigation. Such litigation has been highly effective in India and Pakistan, as Anderson and Lau show. However, in Malaysia where the judiciary is not receptive to such innovations, or in Ecuador where public interest lawyers do not trust the environmental awareness of judges, public interest litigation may actually be counter-productive. The viability of public interest litigation in enforcing environmental claims depends upon both legal and social variables. On the legal side, procedural rights to participation and representation are crucial. In particular at the domestic level, relaxed rules of standing are required. Turning to relevant social variables, it is clear from Glazewski's account that South Africa's wealthy whites are in a much better position to pursue their environmental concerns than are their black counterparts subject to often harsher environmental conditions. Similarly, as Fabra explains, the Hourani people in Ecuador lack the financial backing and institutional skills required to pursue actions in court; most do not speak the language in which the laws are written, and have no familiarity with official legal concepts.

Even where individuals or groups with environmental claims possess the skills, resources, and determination to bring issues before domestic courts, whether such actions are effective will turn upon the character of the judiciary. The chapters by Fabra, Fernandes, and Harding show how political and jurisdictional limitations may render the courts timid and ineffective. Conversely, the chapters by Lau and Anderson show how a strong judicial stance may create environmental remedies even where they are not provided for in existing laws. Environmental rights are most effective where there is an independent, autonomous, and sympathetic judiciary. It is precisely because a strong judiciary is not always available to aggrieved parties that some degree of international supervision may be desirable.

5. ADVANTAGES AND DISADVANTAGES OF A HUMAN RIGHTS APPROACH

How do we evaluate these developments and proposals? What are the advantages and disadvantages of using a human rights approach rather than an approach based in regulation, criminal law, or the law of tort? Looking to the advantages, several are apparent. First, a human rights approach is a strong claim, a claim to an absolute entitlement theoretically immune to the lobbying and trade-offs which characterize bureaucratic decision-making. Its power lies in its ability to trump individual greed and short-term thinking.

A second advantage is that the procedural dimensions of an environmental right can provide access to justice in a way that bureaucratic regulation, or tort law, simply cannot. A robust environmental right can mobilize redress where other remedies have failed. This is particularly important in cases like the Asian Rare Earth litigation in Malaysia, where proof of causation and other technical barriers make tort law ineffective. It was also important in the Indian context, where procedural simplicity has made environmental rights highly attractive to aggrieved parties. An environmental right may serve as the ultimate 'safety net' to catch legitimate claims which have fallen through the procedural cracks of

public and private law. Thirdly, a human rights approach may stimulate concomitant political activism on environmental issues. Concerned citizens and NGOs are more likely to rally around a general statement of right than a highly technical, bureaucratic regulation expressed in legalese. Fourthly, a human rights approach can provide the conceptual link to bring local, national, and international issues within the same frame of legal judgment. At present, environmental damage is unequally distributed at both the national and international level; a non-discriminatory human rights standard could facilitate comparison, and foster political mobilization linking local concerns with more global issues. For example, with the emerging procedural rights described by Cameron and Mackenzie, the operations of the World Bank could be made subject to a human rights standard which would apply equally to its international transactions, its national programmes, and its local projects. Fifthly, a general expression of right can be interpreted creatively as issues and contexts change. This is evident in the Indian jurisprudence, where the right to a healthy environment held to be implicit in the right to life has been given more precise definition on a case-by-case basis as specific disputes have come before the courts. Thus, definitions and trade-offs evolve gradually in the light of experience rather than needing to be defined comprehensively and rigidly in a single piece of regulatory legislation.

A number of disadvantages are also apparent. Indeed, some contributors argue that proposals for environmental rights are at best ill-conceived, and at worst a damaging distraction from more fruitful legal avenues. What are their arguments? First of all, it is not clear to what extent a simple right may address the complex and often technical issues of environmental management. Environmental protection, in both decision-making and implementation, requires a legal language capable of incorporating highly technical specifications, distinguishing among industrial processes, evaluating elusive causal relationships, and protecting complicated biological and ecological systems. Not all issues can be resolved in the simple language of rights (although environmental rights may be supplemented with technical expertise and specific standards). As Merrills and Boyle note, disputes which essentially require the balancing of interests may be more difficult to resolve where two rights-holders are involved (although du Bois argues that courts routinely balance competing interests when applying rights). Secondly, a rights approach may not address the relationships of political economy which underlie much environmental damage. The causes of environmental damage—including technology choice, forms of production, and distribution of the social product—will not be addressed by a right directed merely to their symptoms. If environmental rights serve as nothing more than symbolic gestures, as in Hungary, or as mere palliatives which inculcate a sense of environmental responsibility while denigration of the environment continues largely unabated, then those rights may be positively counter-productive, drawing attention away from the structural causes of environmental change. Just as the prescription of anti-diarrhoea drugs in the poorer villages of Bangladesh can only be an expensive and ineffective short-term remedy for people without access to clean drinking water, likewise, the right to object to environmental damage will have little effect unless the social and economic forces causing the damage are confronted directly.

Thirdly, rights, especially procedural rights, may be used by affluent groups or 'cosmetic environmentalists' to protect a privileged quality of life, which may impose further environmental costs upon the dispossessed or environmentally vulnerable communities, who are in turn denied access to justice by poverty or lack of institutional skills. Legal recognition of environmental rights will not necessarily change anything unless disadvantaged groups possess economic and political power to mobilize legal institutions.

Fourthly, the expansion of rights-based litigation may well displace other forms of legal remedy, such as tort law or negotiated settlements, which are better suited to environmental issues. This danger is identified in the Indian context by Anderson, who notes that writ petitions under the Constitution are now displacing statutory regulation and civil suits as the main means of distributing environmental benefits and burdens. This raises the twin dangers of inconsistent standards and the transfer of essentially bureaucratic functions to the courts. Fifthly, as Harding notes, the language of human rights may politicize and draw attention to environmental claims in a way that may attract more overt opposition from polluters, or even exacerbate government repression. Sometimes what may be easily achieved by quiet lobbying and technical regulation may not be possible through public campaigns and prominent litigation. And the explicit incorporation of environmental rights into the Malaysian legal system may invite a series of statutory restrictions and limitations which may leave environmentalists with fewer rights than they held at the outset.

On balance, our deliberations show that human rights approaches to environmental protection offer many attractions, and could play a key role in fostering equitable and sustainable human communities. If very real problems of theory and practice remain, they should stimulate careful analysis and jurisprudential innovation rather than intellectual surrender.

Shutkin, W A, International Human Rights Law and the Earth The Protection of Indigenous Peoples and the Environment" (1991)31 *Virginia Journal of International Law*, 479-511.

International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*

Introduction

The issue of the environment has achieved significant status on both the national and international scene. The term "environment" is itself common parlance from Main Street to the halls of the United Nations. Communities around the world have come to learn that the environment is threatened by forces derived from human activity: the greenhouse effect, acid rain, and desertification, to name a few. But the term "environment" is insidious, for it implies an essential distinction between human animals and the rest of nature.[1] Environmental matters are often approached in a way which either wholly divorces or deliberately abstracts human practices from their manifest and pervasive effects on the whole of the physical world.[2]

Environmental degradation is neither contained nor abstract. It is omnipresent, immediate, and threatens entire communities with cultural, if not virtual, extinction. Presently, indigenous peoples of South America, such as the Huaorani in Ecuador, are gravely imperiled by the hazards of natural resource exploitation.[3] On the low-lying islands of the Caribbean, South Pacific, and Indian Ocean entire cultures are potentially endangered by global climate change.[4] With rich social traditions and vital economic practices integral to the physical area in which they occur, these communities depend upon a healthy environment. To be sure, possessing little or no technological capability, these communities *are* their environment--profoundly integrated and deeply dependent.

The concept of international law, like the environment, is also problematic. Traditionally, international law denotes the laws which govern sovereign states exclusively.[5] Yet, certain activities do not fit well into the narrow framework of state-based international law. These include torture by a state against individual subjects, crimes against humanity, and other so-called human rights violations. Consequently, international human rights law has emerged to vindicate the rights of individuals and groups in the face of state persecution or malfeasance.[6]

Basic human rights norms appear to be at issue in the case of indigenous peoples imperiled by environmental degradation.[7] This Note explores the convergence of environmental and human rights issues as they relate to indigenous peoples,[8] and the capacity of international law, as it is and as it might be, to protect both human and non-human nature within the context of human rights jurisprudence.

Part I of this Note considers the evolving concepts of the environ-

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1. The Oxford English Dictionary, (Oxford, 1933 & Supp. 1972), defines "Environ" as "Surrounding," "Encircle," and "Environment" as "the conditions or influences under which any person or thing lives or is developed." See also Cheney, Postmodern Environmental Ethics: Ethics as Bioregional Narrative, 11 Envtl. Ethics 117 (1989) (discussing the idea of place and "the related notions of myth, narrative, storied residence, and ethical vernacular")

2. In the United States and the United Kingdom, for example, a common method by which individuals and communities deal with environmental problems is by declaring "not in my back yard" (NIMBY), as though these problems were not their own. Thus, responsibility for remedial action is shirked.

Another example is the debate concerning global warming. Because the concept of global climate change embraces issues of tremendous scope and some speculation, it has proved easy for individuals and states simply to disregard the plea for united action by explaining that because the matter is so vast, it necessarily demands protracted review before significant funds or resources will be committed to its resolution. See, e.g., Shabecoff, Bush Asks Cautious Response to Threat of Global Warming, N.Y. Times, Feb. 6, 1990, at A1, col. 5 (President's speech reflected concerns at the White House that "more scientific data about global warming and more study of the potential costs . . . are needed before formal international action is taken.").

3. See infra notes 69-106 and accompanying text.

4. See infra notes 107-117 and accompanying text.

5. I. Brownlie, Principles of Public International Law 287 (3d ed. 1979) ("The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations . . . .")

6. See International Human Rights: Problems of Law and Policy 1-124 (R. Lillich & F. Newman ed. 1979) [hereinafter International Human Rights]; see generally The Rights of Peoples (J. Crawford ed. 1988)

7. For example, the right to life and security of person found in articles 6 and 9 of the International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 1976, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976)

8. This Note deals specifically with the Huaorani tribe in Ecuador and more generally [illegible]

prospect of extinction due to global climate change, compels a resort to human rights law for the protection of both people and the environment. As Professor Falk observes, "there must be ways to promote human rights in relation to the specific circumstance of individuals and groups properly identified as indigenous . . . so as to assure protection against exploitation by non-indigenous structures."[27] But how is this to be done? This unfortunate and largely neglected confluence of environmental with cultural issues elicits an examination of international human rights law. The essential questions are whether human rights norms are available to promote the welfare of indigenous peoples and the global environment, and, if so, whether the existing corpus of human rights norms is amenable to such application in light of traditional international legal jurisprudence.

Historically, the core of international law, both procedural and substantive, has been the notion of state sovereignty. Principles of international law have traditionally enshrined state dominion over both people and territory with no recourse provided to aggrieved individuals or groups within or without the state.[28] Yet, that international law, and consequently international society, should be comprised of states alone defies logic. "The subjects of international law, in the sense of those for whose benefit the law assigns all rights and duties, are the peoples of the world."[29] Nevertheless, the only international responsibility for state activity traditionally recognized by international law is a form of legal responsibility—state responsibility—for a breach by one state of another state's rights, whether territorial, contractual, or delictual.

defend their land against invaders." Hannum, New Developments in Indigenous Rights, 28 Va J Int'l L 649, 667 (1988).

27. Falk, The Rights of Peoples (In Particular Indigenous Peoples), in Crawford, supra note 6, at 35.

28. See M N Shaw, International Law 1 (2d ed. 1986) ("[T]he principal subjects of international law are nation-states, not individual citizens.")

29. Allott, State Responsibility and the Unmaking of International Law, 29 Harv. Int'l L J 1, 14 (1988). Allott urges a reconception of the world, not as a collection of states, but as a society of individual human beings. He explains that our contemporary international system is neither natural nor inevitable but the product of historical contingency. "Our social ideals and . . . possibilities are trapped and stifled within mental structures which divide and disable the human world, structures which human consciousness has made and which human consciousness can remake." International Law and International Revolution: Reconceiving the World, Josephine Onoh Memorial Lecture, University of Hull 19 (February 21, 1989).

International law, then, must come to reflect the ideals of the true components of international society: individuals and groups. Only then can "[o]ur sympathies extend to the whole of humanity [and] our moral and social responsibility . . . to the whole of the physical world we transform by our actions." Id.

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Notwithstanding state positivism, international human rights law has evolved, institutionalizing individual recourse in international law.[30] Beginning with the Universal Declaration of Human Rights[31] in 1948, a body of international law has emerged encompassing the fundamental rights and freedoms once incorporated only in the laws of a few nations. In 1966 both the International Covenant on Civil and Political Rights[32] and the International Covenant on Economic, Social and Cultural Rights (ECOSOC Covenant)[33] were drafted, refining and reinforcing the provisions of the Declaration.[34] This distinction between civil and political rights, on the one hand, and economic, social, and cultural rights on the other is also reflected in regional human rights agreements.[35] The European Convention on Human Rights,[36] for instance, exists alongside the European Social Charter.[37] The American Convention on Human Rights[38] lists sepa-

30. See, e g., Sohn, The New International Law: Protection of Rights of Individuals Rather Than States, 32 Am U L Rev 1 (1982) (analysis of developments in international law which protect civil and political, and economic, social and cultural rights of individuals and the collective human rights of groups). Shaw, supra note 28, at 40-42 ("International law . . . has extended itself to include individuals . . ."). Robertson, Human Rights in the World, 16 International Human Rights, supra note 6, at 33 (2d ed. 1991) (international law is in the process of transformation from a doctrine based on national sovereignty to one based on the fundamental rights of the individual).

31. The Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A, U.N. Doc. A/810 at 71 (1948) [hereinafter Declaration].

32. Supra note 7.

33. The International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 19, 1966, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (entered into force Jan. 3, 1976).

34. The Declaration, supra note 31, a near-exhaustive catalogue of thirty articles, is generally considered to be binding as customary international law. The United States Court of Appeals for the Second Circuit affirmed this opinion in Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) (noting that "the General Assembly has declared that the Charter precepts embodied in [the] Universal Declaration constitute basic principles of international law.").

The Declaration, the International Covenant on Civil and Political Rights, supra note 7, and the International Covenant on Economic, Social and Cultural Rights, supra note 33, together comprise the International Bill of Rights.

35. See Weston, Lukes, Hnatt, Regional Human Rights Regimes: A Comparison and Appraisal, 20 Vand. J. Transnat'l L. 585 (1987). But see the African (Banjul) Charter of Human and Peoples Rights, adopted June 27, 1981 O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (entered into force Oct. 21, 1986), reprinted in 21 International Legal Materials 58 (1982), which does not ostensibly differentiate between these groups of rights.

36. European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, entered into force Sept. 3, 1953, 213 U.N.T.S. 222.

37. European Social Charter, signed Oct. 18, 1961, entered into force Feb. 26, 1965, 529 U.N.T.S. 89 (No. 7659), [1965] Gr. Brit. T.S. No. 38 (Cmd. 2643).

38. American Convention on Human Rights, signed Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (English 1979) (entered into force July 18, 1978).

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rately the two classes of rights.

The categorization of rights has inspired debate among scholars concerning the relative weight of the different classes of human rights.[39] Civil and political rights, the so-called first generation rights, purportedly adumbrate those rights pertaining to individual liberty—for example, the right to security of person—and prohibit state intrusion upon personal freedom. Thus, they are described as individual and negative rights. Economic, social and cultural rights, the so-called second generation rights, purportedly emanate from the more essential civil and political rights. These include rights associated with the welfare state such as the right to work or to maintain family. Consequently, they are deemed collective and positive rights.

However appealing this conceptualization of human rights appears, it is misleading if not fallacious. Both the United Nations covenants, for instance, deliberately refer to the other in their Preambles, implying that neither is intended to stand alone. There is no deliberate attempt at ranking, as Professor Sieghart explains, "[i]n the entire code of international human rights law—all rights and freedoms are placed on equal footing."[40] Human rights, he continues, are "indivisible and interdependent—as are the Covenants which define them."[41]

Moreover, the distinction between a negative and a positive human right is specious. In the United Nations covenants the term "freedom," purportedly denoting a negative right, is used interchangeably with the term "right." Concerning the asserted dichotomy between individual and collective human rights, it is difficult to envisage a human right that is not at once individual and social. All human rights are, like humans themselves, inextricably singular and social.[42]

39. See, e.g., Alston, A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?, 29 Neth. Int'l L. Rev. 307 (1982); Donnelly, In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development, 15 Cal. W. Int'l L.J. 473 (1985); Lillich, Remarks, in International Human Rights, supra note 6; van Boven, Distinguishing Criteria of Human Rights, in The International Dimensions of Human Rights (Vasak ed. 1982).

40. Sieghart, Economic Development, Human Rights and the Omelette Thesis (Book Review), 1 Dev. Pol'y Rev. 1, 8 (1983).

41. Id.

42. As a matter of political theory, the dialectic between individualistic, or classical liberal, conceptions of human society and communitarian notions is a sophisticated and protracted one. See, e.g., R. Dworkin, Law's Empire (1986); A. MacIntyre, After Virtue (1981); J. Rawls, A Theory of Justice (1971); R. Rorty, Contingency, Irony, and Solidarity (1989); R. Unger, Knowledge and Politics (1975). Nevertheless, it is well understood in the context of human rights that individual and group rights are deeply entwined, if not one and the same. See, e.g., Brownlie, The Rights of Peoples in Modern International Law, in The Rights of Peoples, supra note 6, at 1.

Hence, the so-called first and second generations of human rights[43] should be approached more as a unity than as a duality, with equal respect and gravity despite the nomenclature.

Because of the endangerment of indigenous cultures and the environments in which they exist, there is presently a need to advance international law, in part by "identif[ying] those group rights not adequately recognized or protected in the context of existing principles and standards of human rights."[44] Clearly, as Professor Brownlie maintains, the "assumption lying behind the classical formulation of standards of human rights . . . has been that group rights would be taken care of automatically as the result of the protection of the rights of individuals."[45] With this in mind, this Note next briefly discusses the existing concepts of international human rights law found in the leading United Nations materials as they relate generally to indigenous communities and the environment.[46]

II. Existing International Law and the Protection of Indigenous Cultures and the Environment

The basic human rights documents seek to ensure the preservation of cultures.[47] The Universal Declaration of Human Rights, for instance, explicitly establishes the right to participate freely in cultural life.[48] Such a right, though not necessarily implying independent statehood, implies rights of minimal self-determination such as

43. There exists yet another class of human rights, entitled third generation rights. Of more recent origin, these rights purport to embody "solidarity" rights like peace, development, and a healthy environment. See Robertson, supra note 30, at 33 (viewing third generation rights as social policy objectives rather than traditional legally enforceable principles). They are also more controversial than their predecessors. See, e.g., Donnelly, supra note 39 (questioning existence and sources of right to development and other third generation rights). Nevertheless, these rights do inform contemporary human rights discourse and might well develop into human rights norms. See infra notes 139-170 and accompanying text.

44. Brownlie, in The Rights of Peoples, supra note 6, at 10.

45. Id. at 2.

46. Professor Moskowitz writes:

> Stripped of [their] environmental, national and cultural characteristics, spiritually adrift from [their] past and loosed from [their] traditional moorings, [humans] lose [their] essential humanity. Yet these are the inevitable consequences of a doctrine or policy that carries the distinction between rights and freedoms of the individual as a human person and his rights and freedoms as a member of a racial, religious, linguistic or ethnic group to its logical conclusions.

M. Moskowitz, The Politics and Dynamics of Human Rights 169-170 (1968).

47. "Culture" can be defined broadly as the totality of knowledge and practices, intellectual and material, of any particular group within a society or state. See, e.g., Picot, Cultural Rights As Peoples Rights in International Law, in The Rights of Peoples, supra note 6, at 79.

48. See Declaration, supra note 34, art. 22 (mandate for national and international efforts to [illegible] economic, and cultural rights).

protection of family, freedom of movement and religion, the inviolability of the home, property and privacy."[49] Thus, while an exercise of the right could not justify disrupting the territorial integrity of a sovereign state, it could prohibit the attempts of a sovereign state to impose complete assimilation on indigenous communities.[50] The right to cultural participation or minimal self-determination, therefore, is practicable and justified in light of both state and foreign incursions upon indigenous cultures and the environment. More fundamentally, claims relating to culture entail the right to exist: cultural survival. The protection of a culture from "ethnocide"[51] is the core of the right to cultural participation.[52]

The right to life and the right to security of person, paramount in all human rights agreements, are also at issue in the matter of indigenous communities and the environment. With threats to the environment which could destroy indigenous territories—namely, the submersion of low-lying islands due to global warming—as well as exploitative actions on indigenous lands which degrade hunting and agricultural areas, these most basic human rights of self-preservation[53] are jeopardized.

The right to life and the right to security of person are non-derogable and universally regarded as *jus cogens*.[54] Moreover, the right to

49. Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser. L/V/II 62 Doc. 10 Rev. 3 and OEA/Ser. L/V/II.62 doc. 26 (1984), at 81-82 [hereinafter Miskito Report]. Rights related to culture are also articulated in Declaration of the World Conference to Combat Racism and Racial Discrimination, E/CN 4/Sub. 2/476/Add. 4 (1984), at 31-34 (protecting minority rights, particularly those relating to cultural identity and development). See also Universal Declaration of Rights of Peoples, Algiers, 1976; Banjul Charter on Human and Peoples Rights, CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 I.L.M. 59 (1982) (member states of Organization of African Unity recognize and protect individual human rights). Professor Brownlie suggests that cultural rights essentially serve to guarantee group identity and equality. Brownlie, in The Rights of Peoples, supra note 6, at 6.

50. Miskito Report, supra note 49, at 80-81. Professor Brownlie says "the claim to self-determination does not necessarily involve a claim to statehood and secession." Brownlie, in The Rights of Peoples, supra note 6, at 6.

51. Ethnocide denotes the death of a culture in all but physical form, i.e., a group stripped of its traditional habitat and ability to participate in customary practices. See, e.g., Kimerling, Petroleum Development in Amazonian Ecuador: Environmental and Socio-Cultural Impacts, A Report of the Natural Resources Defense Council 27-28 (Oct. 1989).

52. See e.g. Communication 167/1984 (Ominayak v. Canada), U.N. Doc. CCPR/C/38/D/167/1984 (Annex) (Decision of Mar. 26, 1990) [hereinafter Lubicon Lake case].

53. Donnelly, explicating the philosophy of Locke, says that both self-preservation and preservation of the human species constitute our most fundamental human rights. J. Donnelly, The Concept of Human Rights 10 (1985).

54. See Case 9647, Inter-Am. C.H.R. 147, 166, OEA/Ser. L/V/II.71, doc. 9 rev. 1 (1987). Gormley, The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus

life has application beyond intentional or arbitrary deprivation of life, and requires that governments act affirmatively to protect life by promoting policies to ensure survival of persons within a state's jurisdiction.[55]

Cultural extinction is a genuine possibility for indigenous communities threatened by environmental degradation. Indigenous peoples have emphatically emphasized the intricate spiritual and historical qualities of their relationship with the earth which are essential to their existence.[56] Thus, members of indigenous communities have passionately advocated for protection of their native lands. The Coordinator of the Indian Nations Union explains:

> When the government took our land . . . they wanted to give us another place . . . but the State, the government, will never understand that we do not have another place to go. . . The only possible place for [indigenous] people to live and to re-establish our existence, to speak to our Gods, to speak to our nature, to weave our lives is where our God created us. . . . We are not idiots to believe that there is possibility of life for us outside of where the origin of our life is. Respect our place of living, do not degrade our living conditions, respect this life. . . . [T]he only thing we have is the right to cry for our dignity and the need to live in our land.[57]

Another member of an indigenous community lamented the plight of native peoples, declaring:

> [T]he surest way to kill us is to seperate us from our part of the Earth. Once seperated, we will either perish in body or

Cogens, in The Right to Life in International Law (Ramcharan ed. 1985) (right to life viewed as unconditional norm binding on global community, even in periods of emergency).

55. See Case 7615 Inter-Am. C.H.R. 24, OEA/Ser. L/V/II.66, doc. 10 rev. 1 (1985) [hereinafter Yanomami case].

56. See, e.g., Declaration of Principles adopted at the Fourth General Assembly of the World Council of Indigenous People in Panama, Sept. 1984, reprinted in Report of the Working Group on Indigenous Populations on its Fourth Session, U.N. Doc. E/CN.4/Sub.2/1985/22 (1985) Annex III; Declaration of Principles proposed by the Indian Law Resource Center, Four Directions Council, National Aboriginal and Islander Legal Service, National Indian Youth Council, Inuit Circumpolar Conference, and the International Indian Treaty Council, reprinted in Report of the Working Group, U.N. Doc. E/CN.4/Sub.2/1985/22 (1985) Annex IV. These documents provide for exclusive land rights, both surface and subsoil, and prohibit destruction of any part of indigenous territory which may despoil land, air, water or wildlife without the consent of the community. Such strictures came about because of the widespread recognition among indigenous tribes of the supreme value of the environment to their cultural lives.

57. A. Krenak, WCED Public Hearing, Sao Paulo, Oct. 28-29, 1985, quoted in Our Common Future, supra note 19, at 114.

our minds and spirits will be altered so that we end up mimicking foreign ways, adopt foreign languages, accept foreign thoughts and build a foreign prison around our indigenous spirits which suffocates [us] . . . Over time, we lose our identity and eventually die or are cripples as we suffer under the name of "assimilation" into another society."[58]

Moreover, because the survival of individuals within indigenous societies has often depended on ecological awareness and adaptation, a change in the environment of any particular community could easily disrupt the relationship between that community and the environment, leading eventually to disease or starvation."[59]

Thus, it seems that claims to preserve indigenous cultures and the environment are viable. However, procedural constraints exist under the United Nations regime which might frustrate even urgent claims. The Optional Protocol to the Covenant of Civil and Political Rights allows individuals to petition international fora or tribunals, but only if the complainant is a person subject to the jurisdiction of one of the signatories of the Protocol and has exhausted domestic remedies.[60] Further, the Covenant allows the Human Rights Committee, the monitoring body, to use information supplied by NGOs regarding human rights violations, but only "unofficially."[61] Nonetheless, Professor Fischer observes:

> It is clear . . . that information supplied by NGOs has been used by most members [of the Committee] in formulating questions. . . . One member estimated . . . that the Committee would have been fifty percent less effective without NGO expertise. . . . Early in the Committee's practice, there appeared to be an understanding . . . that information could be used from any outside source.[62]

Indeed, the body which oversees the implementation of the ECOSOC Covenant, the Economic and Social Council, invites NGOs "to submit . . . written statements that might contribute to full and universal recognition and realization of the rights contained" in the Covenant.[63] Nevertheless, neither the Council nor the Human Rights Committee may make specific recommendations to the General Assembly; only general recommendations are acceptable.

Thus, while the United Nations Covenants constitute a significant attempt to restructure conventional state-based international law, the machinery of these laws remains fragile on account of the broad normative prescriptions involved and the immense coverage intended.[64] Potentially more instructive, then, of the possible use of human rights law to protect indigenous societies and the environment are regional human rights regimes.

Regional covenants, and specifically the American Convention on Human Rights, enumerate in an exceptional way the rights guaranteed and the means by which those rights are to be protected.[65] Parties to the American Convention agree to accept the jurisdiction of Inter-American Commission on Human Rights. Significantly, article 44 of the Convention gives power to the Commission to consider petitions lodged by persons, groups or NGOs.[66] Further, article 26 of the Regulations of the Inter-American Commission on Human Rights allows petitions on behalf of third persons by individuals or groups legally recognized in a member state of the Organization of American States. Thus, members of indigenous communities themselves or a representative organization are empowered to file suit against the state.

Substantively, a petitioner can seek precautionary measures to avoid irreparable damage to indigenous cultures caused by environmental degradation. Article 29 of the Regulations provides, in pertinent part: "In urgent cases, when it becomes necessary to avoid

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58. World Council of Indigenous Peoples, Rights of the Indigenous Peoples to the Earth (submission to the United Nations Working Group on Indigenous Peoples, July 1985).

59. Life-threatening effects of environmental exploitation include the destruction of natural areas used for subsistence hunting and farming and the introduction of disease by colonists and industry workers. Concerning the potential impact of global climate change, a similar diminution or even destruction of natural resources necessary to sustain life is possible. See Yanomami case, supra note 55, at 33.

60. Parson, The Individual Right to Petition: A Study of Methods Used by International Organizations to Utilize the Individual as a Source of Information on the Violation of Human Rights, in International Human Rights, supra note 6, at 324.

61. Fischer, Reporting Under the Covenant of Civil and Political Rights: The First Five Years of the Human Rights Committee, 76 Am. J. Int'l L. 142, 146 (1982).

62. Id. at 145-147.

63. E.S.C. Res. 1987/5, U.N. ESCOR Supp. (No. 1) at 10, U.N. Doc. E/1987/87 (1987).

64. The existing mechanisms of international law are weak instruments for protection of economic, social, and cultural rights because of the sheer complexity of the task of restructuring the international economic order and the difficulty of monitoring international activities in furtherance of these goals. See Trubek, Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs, Human Rights in International Law 233-235 (Meron ed. 1985).

65. Professor Goldman has remarked that the American Convention is "perhaps the most ambitious and far-reaching document of its kind ever elaborated by an international body." Goldman, The Protection of Human Rights in the Americas: Past, Present, and Future, in International Human Rights, supra note 6, at 628.

66. American Convention on Human Rights, OEA/Ser. L/V/II.50 doc. 6 (1981), reprinted

irreparable damage to persons, the Commission may request that provisional measures be taken to avoid irreparable damage . . . ."[67] Further, the petitioner may urge the Commission to request a prompt reply from the state in "serious or urgent cases or when it is believed that the life, personal integrity or health of a person is in imminent danger."[68] Though article 37 of the Regulations and, more generally, article 46 of the Convention require exhaustion of municipal remedies, urgent cases governed by article 29 or the failure of domestic legislation to afford due process of law excuse the petitioner from this requirement.[69]

III. Existing Remedies in Human Rights Law for Indigineous Peoples

A. *The Huaorani in Ecuador*

The Huaorani are nomadic hunters and gatherers that have lived from time immemorial in the Ecuadorian Amazonia between the Napo and Curaray Rivers.[70] With population estimates ranging from 525 to 3000[71], the Huaorani are a small tribe and the least assimilated of the six remaining indigenous cultures in the Oriente.[72] Approximately five-sixths of the Huaorani live within a reserve one-tenth the size of their traditional territory near Yasuni National Park.[73] The remaining tribe members, nine small bands, occupy traditional lands outside the reserve within or near Yasuni National Park.[74]

Huaorani families possess lots on which they plant manioc, a common food source, and plantain and migrate between them, hunting, fishing and gathering along the way. Their relationship with the forest is one of grave dependence and respect as each season the nomadic Huaorani subsist on the plantlife and wildlife of the Amazonia. As a result, they have developed sustainable methods of resource use which, though requiring large areas, have preserved the biological richness and natural processes of the area.[75]

Further, indigenous cultures of the Amazonia like the Huaorani vest in the environment profound spritual value that can only be appreciated, if not felt, by non-indigenous people. Elements of the environment such as lakes, trees, and wildlife are animated by religious and cultural forces which protect and mystify indigenous communities.[76]

Conoco Ecuador, Ltd., a subsidiary of the U.S. company Du Pont, plans to build a 175 kilometer road and auxiliary roads through the forest inhabited by the Huaorani in order to construct and maintain a pipeline for oil exploration.[77] Since 1972, the government of Ecuador has provided foreign corporations with concessions, or rights, to exploit large tracts of the Oriente for oil as long as the grantee finds oil in commercial quantities. As of April 1989, approximately 630,000 hectares of the Amazonia were being exploited for oil while

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67. Regulations of the Inter-American Commission on Human Rights, OEA/Ser L/V/II.50 doc.6 (1983), art. 29 [hereinafter Regulations].

68. Id. art. 34.

69. Regulations, art. 29; American Convention, art. 46.

70. The information recounted in this section comes from four sources. As a Research Fellow at the Centre for International Environmental Law in London, the author acquired up-to-date and detailed accounts of the Huaorani from Laura Rival, a doctoral candidate in Anthropology at the London School of Economics who lived among the Huaorani for two years. Also, the author was able to obtain both the report of Judith Kimerling, a scientist with the Natural Resources Defense Council who lived in Ecuador and studied the impacts of oil development on the ecology and culture of the Amazonia, and the Masters Thesis of Gustavo Gonzalez, a student in Environmental Planning at the University of California at Berkeley. As well, with the assistance of Helena Paul, an environmentalist at the Gaia Foundation in London, the author was able to examine the correspondences and reports of Conoco, Inc., as they relate to the Huaorani. See generally Rival, Report on the Huorani, Paper submitted to CIEL 1 (Summer 1990).

71. Gonzalez, Land Use Conflicts in Tropical Rainforests: A Critique of the Management Plan for Yasuni National Park in Ecuador, M.A. Thesis, Department of Landscape Architecture, University of California at Berkeley 37 (May 1990).

72. Rival, supra note 70, at 1; Kimerling, supra note 31, at 5.

73. Many Huaorani were initially enticed into a protectorate in order to be Christianized by fundamentalist Protestant missionaries who were part of the Summer Institute of Linguistics. Between 1960 and 1973, the Institute removed up to eighty percent of the Huaorani from the forest and resettled them in an area less than one tenth of their original territory. However, by the late 1970's opposition from university students and political groups accused the missionaries of serving as an agent of American imperialism by depopulating the forest to the interest of American oil companies. In 1981 the government expelled the Institute from Ecuador. In 1983 the government granted the reserve to the Huaorani. Rival, supra note 70, at 1; Gonzalez, supra note 71, at 10-11.

74. Yasuni National Park was created in 1979 and is considered by scientists to be one of the worlds most biologically diverse areas. The park itself is protected by both the Ecuadorian constitution which guarantees a clean environment and entrusts the state with preserving natural areas and the Ley Forestal, a law which expressly protects the park from exploitation. La Corporacion de Defensa de la Vida (CORDAVI), an Ecuadorian environmental group, brought a law suit against the state in the Constitutional Court of Ecuador in August 1988 to enjoin further oil development in Yasuni in hopes of preserving not only the park but the territory and culture of the Huaorani. A judgment in the case is still pending as of the time this Note goes to press. Gonzalez, supra note 71, at 2.

75. Gonzalez, supra note 71, at 2-5.

76. Kimerling, supra note 31, at 27-28.

77. Conoco is part of a consortium including OPIC, Maxus, Nomeco, and Murphy and Canan Offshore Ltd. Oil companies from France, Brazil, the United Kingdom, Argentina, Canada have also exploited Yasuni's oil reserves, thus additionally affecting the Huaorani. Nevertheless, it is Conoco's proposed development within Block 16 of Yasuni National Park that most egregiously threatens indigenous culture and lives. See, e.g., Gonzalez, supra note 71, at 3, 9; Kimerling, supra note 31, at 7.

another 3,000,000 hectares were in the exploratory phase of development. In addition, some 2,500,000 hectares were granted to oil interests by the end of 1989, including land in both Huaorani territory and Yasuni.[78]

As of 1988 Ecuador received 44.5 percent of its export revenues from oil and oil derivative products.[79] At the current rate of exploitation, however, the oil reserves are expected to last only ten to twenty years.[80] In 1984 an environmental bureau was created within the Ecuadoran Ministry of Energy and Mines, Direcion General de Medion Ambiente (DIGEMA).[81] But without authority to act under the existing oil laws, DIGEMA has been able to do little more than basic monitoring of the environmental effects of oil development.[82] Its requests for environmental impact assessments have gone unheeded by the oil companies.[83] For its part, Conoco has pledged support for "environmentally responsible development" that will neither harm the forest nor allow colonists and oil workers to threaten indigenous communities by competing for their resources.[84]

Despite the reassurances of the oil industry, however, oil exploration, exploitation and transportation entail severe risks and hazards for both the environment and the Huaorani. In the exploration phase of oil development, thousands of kilometers of trails and hundreds of heliports and detonation holes for seismic investigations will scar and disrupt the fragile systems of the forest leading to erosion, pollution and wildlife dispersion.[85] The Quichua tribe have reported that the ancient spirits they believe inhabit the Amazonia have abandoned their chain of sacred lakes since the exploitation of oil in Yasuni.[86]

Exploratory drilling, subsequent to seismic investigations, requires massive clearing of forest—two to five hectares for each well and ten to fifteen hectares for boards used for drilling platforms.[87] More heliports, too, will be needed thus requiring the destruction of more wooded area.[88] Drilling itself produces toxic, acidic, and alkaline wastes like petroleum, natural gas, drilling muds, and formation water which are discharged into surrounding soils or streams or burned within the forests.[89] DIGEMA has reported widespread destruction of flora and fauna due to the drilling.[90] Landfilling of waste, as proposed by British Petroleum and Conoco, would involve no pretreatment, lining, or leachate collection system.[91]

In the exploitation phase, more land will be cleared and more wells are drilled.[92] DIGEMA reports that oil spills from production station flowlines averaging 17,000 to 21,000 gallons are a bi-weekly occurence.[93] The Shusufindi and Aquaric Rivers, traditional fishing grounds of indigenous communities in the Amazonia, are now contaminated and have been abandoned by the local tribes.[94]

Additionally, transportation of oil is hazardous to the Amazonian environment and indigenous people.[95] Roads built for oil transportation facilitate soil erosion and sedimentation of rivers and streams.[96] They also serve as barriers to animal migration.[97] Even more invidious, they allow thousands of colonists to enter indigenous areas.[98] In the Cuyabeno Wildlife Reserve, for example, 1200 non-indigenous families followed a pipeline road to settle in the forest.[99] Colonists are notorious for degrading the rainforest and depriving indigenous communities access to traditional hunting and farming lands.[100] Meanwhile, both colonists and oil workers spread deadly disease among indigenous communities.[101] In Brazil between 1974 and 1976,

78. Kimerling, supra note 51, at 6.
79. Id. at 7.
80. Id. at 8.
81. Id. at 9
82. Id
83. Id.
84. Letters from Alex B. Chapman, Manager, Conoco Ecuador, to Helena Paul, May 8 1990 and June 8, 1990
85. Kimerling, supra note 51, at 11-14
86. Id. at 13
87. Id. at 14
88. Id.
89. Id. Each well produces 42,000 gallons of petroleum waste. When burned this waste produces air-born pollutants such as SO_x, NO_x, CO_x, and heavy metals. Heavy hydrocarbons are either burned or left in waste pits. Also, unsealed oil wells allow migration of contaminants into drinking water wells. Id. at 16.
90. Id. at 15.
91. Id.
92. Id. at 17.
93. Id. at 21.
94. Id. at 19-21.
95. Id. at 23-27.
96. Id. at 24.
97. Id.
98. Id. at 23.
99. Id.
100. As Laura Rival explains, oil workers and colonists are one and the same to the Huaorani—invaders. She remarks:

> [T]he track record of the oil companies . . . is not good. Uncontrolled colonization along the oil roads has destroyed most of the rainforest, leaving little land and no hunting for the Indians. . . . The Colon, Siona, and Secoya . . . have been reduced to only a few hundred individuals . . . and face cultural extinction. The Tetete have disappeared entirely, leaving just an oil field named after them.

Rival, supra note 70, at 7.
101. Gonzalez, supra note 71, at 43.

twenty-two percent of the Yanomami Indians in thirteen villages along an oil road in the Amazonian basin died as a result of disease introduced by construction workers.[101]

The deleterious effects of oil development in or near traditional Huaorani territory are thus not difficult to imagine. Aside from the tremendous loss of natural habitat and sustenance base,[103] there is the concomitant loss of control over their territory due to the intrusion of oil workers and colonists. "Once the [Huaorani] lose control of their resources, they are compelled to become agro-pastoralists or wage workers,"[104] abandoning their traditional relationship with the environment. Oil development thus introduces and accelerates acculturation of indigenous tribes like the Huaorani.[105] Integration into a cash economy debilitates family and cultural life by luring members away from the tribe in search of migratory wage labor.[106]

The oil companies encourage the process of assimilation by providing the Huaorani with gifts of soft drinks, chainsaws and machetes.[107] Racism pervasive in Ecuadorian society and directed, in part, against indigenous peoples will further serve to dismember indigenous culture.[108] Dr. James Yost, an anthropologist hired by Conoco to develop a policy for dealing with the Huaorani and formerly associated with the Summer Institute of Linguistics, explains that "[d]evelopment in an area like the Yasuni has implications that no single individidual can totally anticipate."[109] Overall, according to Yost, "when an area like this has been developed in the past, the results have been detrimental to the local people. In fact all too frequently they have been catastrophic."[110] Dr. Yost further states that the Huaorani come upon almost everything in the forest, especially by taste.[111] Thus, the hazardous wastes and remnants of oil development could likely injure or kill many nomadic Huaorani. Moreover, the commercial hunting and fishing which serve to supply the camps of

102. Confederacion de Nacionalidades Indigenas de la Amazonia Ecuatoriana, Petition Submitted to the Inter-American Commission on Human Rights, Organization of American States, on behalf of the Huaorani People Against Ecuador 15 (June 1, 1990)

103. As one of the richest ecosystems in the world, Amazonia, and consequently the Huaorani, will have several species of plants used for medicinal, religious and artisanal purposes. Kimerling, supra note 31, at 28

104. Gonzalez, supra note 71, at 40

105. Kimerling, supra note 31, at 27-29

106. Id.

107. Id. at 30

108. Id. at 27-28

109. Gonzalez, supra note 71, at 44

110. Id.

111. Kimerling, supra note 31, at 31.

oil workers will, Dr. Yost anticipates, destroy the subsistence base of the Huaorani.[112] Finally, Dr. Yost says that oil workers pay Huaorani men to bring Huaorani women into the camps for prostitution.[113] As a result, the women may be deprived of a family life because, if they become impregnated by oil workers, their children will be killed and the women will be denied a spouse.[114]

Redress for the harm perpetrated against the Huaorani and the rainforest by oil development and its attendant effects can be sought, in part, from the Inter-American Commission on Human Rights.[115] As a party to the American Convention on Human Rights, Ecuador accepts *ipso facto* the jurisdiction of the Commission.[116] Under article 44 of the Convention and article 26 of the Commission Regulations, a petition can be filed by a member of the Huaorani, by the Huaorani as a group, or by an NGO on the Huaorani's behalf.[117] As a petitioner, the Huaorani can seek precautionary measures, under article 29 of the Convention, to avoid irreparable damage to persons caused by reckless incursions of oil workers and colonists into Huaorani territory.[118] Certainly, the life, personal integrity, and health of all Huaorani residing in or travelling through exploited areas are in imminent danger. And clearly, too, this is an urgent matter necessitating immediate relief. Therefore, under article 29 the exhaustion of domestic remedies is not required.[119]

Additional substantive claims are available to the Huaorani. Fore-

112. Id.

113. Id.

114. Id. at 31.

115. La Confederacion de Nacionalidades Indigenas de la Amazonia Ecuatoriana (CONFENIAE), an organization of representatives of all the Ecuadorian Amazonian indigenous people, in collaboration with attorneys from the Sierra Club Legal Defense Fund, submitted a petition to the Commission in June 1990.

116. Ecuador ratified the Convention of December 8, 1977 and is therefore bound by both the American Declaration of the Rights and Duties of Man, adopted by Ninth International Conference of American States, Res. XXX, Final Act of the Ninth International Conference of American States, Bogota, Columbia, March 30 - May 2, 1948, at 38 (PAU 1948) [hereinafter Declaration] and the American Convention on Human Rights, O.A.S. Official Records OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 (1970) [hereinafter Convention], and all customary international law as evidenced, *inter alia*, by documents, declarations and resolutions of the United Nations.

117. See supra note 66 and accompanying text.

118. See supra note 67 and accompanying text.

119. Land ceded to the Huaorani in April 1990 after pressure was applied on the government by CONFENIAE nevertheless is still vulnerable to oil exploitation. The grant specifically reserves the right in the state to extract subsoil resources and prohibits the Huaorani from interfering with this right. Moreover, no protection from colonization was provided. This action is indicative of the reluctance of the state to protect the welfare of the Huaorani and thus provide due process of law.

most, the right to life and security of person are violated by the actual and potential activities of oil companies authorized by the government of Ecuador. Exploitative practices and colonist encroachment implicate these basic rights which are protected by article 27 of the Convention and universally recognized as *jus cogens*.[120] Moreover, unable to live and evolve in their unique way, the Huaorani are susceptible to ethnocide.[121] Recent human rights reports have urged that immediate attention be given to cases involving the destruction of indigenous cultures and that ethnocide is a grave violation of international human rights law.[122] Hence, as government plans to alleviate pressures on Huaorani culture are inadequate to maintain Huaorani traditions and practices in light of the sanctioning of rapacious exploitation and colonization, the right to life of the Huaorani, individually and collectively, is compromised.[123]

Further, in a similar case the Commission adjudged that gross encroachments by oil workers and colonists onto traditional indigenous lands lead to declines in life-expectancy and health among indigenous people.[124] Governments are obliged to take timely measures to prevent activities which negatively affect the welfare of indigenous communities.[125] Deforestation and pollution jeopardize Huaorani culture by severing the vital nexus between them and the environment.[126]

120 See Case 9647, Inter-Am. C.H.R. 147, 166, OEA/Ser. L/V/II.71, doc. 9 rev. 1 (1987) (applying concept of *jus cogens* to United States system of capital punishment).

121. See, e.g., UNESCO, Declaration on Ethnocide and Ethnodevelopment, San Jose (1981).

122. See, e.g., Study of the Problem of Discrimination Against Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/1983/21/Add. 3; Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.4/Sub.2/1985/6.

123. See Annual Report, Inter-Am. C.H.R. (1973), at 27 OEA/Ser.P/AO/doc.409/174, Mar. 5, 1974.

124. See Yanomami case, supra note 55. In 1985 the Inter-American Commission found widespread human rights abuses in Brazil on account of road construction, destruction of Amazonian land, government-authorized exploitation of resources, failure to stem massive colonization and contagion, and the displacement of indians from traditional land. Id. In the Peruvian Amazonia, oil exploitation by Royal Dutch Shell in collaboration with the government of Peru over a period of three years resulted in disease that killed almost half the Nahua population and initiated a wage labor economy that disrupted Indian traditions with alcoholism and prostitution.

125. Yanomami case, supra note 55, at 33. See also Velasquez Rodriguez Case, Inter-Am. C.H.R., Judgment of July 29, 1988, Inter-Am. Ct. H.R. Annual Report 35, OEA/Ser. L/V/III.19 (1988) (governments have an affirmative duty regarding the promotion and protection of basic human rights).

126. See Munkterthorn, Background Paper, Report on the U.N. Seminar on Indigenous Peoples and States, U.N. Doc. E/CN.4/1989/22 (1989).

concerning rights to minimal self-determination such as the right to family, home, privacy, and property incorporated in the Declaration and Convention, the Huaorani have a right to exist as a distinct culture.[127] Article 27 of the International Covenant of Civil and Political Rights, to which Ecuador is a signatory, mandates that the cultural identity of a community be protected.[128] The Huaorani may assert these rights to preserve their identity and prohibit harmful intrusion upon or degradation of traditional lands and destruction of traditional livelihoods and practices, without seeking independent sovereignty.

Thus, under regional regimes such as the American Convention on Human Rights, claims can be brought before an international tribunal to simultaneously protect indigenous peoples and, indirectly, the environment. The situation changes, however, when harm to indigenous societies and the environment is not actual but potential.

B. *Cultures of Low-lying Islands in the Caribbean, South Pacific, and Indian Oceans*

The international legal process is clearly stretched to accomodate alleged human rights violations brought on behalf of isolated communities possibly threatened by the potential consequences of a disputed environmental condition, namely global warming. Given this problem, this section of this Note discusses the possible application of existing human rights law in the context of low-lying island cultures potentially threatened by global climate change.

There is little doubt among the scientific community that global climate change brought about by increased emissions of fossil fuels poses at least some threat to the health of the earth's ecosystems, including humankind.[129] As Barber Conable, President of the World Bank, has remarked, "[t]he possible risks [of global warming] are too high to justify complacency or evasion. The international community cannot sit back hoping that these problems will somehow pass us

127 See Mukito Report supra note 49, Lubicon Lake case, supra note 52.

128 See International Covenant on Civil and Political Rights, supra note 7, art. 27.

129 See Council on Environmental Quality, Guidance Regarding Consideration of Global Climactic Change in Environmental Documents Prepared Pursuant to the National Environmental Policy Act, 6 (Feb. 24, 1989); Mintzer, Living in a Warmer World Challenges for Policy Analysis and Management, 7 J. Policy Analysis & Mgmt. 443 (1988); The Changing Atmosphere: Implications for Global Security (July 3, 1988), held in Toronto, Canada on June 27-30 (1988); Stevens, New Report Intensifies the Warning on Global Warming, The New York Times, Oct. 17, 1990, at 9, col. 1.

by."[130] Though the industrialized nations have contributed most significantly to what many believe to be a global crisis,[131] lesser developed nations are likely to suffer the consequences of global warming equally, if not more, than their industrialized counterparts.[132] This is particularly so in the case of low-lying coastal and island states which potentially will lose substantial territory or, worse, disappear under rising seas.[133]

Island states in the Caribbean, South Pacific and Indian Oceans such as Trinidad and Tobago, Kiribati, the Republic of Maldives, and Tuvalu are rarely more that three meters above sea-level.[134] A two meter rise in sea-level, for instance, could decimate Kiribati and its 60,000 inhabitants, or the capital of the Maldives, or many of the populated atolls of the Indian Ocean.[135]

As island cultures, these societies have maintained for centuries a vital relationship with the marine environment. It is a source of sustenance and economic opportunity, allowing a rich food source and profitable tourist and commercial trade. These cultures have shaped their traditions around the sea and islands; indeed they are defined by their insular, marine existence. Thus, even a moderate rise in sea-level could decimate islands and the cultures which inhabit them. Floods and storms would become more frequent and severe. Diminished drinking water supply and a dearth of tourists due to eroded beaches and damaged coral reefs would also likely result.[136]

Threatened with territorial and cultural devastation, low-lying states essentially must have recourse to the protections afforded by human rights law. Without an applicable regional regime, Carribean, South Pacific and Indian Ocean states can attempt to seek remedies under customary international law.[137] These states could, conceivably, sue offending states for violating basic human rights—such as the right to life and security of person and the right to peaceful enjoyment of property—on account of massive emissions of gases which could alter the environment and thus destroy their habitats and cultures.[138]

However, the difficulties in assessing each state's contribution to the harm expected and in fashioning relief which will not inequitably effect an offending party are surely prohibitive of such claims.[139] Moreover, the magnitude and complexity of proof, liability, and responsibility, coupled with the bulwark of state sovereignty, essentially debilitate existing human rights law in this situation. Claims based on existing human rights standards thus appear impracticable for the protection of low-lying islands and the cultures which subsist on them.

IV. Recent Developments in Human Rights Jurisprudence

Notwithstanding the relative inadequacy of existing international law, recent developments in the jurisprudence of human rights portend a more significant role for human rights law in preventing both global warming and the destruction of human cultures that would accompany it.

As a successor to the first and second generations of human

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130. Conable, Development and the Environment: A Global Balance, 5 Am. U.J. Int'l L. & Pol'y 235, 239 (1990).

131. North America and Europe, representing eight percent of the world's population, nonetheless emit three-quarters of the world's CO2. Developing countries, however, represent eighty percent of the world's population but contribute only seven percent of CO2 emissions. Id. at 244.

132. See infra notes 135-136 and accompanying text.

133. See Male Declaration on Global Warming and Sea Level Rise, Small States Conference on Sea Level Rise, held in Male, Republic of Maldives on Nov. 14-18, 1989, reprinted in Selected International Legal Materials for Global Warming, 5 Am. U.J. Int'l L. & Pol'y 313, 602 (1990) (describing potential for global warming and sea level rise and their impact on small coastal and island states); Zaelke and Cameron, Global Warming and Climate Change—An Overview of the International Legal Process, 5 Am. U.J. Int'l L. & Pol'y 249 (1990).

134. Zaelke and Cameron, supra note 133, at 259.

135. Id.

136. Id. at 260.

137. Of the states mentioned, none is a signatory to either of the U.N. covenants. Nevertheless, the human rights involved, e.g., the right to life, are norms of customary international law or even *jus cogens* and thus can be invoked by any state party. Lillich, Civil Rights, in Human Rights in International Law, supra note 64, 117-118.

138. Customary international law, apart from human rights norms, has proved largely inadequate when applied to environmental damage. While the International Court of Justice has held that every state has the obligation not to use its own territory in a way which contravenes the rights of other states, see Corfu Channel Case (U.K. v. Albania), 1949, I C.J. 4, 22; Lake Lanoux Case (Fr. v. Spain), 53 Am. J. Int'l L. 156 (1959), substantial proof of injury must be preferred before a court will act to enjoin a state. See Trail Smelter Case (U.S. v. Canada), 3 R. Int'l Arb. Award 1907 (1941).

Moreover, there are no definitive precepts in international law which address state liability for environmental damage caused by private activities within a state's territory, or the consequences of transboundary pollution. This is largely due to the reigning assumption in international law that states have the sovereign right to develop their economies and to determine the rules which govern activities on their territories. See Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31), at 50, U.N. Doc. A/9631 (1974). But see article 194(2) of the U.N. Convention on the Law of the Sea opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), reprinted in 21 I.L.M. 1261, 1308 (1982) ("States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States . . . and their environment.")

rights,[139] a so-called third generation of rights is emerging, adumbrating the rights to environment and development, among others.[140] These rights purport to signify an evolving conciousness of the world as interdependent. Akin to economic, social, and cultural rights, this latest category of rights can also be described as containing solidarity, or group, rights. Rights to environment and development, though not yet regarded as legitimate rights,[141] may serve in the future to protect human communities and the environment. Moreover, these rights are not contravening, as their respective titles would indicate, but actually mutually reinforcing.

The idea of a right to environment has been discussed for some years.[142] The concept holds that "[a]ll human beings have the fundamental right to an environment adequate for their health and well-being and the responsibility to protect the environment for the benefit of present and future generations."[143] Moreover, a right to environment implies an international obligation on the part of states vis-a-vis other states and even individuals irrespective of their nationality.[144]

The World Commission on Environment and Development (WCED) has encouraged the "full recognition and legal protection of the environmental rights of individuals, groups and organizations."[145] Implicit in the idea of environment, the WCED adds, is "[c]ulture and cultural heritage of all sorts" which would also be protected by a right to environment.[146] Further, an environmental right entails the substantial participation of NGOs to ensure that states protect both

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139. See supra notes 39-43 and accompanying text.

140. See Rich, The Right to Development: A Right of Peoples?, in The Rights of Peoples, supra note 6, at 41.

141. See, e.g., Experts Group on Environmental Law of the World Commission on Environment and Development, Environmental Protection and Sustainable Development Legal Principles 40 (1986) [hereinafter Final Report]; Brownlie, The Human Right to Development, 14-16 (1989).

142. See, e.g., Gormley, supra note 22. A separate discourse concerning rights in the environment itself began as early as 1964 when a law professor at the University of Pennsylvania wrote a piece on the rights and duties of animals and trees in the Journal of Legal Education. Morris, The Rights and Duties of Beasts and Trees: A Law Teacher's Essay for Landscape Architects, 17 J. Legal Educ. 185 (1964).

143. Charter on Environmental Rights and Obligations of Individuals, Groups and Organizations, art. 1 reprinted in Report on the Regional Conference at Ministerial Level on the Follow-Up to the Report of the World Commission on Environment and Development in the Economic Commission for Europe Region, Action for a Common Future, held at Bergen, Norway, May 8-16, 1990 [hereinafter Action for a Common Future]. See also The Hague Declaration, The Hague, Netherlands, March 11, 1989, reprinted in Selected International Legal Materials for Global Warming, supra note 133, at 367.

144. See Final Report, supra note 141, at 39-41.

145. Action for a Common Future, supra note 143, at 44.

146. Id.

environment and individuals or groups whose environment is imperiled.[147] The WCED states that "[g]overnments should recognize the special expertise and experience of NGOs, and their direct partnership and contact with local communities [so that] . . . traditional activities of indigenous peoples [will] be allowed to continue."[148] NGOs thus would be empowered to act on behalf of individuals or groups in the interest of the environment, notwithstanding jurisdictional constraints.

Another aspect of the right to environment is the notion spelled out in article 1 of the Charter on Environmental Rights that "[e]very generation receives a natural and cultural legacy in trust from its ancestors and holds it in trust for its descendants."[149] This trust "imposes upon each generation the obligation to conserve the environment and natural and cultural resources for future generations."[150] By depleting resources and degrading the environment, the present generation interferes with "the rights of future generations to share in the benefits of the planet."[151]

This concept of "intergenerational equity" thus demands equality among generations and between members of a particular generation to access and enjoyment of a healthy environment, and postulates that all states have an obligation to future generations regardless of nationality.[152]

As a component of an environmental right, then, rights of future generations are not individual rights but group rights which, conceivably, could be guarded by NGOs or state-appointed representatives acting in the capacity of a human rights commission.[153] Trust funds could be established as well to compensate future generations for depletion of resources and to meet future costs of present

147. See Charter on Environmental Rights, art. 6-8, in id.

148. Id. at 48-49.

149. Id.

150. Weiss, In Fairness to Future Generations, Environment, Apr. 1990, at 7.

151. Id. at 8.

152. Id. at 9. Principles of intergenerational equity include:

1. Conservation of options—diversity of the natural and cultural resource base available to future generations must be conserved.
2. Conservation of equality—environmental quality must be preserved which is comparable among generations.
3. Conservation of access—each generation must provide its members with rights of access to the planetary legacy of past generations and conserve that access.

Id. at 9-10.

153. See Sands, The Environment, Community and International Law, 30 Harv. Int'l L.J. 393, 416 (1989).

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development."[154]

The problem underlying the concept of a right to environment[155] is that as long as the right remains theoretical it is essentially non-justiciable. Reflected only in article 24 of the African Charter of Human and Peoples Rights and various state constitutions, the human right to a healthy environment does not constitute well-established international law.[156] While corrollary duties not to impair the environment are implicit in rights listed in the United Nations human rights covenants—for example, the right to life[157] or the right to adequate living standards[158]—no enviromental right *per se* exists either as positive international law or general principles of the type envisaged by article 38 of the Statute of the International Court of Justice.

Nevertheless, a right to environment might well develop in the future so as to protect the whole of nature, including human societies. This potentiality will be realized, however, only when individuals and groups are empowered to bring suits on behalf of the environment, that is, given legal standing, as the WCED recommends. Further, it is clear that a "new planetary ethos in which each generation views itself both in relation to past and future generations of the human species and as an integral part of the natural system" will be necessary before such empowerment occurs.[159]

Concurrent with the on-going growth of a right to environment is the emergence of a right to development. Adopted in 1986 by a Resolution of the U.N. General Assembly,[160] the concept of development denotes an inalienable right which at once mandates that individual states be able to control their own economies and thus develop in their own way, and also suggests that the performance of an economic system is related to qualitative criteria based upon human rights standards.[161] That is, development involves social and cultural, as well as economic, change.

Because the right would essentially guarantee to a state the ability to develop and thus to exploit its natural resources, it would appear that, save for restrictions imposed by other international and municipal laws,[162] the right to environment and even more established cultural rights could be compromised. Industrialized states, for example, under the shibboleth of development, could continue to emit gases which result in global warming and the submersion of low-lying islands. Moreover, in less developed nations seeking to improve their economic status, the right to exploit their resources could well come

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154. Weiss, supra note 149, at 30.

155. Another concept of environmental rights exists, which vests in the environment itself legal rights separate from human agents. With the publication of Christopher Stone's article, Should Trees Have Standing? Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450 (1972), the discourse of environmental rights received significant attention from the legal community. See Gormley, supra note 22; R. Nash, The Rights of Nature: A History of Environmental Ethics (1989); C. Stone, Earth and Other Ethics: The Case for Moral Pluralism (1988); Livingston, Rightness or Rights, 22 Osgoode Hall L.J. 309 (1984); Tribe, Ways Not To Think About Plastic Trees: New Foundations for Environmental Law, 83 Yale L.J. 1315 (1974). However, scholars disagree about the validity of such rights. See, e.g., Stone, supra; Feinberg, The Rights of Animals and Unborn Generations, in Philosophy and the Environmental Crisis (Blackstone ed. 1974); Stone, Earth and Other Ethics, supra. Professor Feinberg has argued that something must possess the ability to be harmed or benefitted and be cognizant of such treatment in order to be thought of as possessing rights. Natural objects, therefore, must have cognitive capacity, for "without awareness, expectation, belief, desire, aim and purpose," a being can have no interest, without interest, he cannot be benefitted, and without capacity to be a beneficiary, he can have no rights. See Feinberg, supra, at 47-60.

Moreover, even if one were to accept that natural objects may possess rights, how would a guardian know what an inarticulate object desired vis-à-vis legal interest, in prevailing action or bringing suit? Also, a right to environment can be seen as excessively biocentric, if not imperious. By conferring rights on the rest of nature, humans would essentially require all existence to be moved under human control. Livingston, supra, at 321. Applying rights to the whole of nature, then, would be to anthropomorphize, to humanize, nature to a degree not even technology has been able to achieve as well as "to export and legitimate a pathological obsession with hierarchical relationships." Id. at 320.

Arguably, this latter criticism could also be invoked against the idea of a right to environment because it subsumes the environment to human interest. The environment becomes, essentially, an entitlement like social security in a welfare state. Nevertheless, pragmatism and prudence surely compel acceptance of this idea to promote environmental health.

156. Crawford, The Rights of Peoples: "Peoples" or "Governments"?, in The Rights of Peoples, supra note 6, at 66.

157. See Universal Declaration of Human Rights, supra note 31, art. 3; International Covenant on Civil and Political Rights, supra note 7, art. 6.

158. International Covenant on Economic, Social and Cultural Rights, supra note 33, art. 1.

159. Weiss, supra note 149, at 31.

160. G.A. Res. 41/128, 41 U.N. GAOR Supp (No 53), U.N. Doc. A/41/53 (1986). The right to development remains *lex ferenda* on account of the non-binding quality of General Assembly resolutions. However, Professor Brownlie suggests that because the Resolution itself refers to other United Nations human rights documents now regarded as general international law, the right to development logically grows out of existing human rights principles and is analogous to the principle of effective interpretation and of implied powers "familiar in the law of treaties." Brownlie, supra note 141, at 15. But see Rich, in The Rights of Peoples, supra note 6, at 41 (questioning whether it is possible to discuss the right to development in terms of existing international law).

161. See Brownlie, supra note 141, at 1. See also Charter of Economic Rights and Duties, supra note 131, art. 7. ("Every State has the primary responsibility to promote the economic, social and cultural development of its people. To this end, each State has the right and responsibility to choose its means and goals of development.")

162. International rules against transboundary pollution, for instance, or the penumbra of human rights norms could serve to restrict the right to development. So too could domestic environmental or civil rights laws. However, given the primacy of economic concerns in all municipalities, it cannot be expected that these constraints will significantly affect resource exploitation.

at the expense not only of the environment but indigenous societies which depend on it. While ideally in the interest of the whole of a society, development may often result in the destruction of those cultures within the society which do not want to partake in economic development but wish to remain as they are—traditional, pre-industrial.

There is a less ominous face, however, to the right to development. As the International Commission of Jurists has urged, development is not a purely economic matter. Rather, development should be seen as

> a global concept, including, with equal emphasis, civil and political rights and economic, social, and cultural rights .... True development requires a recognition that the different human rights are inseperable from each other .... Development should be understood as a process designed progressively to create conditions in which every person can enjoy, exercise and utilize under the Rule of Law all his [or her] human rights, whether economic, social, cultural, civil or political.[163]

Development thus aims at the improvement of the welfare of the entire population of a state.[164] Concerning indigenous cultures, Professor Brownlie explains that:

> [t]hey are to share in the process of development of the national community as a whole, without discrimination. This is the outcome of the prominent reference to the usual standards of human rights in the Declaration [on the Right to Development] and the interdependence of economic and other categories of rights. At the same time, there can be no doubt that indigenous peoples are among the beneficiaries and claimants of the right to development.[165]

The right to development, then, entails an abiding interest in social justice and could thus enhance the status of indigenous peoples by protecting their right to develop their unique cultures. The problematic of development remains, however, because states will be hard-pressed to maintain an equitable balance between cultural autonomy and the introduction of economic changes intended to improve living standards throughout the state.

In order to resolve this problematic, the notion of "sustainable development" and the precautionary principle have emerged as components of international environmental discourse. Sustainable development implies that states, regardless of their stage of development, must treat the conservation of natural resources and the environment as an integral part of the planning and implementation of development activities.[166] Particular attention is to be paid to environmental problems arising in developing countries. Underdevelopment often involves a risk of improper management of natural resources due to a lack of capital for financing institutions required to conserve natural resources and a dearth of relevant scientific and technological expertise. Thus, sustainable development involves the establishment of programs designed to provide developing countries with financial support and scientific and technical information and equipment, garnered in part from developed states, to promote rational use of natural resources and to prevent or abate degradation of the environment.[167]

Concomitant with the notion of sustainable development is the precautionary principle. This principle holds that in order to achieve sustainable development environmental measures "must anticipate, prevent and attack the causes of environmental degradation."[168] As the WCED emphasizes, "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[169]

Clearly these principles embody a prudential, progressive attitude towards the global environment and the human societies that constitute a part of it. Also, they appear to resolve the problematic of environmental and cultural preservation and economic development. Yet, as mere principles and theories, sustainable development and the precautionary principle remain essentially effete, lacking even the semblance of law. Unlike the idea of a right to environment, however, these principles do not seem to require a substantial leap in sensibility or consciousness. They are thus likely to be more quickly realized in the form of positive international law than the right to

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163 Sieghart, An Introduction to the International Covenants on Human Rights, Paper Prepared for the Commonwealth Secretariat 13 (London, 1988)

164 See Sieghart, supra note 40, at 95

165 Brownlie, supra note 141, at 19

166 See Final Report, supra note 141, at 63-69; World Charter for Nature, G.A. Res. 37/7, 37 U.N. GAOR Supp (No 51), U.N. Doc. A/37/51 (1982)

167 Final Report, supra note 141, at 67-68

168 Action for a Common Future, supra note 143, at 13

169 Id.

environment [170]

V. Expanding the Limits of International Law: Ideology and Contingency

> When we will and act, we choose among our self-conceived possibilities and act to actualize the chosen possibility. The basis of our choosing is value. Our values depend on the realities within which we live, including the whole reality-for-itself of each of the societies to which we belong, from the society of the family to the international society of the whole human race.[171]

As demonstrated above, international law in its present state can and should be expanded to protect the rights of indigenous peoples and the environment. Recent developments in the jurisprudence of human rights and international environmental policy betray a potentially more forceful role for law in these matters. Yet, the principle of state sovereignty continues to thwart or limit the initiatives of groups and individuals on behalf of human rights and environmental protection while allowing states themselves to persist in relentlessly exploiting natural resources in order to maintain or enhance the living standards of their populations. As long as international law and consequently international society are conceived as constituted primarily by states vis-a-vis individuals and groups, these same entities will continue to sanction the destruction of cultures and the environment.[172] For it is generally in the interest of a state qua state to exploit its resources fully in order to promote economic self-reliance or, alternatively, to encourage other states to develop its resources to amass revenue.

Moreover, the role of state responsibility for environmental damage is severely limited.[173] Consequently, an aggrieved state has limited recourse in international law for transboundary environmental injury. More importantly, most states have little or no incentive to sue other states when they themselves are likely to be liable for some transboundary environmental injury.

International law, derived from the international community, is supremely ideological. It exists as the result of a particular conception of the way the world is, or should be, and admits of only periodic mutations. The idea of state sovereignty controls: international law is made by and for states; individual human beings and non-governmental entities are not subjects of international law; each state is empowered to formulate its own policies and pursue its own interests; states only *choose* to accept limits on the exercise of their sovereign authority. This ideology of international law—state sovereignty—presents almost no conception of the world as socially or morally responsible for the consequences of international activities. The degradation of the environment and indigenous cultures attests to this grave deficiency.

But international law does not have to be defined exclusively in terms of state sovereignty. Ideologies are malleable, if not replaceable. Moreover, it is arguable that the existing ideology of international law is not essential, not inherent in the way the world functions, but in fact the result of history, of contingency.[174]

As cultural and environmental crises reveal, the current conception of international law defies global realities. Especially now, late in the twentieth century, state boundaries and differences have been rendered increasingly meaningless by technological forces and the widespread desire for democratic, market-based systems. Further, states and the peoples that comprise them exist interdependently with other states and peoples. There is simply no such reality as atomistic, self-contained states.[175]

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170. The recent Bergen Conference and the Second World Climate Conference held in Geneva in the Fall of 1990 signify an abiding interest among the international community in converting these principles into laws as part of the larger objective of abating global environmental degradation.

171. P. Allott, Eunomia: A New Order for a New World 413 (1990).

172. Certainly there has been progress in forging international agreements vis a vis the environment and human communities. See, e.g., Vienna Convention for the Protection of the Ozone Layer, March 22, 1985 reprinted in 26 I.L.M. 1516 (1987); Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, reprinted in 26 I.L.M. 1541 (1987). Nevertheless, such progress has been episodic and many states are simply not parties to international conventions. Thus, states may persist in causing environmental and cultural damage.

173. See supra note 138 and accompanying text.

174. Professor Allott elegantly describes the evolution of the idea of state sovereignty and its succession to primacy in international law. What began as a theory of international law grounded in natural law, where human beings constitute the core of international law, was abruptly transformed in the eighteenth century into a conception of the world as state based. Allott, International Law and International Revolution, supra note 29, at 13-15. On account of a book by Emmerich de Vattel, Allott explains, the theory of state sovereignty was effectively disseminated throughout Europe. Written in French (the leading natural law theory was published in Latin and thus accessible only to the learned) and "archetypally eighteenth century," Vattel's book "was read by everyone that mattered . . . [and] formed the minds of those who formed international reality." Id. at 14-15.

Thus, international law and relations did not have to be conceived in the manner they are currently. Were it not for contingency—the use of French, say instead of Latin - another, different ideology of international law might have arisen.

175. Brian Urquhart, former UN Under Secretary General recently noted that "pollution,

The "commodities" of international exchange—resources, goods, ideas—have become a vital part of each nation's daily functioning. Thus global interdependence means that the actions of any state and its population may adversely affect another state and its population inadvertently. Certainly, this is true both in the case of the Huaorani threatened by the energy "needs" of foreign states, and the situation of low-lying islands imperiled by global climate change resulting, in large part, from the energy use of industrialized states.

International law, then, should come to reflect *these* contingencies of history. It should incorporate as subjects the individuals and groups that constitute states and, *a fortiori*, the international community. Only then will the critical problems of environmental degradation and cultural extinction—issues which, after all, affect those selfsame individuals and groups and not the abstract agents called states—be effectively resolved.

William Andrew Shutkin

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radioactive debris, the flow of money, the power of religious or secular ideas, [and] AIDS . . are only a few of the phenomena that pay scant attention to national borders or to sovereignty." Urquhart, Sovereignty vs. Suffering, N.Y. Times, April 17, 1991, at A23, col. 1 (late ed.)

UGC ACADEMIC STAFF COLLEGE PROGRAMME FOR LAW TEACHERS

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"TEACHER, COME BACK ... AND MEET THE LEARNER!"

By
Blair Stone

Doesn't it seem strange that the students in our Universities are persons who remain substantially unknown to those who teach them? This paper addresses the question of how and why learners who are not known, and whose needs are therefore not understood, are being frustrated by the way teaching is currently conducted in Universities; and how forms of teaching might be generated which recognise and cater for the needs of individuals. One way of generating more satisfying teaching forms - psychotypal instruction - is considered in some detail.

The Teaching Problem - An Interpretation :

When you do anything for a long time you get used to it. There is a numbing effect. Gradually what might be obvious to an outsider becomes hard to perceive. As fish don't know they live in water, University teachers have got used to the teaching environment. And so the system rolls on basically unchanged year after year. We have learned to live with it.

Among the students however, and in the community generally, there are high levels of frustration and dissatisfaction with University teaching, as it is. In an important sense this dissatisfaction is the teaching problem. Stripped to its essentials the cause of the dissatisfaction is that we "teach" groups. In aiming to teach the group, individual persons - our real clientele - are inevitably ignored. The approach guarantees it.

In our teaching, aren't we at the end of a long road? Before priting, a monk reed aloud from his own handwritten test and each novice recorded every word, creating his own book. Thus - "class" teaching. But that which served the purposes of the middle ages is not necessarily helpful today. Yet despite our democratic society, unprecedented cultural diversity in the student population, and an entirely different educational need, group instruction remains the norm.

But in every problem lies an opportunity. As far as University teaching goes, it would not be an exaggeration to say we live in an age of hard-knocking opportunity. To take

advantage of it we only need to find satisfactory ways of teaching individuals.

What Then Does "Good Teaching" Mean today?

Although the question of what constitutes good teaching arouses debate, clearly "good teaching" will employ strategies that overcome students high levels of frustration and dissatisfaction with group teaching forms which inherently interfere with their attempts to learn.

Specifically, "good teaching" will give students better opportunities to do their learning in ways which they find satisfactory as individuals, and will allow them to use time efficiently. The definition can be made clearer by also considering it in the negative - "good teaching" will employ strategies that don't unreasonably frustrate individuals in their learning, and which don't involve students in situations which result in great wastes of time.

The Kind of Teaching That is Dominant in Universities Today :

To better understand the teaching problem we need to look more closely at the kind of teaching that causes it.

Excepting laboratory and field work activities, there are two clearly identifiable major forms of teaching in Australian Universities today. The first and overwhelmingly the dominant one is the already mentioned lecture-tutorial pattern. The second is individualised instruction, which has been instituted in a small but growing way in recent years. The two forms are often seen to be competing and there is a body of opinion that the new form will in time substantially replace the old and thus solve the teaching problem in Universities. If this were true there would be no need to look for new strategies to alleviate or solve the problem. Such an assumption obviously needs to be evaluated.

The lecture-tutorial pattern in use in Universities today may be fairly described as the descendent of the medieval class teaching method [illegible] with modern aids, some of which are

electronic. It is the dominant pattern and the one which is the subject of so much student criticism and discontent. Individualised instruction - including some uses of the computer which may not be recognised or labeled as such - is a modern form which emphasises individual learning in a controlled environment. In many respects it is like a very well structured homework assignment done in class time. Individualised forms have arisen to overcome the limitations inherent in group teaching.

How Do the Two Forms Compare as "Good Teaching"?

Numerous studies have demonstrated that students have difficulty understanding and don't retain much of what they hear in lectures. Adjunct tutorials are often experienced as dominated by a few vocal students. The lecture-tutorial strategy is not perceived as "good teaching" because far from providing reasonable opportunities for effective learning, both lectures and tutorials are seen as offering quite problematic opportunities for significant learning, which often result in large blocks of wasted time.

Individualised instruction on the other hand scores highly because it gives learners the opportunity to be in control of the process of learning - if not necessarily the content! - and to achieve time efficiencies. Individualised instruction is better teaching than lecture-tutorials. But the key to that achievement by individualised instruction lies in the teacher's role shifting from presenter to learning program designer. This change has seen the teacher moved physically off-stage while the students are involved in their structured active learning. And here lies the rub, as we shall see.

Are Other Strategies Needed?

As individualised instruction seems to outperform lecture-tutorials in many ways, one might logically conclude that it would be a supportable strategy in terms of accountability, i.e. the worry about experiencing the consequences of one's deeds. However, attitudes come into play here. Many academics argue that in terms of perceived accountability it is important for academics to be seen to be "teaching". A considerable body of public opinion, it is argued, sees academic as already "teaching" too little. If lecture-tutorial is replaced by individualised instruction the problem will be worse! This

is shrewd and indicates that formidable ontological, sociological, and psychological barriers exist to the widespread acceptance by academics of individualised instruction. Of course certain academics will continue to be attracted to individualised instruction's particular virtues, and thus is a good thing. But the hope or expectation that with time it will percolate through and thus solve the Universities teaching problem is probably wishful thinking. Individualised instruction can make an important contribution, but probably can't solve the whole teaching problem.

Piecemeal Progress or a General Remedy ?

As individualised instruction seems unlikely to be a panacea, it follows that other answers are needed. Strategies able to contribute to a general remedy of the current teaching problem within Universities will at least need to be :

1. satisfying to students
2. perceived as "accountable"
3. non-threatening to academics
4. perceived as economical

Between the poles of teacher-dominated lecture-tutorial and teacher - absent individualised instruction there is considerable room for manoeuvre. Theoretically a host of new forms could be devised. What would be helpful are some good ways of generating acceptable new forms.

Needed : Conceptual Tools for Devising "Good Teaching"

What sort of frameworks or ways of thinking can play a constructive role in devising some acceptable new forms of "good teaching"? Such frameworks would have to be able to suggest new forms of teaching that will allow some important individual needs to be taken into account, although not necessarily all needs, but not go so far as to say "Good Bye, Teacher!". Are there such frameworks? One approach that appears to have potential for generating some such acceptable strategies could be called psychetypal.

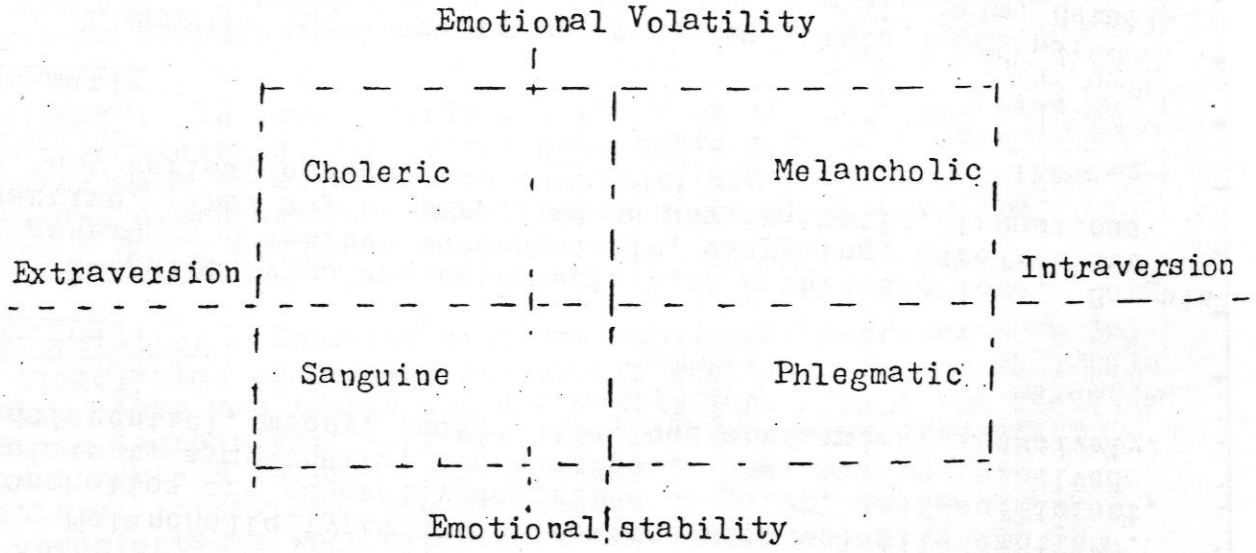
What are the Psychetypes ?

The Psychetypes referred to are those which were first described by the early Greeks, and later by philosophers in the Middle Ages. The four psychetypes were identified as

Melancholic, Choleric, Sanguine and phlegmatic. Elizabethan dramatists William Shakespeare and Ben Jonson are said to have used the psychetypes in drawing their characters.

Of What Use Might These Psychetypes Be Today?

In our century B.J.Eysenck (1972) has argued that the traditional psychetypes are remarkably accurate. This is so in his view because the basis of the four types are two major dimensions of personality - volatility/stability and extraversion/intraversion. The relationship can be seen in a two-by-two matrix.



People high in "volatility" have emotions that are easily aroused and which persist longer than people high in "stability". Similarly extraverts are characterised by lower levels of brain arousal and seek stimulation while "intraverts" are relatively speaking, stimulation avoiders.

The psychetypes are also universal, according to Eysenck, as these dimensions are rooted in physiology rather than conditioning or learned behaviour. They therefore provide useful descriptions of people, and most people can be easily classified as fitting into one of the four psychetypal categories.

enjoys collecting, analysing and organising information. As a consequence the student is having difficulty finishing the thesis on time.

Problem-4 : A group of academics have taken considerable time and pains to re-organise a mandatory first year course along individualised instruction lines. In general the course has been well received and is working well. However a proportion of the students have complained that there isn't enough variety in the materials provided and have asked that informal discussion be organised. Also a few students have been gathering at the back of the work area and their talking and laughter is disturbing the concentration of other students.

Interpretation : The logical, analytical Phlegmatics are thoroughly enjoying the individualised instruction environment with its logical sequence of activities and abundance of information. The moody but cooperative melancholics generally like the quiet and peace of the approach, but are worried about how they'll do. They would like a supportive discussion group to reassure them they are on track. The cholerics were enthusiastic at first about doing something new and different. But they have become bored with all the paperwork. A few of them have asked the teacher to organise some films and discussion groups to liven things up. The sanguines are enjoying the course - although it could be a bit more stimulating. But they have no strong complaints, they enjoy the rational, un-emotional atmosphere and they are confident they'll do well in the course.

Implications of Psychetypal Analysis for "Good Teaching"

The foregoing analysis shows how we can use psychetypes to get to the bottom of many of the classic frustrations in the University teaching process. Because of this, it becomes possible to alleviate much of the teaching problem - and thus bring about "good teaching" by :

1. modifying the way lectures and tutorials are run so that the needs of the psychetypes are taken into account, not ignored.
2. doing the same for courses of individualised instruction.
3. perhaps designing [illegible] to cater for psychetypal differences.

Naturally the ability to generate such strategies presupposes a good working knowledge of the psychetypes. Such knowledge could be acquired by reading, or perhaps preferably by some training. This would not necessarily take a lot of time.

More About Psychetypal Needs in Relation to Teaching

It can be useful to chart the relationships between psychetype needs and teaching strategies as, for example :

Strategies	Needs			
	Choleric:	Sanguine:	Phlegmatic:	Melancholic
Lecture	New Ideas, Voice variation, Changes of Pace	Logical Development, "The Rationale", Any Practical Applications	Information, Facts/Details, Logical Presentation Clear Organisation	Medium Pace Clarity, Any Teacher Expectations Made Explicit.
Tutorials	To Receive Attention, To Talk! (To Express Emotions & Opinions) To Argue, Liveliness	Logic, To Talk (To Express Thoughts) To Achieve Something, Practicality	Information To Listen, To Question Logic & Facts, No Dramas, To Analyse	Clear Goals Friendly Atmosphere To listen, To Ask Questions, To Comment Without Being Attacked
Individualised Instruction	To Have Variety In Activities, Chance to Socialise and Discuss, Feedback About Performance	To Be Active, Logical Sequence of Activities, Challenges	Lots of Information Analytical Work, Logical Sequence, Things to Organise	Clear Instructions, Secure and Calm Environment, Backup Support

Strategies	Needs			
	Choleric:	Sanguine:	Phlegmatic:	Melancholic:
Supervision of Theses or Projects	Social Contact With Supervisor, To Argue Things Through, Help With Logic, Reminders Re Deadlines, Stimulation of Self-Discipline	Challenge To Achieve Excellence, Logical Discussion of Work, Stimulation of Feelings to Enhance Motivation	Logical Discussion of work, Help to Get Focused on Overall Goal and Not Bogged Down in Details, Stimulation of Imagination	Friendly Collegial Discussion, Help With Logic, To Have Problems Listened To Sympathetically, Stimulation of Confidence.

Lectures are good for inspiring, stimulating, activating and challenging and are not problamatic to students when used for those purposes. Contrary-wise they are not good for just transmitting information. It would probably be salutary if schools, departmentsand faculties could make commitments to see that lectures are presented only at that higher standard - even if that meant reducing the number of lectures given.

Tutorials, as everyone knows, are occasionally wonderful, but often frustrating. The dynamics are different with every group of students. Training in recognition of psychetypes and related discussion management strategies would provide a logical way of lifting performance in this important teaching area.

Supervision is a relationship that has been created to facilitate some higher level work getting done. A knowledge of the psychetypes in relation to managing that situation would again seen a reasonable line of development. Supervisors are in many ways really managers; their job is to help someone get some worthwhile work achieved, one hopes without too much unnecessary trauma. Indeed, why not enjoyment and exhilaration? it can happen.

If individualised instruction were to be modified in the direction of some more teacher involvement - and why can't it? - might it not be able to make some headway in interesting places not yet touched?

A Pure Form of Psychetypal Instruction ?

In addition to the strategies just outlined for psychetypalising existing forms of instruction - to good purpose! - might it not be possible to envisage a purer form? What might this be like?

One version would be psychetypal options. In essence this would be a course organised into four parallel tracks, each aimed at achieving the same learning outcomes, but organised separately to cater to the needs of each psychetype. This sort of approach would clearly result in indefensible type indulgence as well as being very expensive. But there is no telling what might be learned from such an experiment. It should be tried.

The Price of Maintaining the Status Quo

It would clearly be an exaggeration to say that if the current teaching problem isn't solved Universities are going to be shut down. On the contrary Australian Universities have a big problem of not having enough places to accommodate those who want to attend them! But the quite justified level of student and community dissatisfaction with much of what passes for University teaching these days will almost certainly have the following consequences :

1. An increase in frustration and cynicism in students about the educational processes in Universities.
2. Lowered motivation and achievement by certain students.
3. The creation of communication barriers between students and staff outside the formal learning situation.
4. Fewer of the best students being attracted to pursue academic careers.

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K: ECO TOURISM

Development and Sustenance of Coastal Tourism in India

An EQUATIONS Paper

By
Hari Babu

For
Workshop on "Role of Civil Society and Social Movements in Environmental Protection"
Mangalore, September 1998

Organised by
Centre for Environmental Education Research & Advocacy, NLSIU.

Development and Sustenance of Coastal Tourism in India

Beaches are fantastic gifts of nature as long as they are retained as beaches

Beaches have been seen as "gifts" of nature, implying a cost free resource. However beaches are an important part of an ecological system- the coastal zone, which have been exploited by communities for traditional economic activity. Such activity, whilst exploiting the ecosystem has been low -key and generally in consonance with conservation. Poverty, which has been considered the most environmentally damaging, has not had the same impact on the coastal zone as on forest and mountain resources. Beach tourism, on the other hand is an urban activity, requiring the use of both natural and man made attractions to enable the tourist to pursue leisure activities, in an institutionalised form. The negative impact of tourism stems from this contradiction.

Features of the Indian marine coastal region

India's 7515 kilometers coastline is spread out in two distinct shores known as the West Coast and the East Coast. Gujarat, Maharashtra, Goa, Karnataka and Keralam are on the West Coast, whereas Tamil Nadu, Andhra Pradesh, Orissa and West Bengal on the East Coast. India also has groups of islands. The Lakshadweep group of Islands and the Andaman and Nicobar Islands in the Arabian Sea and the Bay of Bengal respectively. The shoreline of the West Coastline is straight, relatively narrow with raised beaches. East Coast is generally wider, vast stretches of low beaches with many prominent deltas. There are archaeological evidences of submergence along the coast of Tamil Nadu.

"Available information of the hydrology of the Indian Ocean indicates that the water of the Indian Ocean are completely influenced by the changing nature of the 'monsoon' wind system. In Arabian Sea, there prevails a pronounced seasonal variation (especially along the Indian Coasts). The currents are mainly southerly during the monsoons. During the north east monsoon whole of the Bay of Bengal and the Arabian Sea is under wind frictions which drives the surface water towards the western sides of African continent. In the month of August - September there is a complete reversal of the northern circulation due to predominance of the southwest monsoon. During the monsoon and immediately after it, upwelling occurs along the entire west coasts with regional variation in intensity. This brings up nutrients from deeper layers and enriches the surface layers. South Indian Oceans is less marked by such seasonal changes."[1]

"The region is also subject to cyclones, mostly occurring just before and after the monsoon rains. They form over the open ocean and lead towards shore in a generally westward direction. Their effects are most severely felt along the western coasts of ocean basins and island chains. Both the Arabian Sea and the Bay of Bengal suffer regularly from cyclones, but less frequently in the former. Same is the case with the Andaman Sea".[2]

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[1] Sharma RC and Sinha PC., **India's Ocean Policy**, Page 29

[2] *ibid*

The coast

The coast or beach is an area of immense importance. The dynamics of interaction between the ever-vibrant sea and the emerging land remains a challenge to the scientific community. The region is ever vulnerable to changes in way of erosion, accretion and recession. The coast begins from the 'low waterline' and extends landward to few meters to several kilometers in certain instances depending upon various factors like tidal influence, salinity intrusion into the ground water, effect of salt spray on vegetation, saltwedge in an estuary etc. This is the region generally known as the coastal zone that may include cliffs, lowlands or elevated terraces and deltas. "The coastal zone is a physical environmental system, somewhat analogous to the well-known concept of the drainage basin as a geomorphic system The coastal physiography is a result of the interaction of a large number of variables including principally waves, sediments, tides and tectonic, lithological and eustatic factors. This approach also emphasizes that the coast is a dynamic open system subject to natural processes over which man does not always have control".

The sea and the adjacent coast had always attracted mankind for varied reasons. Predominantly it had served as an economic and survival resource pool through its enormous wealth of numerous species of marine life forms. Later minerals and oil had marked the importance of this region. The coast still continue as a major center for ocean based activities like fishing community settlements, parking and building center for fishing and sea vessels, urban settlements, harbours and centre for national and international trading.

The coast and the coastal ecosystem play an important role in supporting various marine life forms in their breeding and regeneration through diverse vegetation like mangroves, complex waterbodies like swamps and marshes.

Beach Tourism

Apart from the economic activity, the sea and beach render yet another service as centers of pilgrimage and worship. A holy dip in centers that are contextualised by scriptures and mythology, the coast and sea is a place of reverence for all religious communities. Kanyakumari, Velankanny, Rameswaram, Mahabalipuram, Puri, etc are the better-known pilgrimage beaches. Paying homage and tribute to ancestors in these holy centers are part of Indian belief and culture.

Beach and sea as a centre for pure touristic recreation is a very recent phenomenon in our country. It began with the Hippies during the sixties with hand picked centers like Goa and Kovalam in Keralam. Coconut palm lined beaches, the simple fishing community and inexpensive living standards suited their 'escapist' life style. As the word spread the international tourism brought tourists, especially the European tourists were wooed into the tropical warm sands for sea and sun. The additional paraphernalia like various water sports came much later with high-tech equipment, which are still not fully developed in India

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[3] Healy, T. (1980) *Conservation and management of coastal resources: the Earth Science Basis.* **The land our future: Essays on Land use and conservation in New Zealand**

Today beach tourism is one of the prominent components of tourism industry. It has diversified from the simple act of idling and sunbathing to recreational and more aggressive adventure. The sea and coast are important players in this but the coast having more significant role. "Beach tourism activities include water and land resources use. The water usage comprises swimming, surfing, sailing, wind surfing, water scootering, motor boat skiing, para sailing, snorkeling etc. many water-based activities. On the other, land use has multifaceted: sunbath or sands, beautiful background of rocks and vegetation are meant for tourists activities, recreational areas for tourists (parks, playgrounds, clubs, theatre, amusement parks, casinos and cultural museum etc), accommodation facilities (hotels, cottages, camping sites, trailer parks etc.), car and bus parking areas, entertainment and shopping complexes, access roads and transportation net work".[4]

Tourism is termed as one of the major foreign exchange earning industry and enjoys top plan priority. The emphasis is to increase the tourist arrivals and extend longer stopover. Importance is also to shift tourist locations to unconventional sites. As part of these promotional priority beach is one of the most advantageous products, the other being the forest. The most ambitious effort may be from the Indian Ocean Tourism Organisation, a travel -industry group based in Perth, Australia. The new group is trying to round-up government and private sector organisations from 25 Indian Ocean bordering nations - including India, Indonesia, Somalia and the Seychelles - to collaborate on a cohesive marketing push..[5]

Beach tourism centers have spread from the traditional sites as a consequence of these developments. More and more pristine beach locations are being identified and developed. All the coastal states of India have identified coastal stretches for beach tourism and resort sites that were little known earlier:

- **Maharashtra:** Madh, Marve, Manori, Gorari, Bordi, Kihim, Harihareshwar, Ganapatipule, Bassein, Vijayadurg-sindhudurg, Alibagh, Velneshwar, Murud-Harani, Dahanu, Tarkarali, Juhu and Chowpati.

- **Goa:** Calangute, Colva, Betul, Palolem, Anjuna, Vagator, Baga, Dona Paula, Miramar, Bogmalo, Harmal, Baina, Siridao, Mandrem and Morgim.

- **Karnataka:** Mangalore, Someshwara,Ullal, Panambur, Suratkal, Malpe, St.Mary's Island, Bhatkal, Karwar, Majhali, Binaga, Araga, Maravanthe, Koppa, Koodali, Murudeswara, Coondapoor, Honawar, Gokarna, Kumta, Mulki.

- **Keralam:** Kovalam, Veli, Sankumugham, Varkata, Kollam, Kozhikode, Mahe, Tallaseri, Kannur, Kappad, Bekal.

- **Tamil Nadu:** Kanyakumari, Vattakottai, Tiruchenddur, Rameswaram, Kurusadi Islands, Mandapam, Muthukkad, Mamallapuram, Covelong, Elliots Beach and Marina. Also the Union Territory Pondicherry, Karaikkal.

- **Andrapradesh:** Bhimli, Waltair, Rushi Konda, Lawsons Bay, Beemunipattanam, Ramakrishna Beach, Manginapaudi, Mypad

[4] Ravi Bhushan Kumar, **Coastal Tourism and Environment – Beach Tourism**
[5] **Business Line** 16 May 1996

- **Orissa:** Puri, Balighai, Konarak, Gopalpur, Chandipur
- **West Bengal:** Digha, Bakkhali,
- **Lakshadweep Islands**
- **Andaman and Nicobar Islands**

Among these Puri-Konarak of Orissa, Mammallapuram, Muthukadu Beach Tamil Nadu, Bekal of Keralam, Andaman Islands and Lakshadweep Islands fall under the Special Tourism Area (STA) for intensive tourism development. Initial work of the Bakel project has already begun. All these are mega projects with huge capital investments and land requirements. Indian and transnational hotel groups have come forward to invest in tourism projects. Tourism industry feels that these new projects would satisfy the demands arising from the aggressive promotion that is given to beach tourism.

"India currently attracts about 42% of the international resort market in South Asia.

Main Resort Accommodation Facilities in India

Resort location	No. of resort rooms	% of total
Goa	4450	74.2%
Kovalam	750	12.5%
Mahabalipuram	300	5.0%
Vishakapatanam	250	4.2%
Puri	250	4.2%
Total	**6000**	**100**

Source: **Accommodation directories.**
Table 52 **Bakel Tourism - Techno-Economical Feasibility Report**

Tourism industry anticipates capturing double the market share in Asia in the following two decades. But this will again depend on many other factors and the ability to sell in the international market.

The strong cultural appeal of India together with its excellent West Coast beaches and hinterland, natural environment and wild life make India a particularly attractive proposition. However its ability to penetrate the market will depend upon:

- *The availability of suitable destination* and *the strong social and cultural attractions*
- *The availability of air transport service to the resort destinations and the linkage* of these to the major, *cultural* attractions in the *country; and*
- *The price competitiveness of its destinations relative to other resort destinations in Asia and South Asia.*

Given that India will perform reasonably well in these factors in view of its strategy to create five new large and accessible beach resort destination then it ought to be significantly increase its current share from 42% of the total resort market in south Asia to 50% by the year 2000, and 60% by the year 2010. The projected demand for and

supply of beach resort accommodation facilities in India assuming this market penetration rate is set out in table":

Projected Demand and Supply of Resort Facilities

Variable	1990	2000	2010
Resort guest Demand	614,000	1,800,00	3,960,000
Rooms required @65%	7,763	22,760	50,073

Source: Table 53 &Text **BakelTourism: Techno-economic Feasibility Report**

Sustainability aspect

The sustenance of this ambitious expectation in beach tourist turnout and corresponding infrastructural development depends solely on the equal prominence given to the impact of these developments. The coast as it is known is a delicate and vulnerable region. The impact of mass tourism on coastal ecology and environment and the necessary protective measures (assuming that they are effective check measures) are seriously being deliberated the world over. What once had been the point of attraction that promoted tourism would be adversely affected by ungoverned growth of tourism infrastructure on the beaches.

'The sheer speed and scale of tourism development has had a major impact on the environment. In addition although many local people have benefited from the increase in prosperity which tourism brings, the cultural effects are significant. In addition over-development and environmental degradation have led to many areas losing their appeal. As tourist numbers drop off the ability to maintain the infrastructure becomes more difficult. Where erosion has become a problem, as has happened in many areas where development has occurred in vulnerable zones, the cost of maintenance can be particularly high and often has to be borne by the local taxpayer. Developments that take environmental consideration into account are likely to be more sustainable in the long term and less costly to maintain." [6]

The adverse effects of mass tourism on coastal ecology and environment are through many factors: construction activities like resorts and highways on the near shore, destruction of coastal habitats like sand dunes, coastal vegetation, mangroves for landscaping and recreation, contamination of water bodies and ground water from fertilizers and pesticides, disturbing, capture and direct killing of coastal and marine life by mass human presence and as souvenirs, destruction of coral reefs, highspeed recreational vessels near shallow waters, spilling of petroleum and petroleum based substances in the sea and coast, solid waste and plastics that are characteristic of mass tourism are some of the threats that could be averted through proper planning and management. The effect of these on marine and coastal ecology and subsequent social and cultural problems on the local community (not the scope of this paper) unless tackled earnestly could end the very tourism activity in coastal region.

[6] Kelly Rid., Tourism and Recreation, **The European Coastal Code – EUCC, Netherlands**

The coast is under tremendous pressure from other activities, Urbanization, ports and harbours, refineries and chemical industries, various defense related projects, effluents, solid waste disposals are common the world over, It was only when it reached an alarming state world bodies like the United Nations stepped up with warning to all nations. Agenda 21 of UNCED states "Despite national, sub-regional regional and global efforts, current approaches to the management of marine and coastal resources have not always proved capable of achieving sustainable development, and coastal resources and coastal environment are being rapidly degraded and eroded in many parts of the world. Each coastal state should consider establishing, or where necessary, strengthening, appropriate coordinating mechanisms for integrated management and sustainable development of the coastal and marine areas and their resources, at both the local and national level. Each coastal state should consider preparing national guidelines for the integrated management of the coastal areas".

Accordingly regional countries also had come to an agreement on coastal protection. "India, Pakistan, Bangladesh Sri Lanka and Maldives adopted a Draft Action Plan for the protection and management of marine and coastal environment of the South Asian region under the South Asian Seas Regional Programme sponsored by the United Nations Environmental Programme". [7]

A foremost question in front of us would be, whether tourism industry also want to be a collaborator to the degradation and destruction of the coastal environment and ecology and that whether this industry want to dig its own grave? These are pertinent questions the tourism industry has to face if it want to sustain and also prove that tourism is indeed a 'smokeless industry' or a 'non-polluting industry'.

An answer to these questions would be by trying to understand the condition of the full-blown beach tourist centers in the country like Goa and Kovalam, and the envisaged future plans for beach tourism.

Present beach tourism and the coast

Goa is the synonym for beach tourism in India with a coastline of 110 km. and a Population of 1.3. million. The state is one of the richest in biodiversity. "Goa's unique topography encompassing estuarine and coastal systems to plateaus and hilly ghats nurtures over 4000 out of the 5412 known species of mammals reptiles, fish, birds, insects, plants, algae, ferns, microfungi, mushrooms, yeast, bacteria and actinomycetes ". [8]

The beaches of Goa were once broad with golden sands. After nearly three and a half decades of mass tourism Goan beaches are live testimony of haphazard development. There are around 400 hotels and 350 shacks in and around the beaches. More than 77% of these are located along the beach almost every one of them within the 200-meters of the High Tide Line (HTL). Destruction of sand dunes and erosion prone coast is what is left of Goa today. Recent reports states that the haphazard tourism development has started showing its effect on Goa by way of fluctuations in tourist arrivals. They opt for lesser-crowded and polluted places like Keralam and Karnataka.

[7] **The Hindu** 28 March 1995
[8] DR. Nanda Kumar

The reflection of these is felt in the desperate sustenance efforts of hotel industry by price hikes. The effect was felt this year with a 'bad peak season' and the luxury hotels shot up their prices to recoup. "Room tariffs short up to a staggering Rs.12000 a day (double occupancy) during the Christmas fortnight which was a hefty 200% increase over the pre Christmas rates". [9]

WTO study points outs that Goa can handle 2.5 million tourists by the year 2000 and 46,000 beds.[10] May be it is in accordance with this WTO report the tourism minister of Goa Mr.Wilfred D Souza has plans for more infrastructure development. "His new tourism scheme emphasis infrastructure. an international airport, super highways, golf courses, offshore casinos, facilities for water sports, adventure tourism and heritage tourism" [11]

But the ecological aspect of Goan coast is not encouraging at all for this anticipated tourism development. ***Report of the National Committee on Tourism,*** Planning **Commission of India** has observed; "the natural charm of coastal area and marine area is being adversely affected by massive tourist development. Goa can be cited as an example. The beach resort facilities are spread all along the coastline of Goa. They undermine the natural sand dunes ecosystems of the coastal areas. But the uncontrolled spurt in construction activity provoked by tourist influx in Goa, particularly the extraction of sand dunes for development works has led to a continual erosion of coastal areas by the relentless sea."

The indifference towards nature still continues. New hotels still prefer to construct on the beach and in ecologically sensitive areas. The work on the Miramar beach of a hotel project owned by the nephew of the industrialist Dhirubhjai Ambani within 500 meters of HTL was stopped recently. The neighboring eco-sensitive bay was a riverfront.[12]

Resort construction activities in Kovalam, Keralam is right on the waterfront. The tourist industry paid heavily for this during the last monsoon. Nearly 150 yards of the beach was submerged, washing away 200 kiosks and badly affecting a dozen lodges and 25 restaurants. While the hotel owners and district administration accuse each other for the cause it is the beach that suffers "It wasn't the government that developed Kovalam into a popular destination but it was us locals. The least the government could have done was to act in time by dumping rocks (along the beach). After all, they earn so much foreign exchange because of Kovalam" BM Khan Secretary **Kovalam Resort Owners Association.** "These people have constructed their structures right on the beach in violation of regulations and now want us to protect them from erosion", District collector Aruna Sunder Rajan.[13]

The Western Coast in general and the Keralam Coast particularly is erosion prone. The entire coastline itself is new formation. ". .erosion is a major problem, especially in Kerala, where 6m/year is lost".[14] Dr.Baba of Center for Earth Science Studies,

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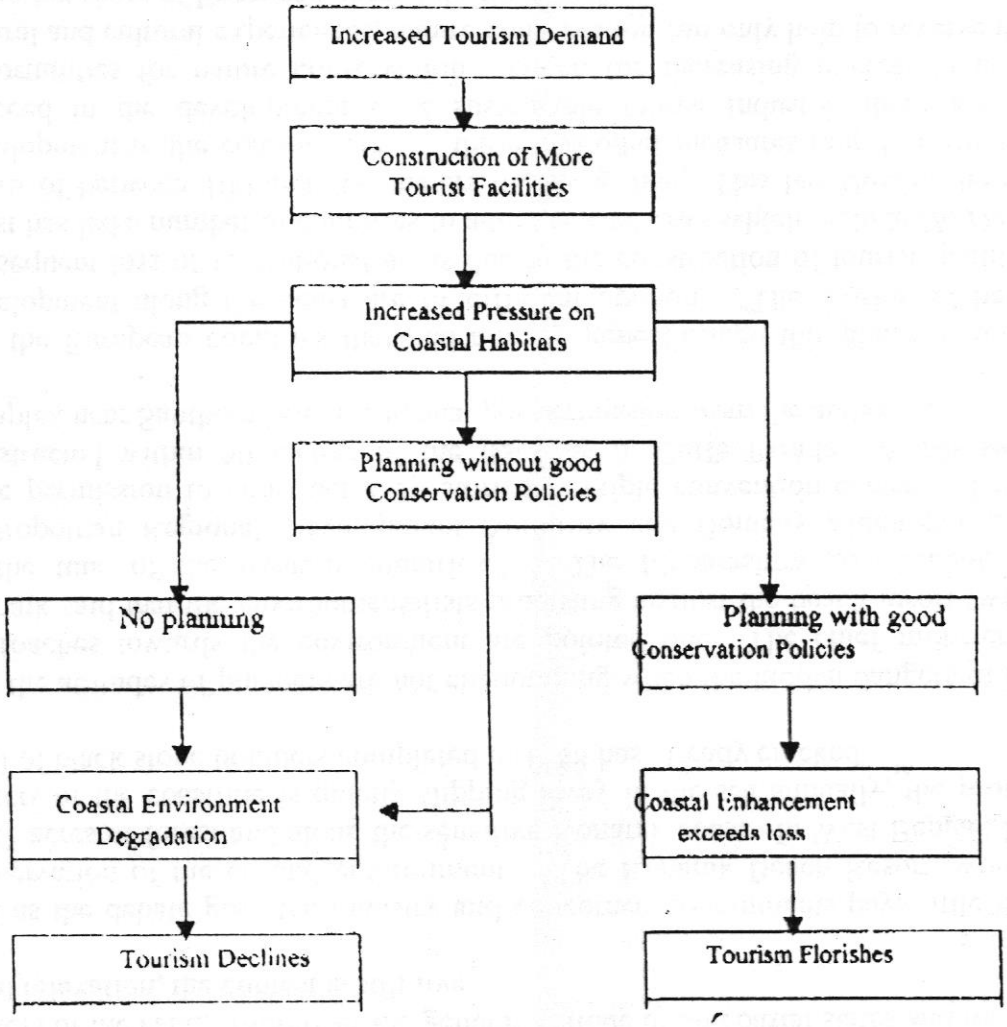
[9] **Deccan Herald** 19 February 1997
[10] *Report of WTO on Goa,* **Know India** Vol.3, No.38, Department of Tourism, Govt. of India
[11] **The Pioneer** 15 February 1997
[12] Construction of hotel stayed by SC, **The Telegraph** 3 January 1995
[13] *Gods must be angry,* **Outlook** 28 August 1996
[14] Sharma RC and Sinha PC, *India's Ocean Policy,* **Marine Geography and Resources of India**

Thiruvananthapuram, who heads the team for preparing the Coastal Zone Management Plan for Keralam, vouches this.

A study on "Marine geological aspect of Dakshina Kannada coast" by Dr. K.R.Subramaniya and Jaganathappa Rao and published by the Mangalore University reveals "that the coastal erosion due to natural factors is very minimal. But it has been aggravated by man's interference with the natural process and due to faulty remedial measures" [15]



The relationship between tourism development and conservation planning
Environmental Guidelines for Coastal Tourism Development in Sri Lanka

Constructing sea wall to check erosion is not considered as scientific or economical. Experts from Geological Survey of India believe that the country's West Coast is more susceptible to erosion than the East Coast. The Western Coast is relatively of new origin. The narrow belt between the ghats and the sea is now covered with sand close to the coast or by an extensive sheet of laterite. Construction and maintenance of hard protection measures like seawall is very costly. The best option is a complete retreat

[15] Vijayakumar R, *Remedial Measures Faulty* **The Hindu** 28 May 1993

from the erosion active zone. According to Mr.D.Venkat Reddy of Karnataka Regional Engineering College growing vegetation on the affected coasts makes practical as well as ecological sense.

No Commitments to Regulations

The debate on beach tourism development in India is centered on the hotel, resort and highways constructions near the shoreline. The adverse effect of heavy structures along the erosion prone coastline is a proven factors the world over. The attempt to protect the coast and coastal ecology has already been made after serious debate in this country too. The result of this was the introduction of Coastal Regulation Zone (CRZ) Notification in 1991. The notification prohibited all construction activities within 500 meters of the HTL. Unfortunately for the coast, by limiting the prospects of the notification to only the 'development' aspect tourism industry was able to bring amendments to the Notification. Permission was given for construction of resorts and hotels beyond 200 meters of the HTL. Moreover the general attitude of all coastal states and industry is for total relaxation, the contest is still live.

But as the debate goes the industry and concerned governments pays little heed to the preservation of the coastal environment. "The Konarak Beach Resort, would acquire 2227 acres of forestland along the sensitive Konarak coast. In West Bengal, Digha - 25 meters of the coastline is quietly slipping away in the sea annually, the protective sea wall of black stone boulders completed in 1988 has already cracked". [16]

But the attitudes of planners are not encouraging when the hidden dangers of insensitive approaches towards the environment are pointed out. The chief minister late Biju Patnaik said that the environmentalists protesting against the beach resort "was dancing to the tune of the western countries." [17] The Maharashtra government. Bombay Metropolitan Regional Development Authority and Bombay Municipal Corporation gave permission to construct a 30 storied multiple convention centre and hotel to be constructed within 50 meters of the Backbay in Cuffe Parade. A 10- storey hotel complex near Santhom beach, Chennai got permission from the authorities.

But the European countries that had already gone through this phase of uncontrolled development along the coast are of different opinion. "The erosion of beaches and consequent loss of recreational areas due to the construction of tourist facilities on the coast has led a number of countries to adopt coastal laws which include *No Development Zones* of between 100 and 300 meters (Nordberg, 1995). This has slowed the process of development in the coastal strip. If these and other measures (e.g. those listed below) succeed in the development of a sustainable tourist industry, there are numerous opportunities for nature conservation. Given the increasing interest in high quality natural and cultural experiences, nature conservation can only help to reverse the decline in market share of European coastal destinations". [18]

Similar is the attitude towards the construction of highways and roads. "No roads should be built or reconstructed in the coastal strip (300 meters) parallel to the coastline, nor

[16] **Times of India** 8 November 1994
[17] **The Patriot** 7 November 1994
[18] Kelly Rig., *Tourism and Recreation*, **The European Coastal Code – EUCC, Netherlands**

through coastal habitats. Main roads should be located several miles inland, with coastal access roads running perpendicular to the coast at specific locations". [19]
But back in our country there are at least three major super highways or express ways that is planned and being constructed along the coast line. The East Coast Road from Calcutta to Kanyakumari would cover the entire eastern coastline. The first phase of this road form Madras to Cuddalore is already built. The work of the second phase is underway. In the western coast the Keralam Governmenent is planning a Coastal Express Way along the entire coast of the state. There is yet another 63 -km highway planned by Tamil Nadu government to connect Kanyakumari and Neerodi in the West Coast.

Recreation

Golf courses as part of tourism recreation is gaining momentum in India. All the newly designed beach tourist enclaves have golf courses in their plan. The potential impact of these along the coastline and near coast had undergone critical studies. Apart from the destruction of sand dunes and natural coastal vegetation there are serious impacts of pollution of water bodies, ground water and the local environment:

1. Stream channelization
2. Destruction of wet lands
3. Lack of wooden buffer along waterways
4. Elevated water temperature due to:
   - Lack of shading vegetation
   - Reduction of ground water inflow
   - Release of heated water from the surface of ponds and
   - The entry of heated storm water runoff from impervious surface
5. Reduction of base flow due to ground or surface water withdrawals
6. Release of toxic substances and oxygen deficient water from ponds
7. Intermittent pollution incidents such as spills of pesticides, fertilizers or fuel
8. Loss of pesticides or fertilizers by way of ground or surface water runoff
9. Entry of storm water pollutants washed from parking lots and the other impervious surfaces
10. Accelerated channel erosion due to increased storm-water runoff velocity or prolonging the amount of time channels are exposed to erosive velocities
11. Elimination of the scouring benefits of flooding by altering the frequency and/or magnitude of flooding
12. Poor erosion and sediment control during the construction phase, and
13. Inadequate treatment of sewage and other wastewater generated on the golf course.

(Richard D.Klein, **Protecting the Aquatic Environment from the Effects of Golf Courses**)

The Maharashtra Tourism Development Corporation (MTDC) proposes to set up tourist complex, golf course, watersport complex in 106.17-hectare creek land in Gorari, the place is full of mangroves. Manori golf course of international standard in 290-hectare land. Both these areas fall under the No Development Zone. The government thinks it can convert this into a *Total Development Zone!* [20]

Water sports

[19] *ibid*
[20] **The Daily** 21 January 1997

Apart from occasional social conflicts with the local population, a water sport in our country was limited to swimming or boat rides. This did not afflict much on the environment. Water sports like fishing and spearfishing is not very popular in our country. But the scenario is changing. With increased focus on the beach tourism today the new generation of tourists requires the modern water sport facilities. Some of the recent studies indicate that "about 62% tourists participate different water based activities " [21] With modern technology to assist, water sports have diversified to sailing, windsurfing, snorkeling and scuba diving. Glass bottom boats for ocean excursions are becoming more popular. There are yet other more investment oriented large-scale recreation like underwater viewing through submerged acrylic tunnels. All these have become more intrusive to the secrets of the ocean.

Of these under water photography, watching the marine life and coral reef has become one of the most popular sports today. Though this is considered as non-consumptive uses of ocean wealth nevertheless the damage to these 'delicate organisms and marine life is very high. "It is an unfortunate truth that those of us who visit reefs most often damage them heavily because of careless behavior. Snorkellers and divers often stand on reefs, walk over corals in shallows and collect coral and shell souvenirs. These activities are very damaging to reefs and may cause long-term alteration to reef communities." [22]

Another act of damaging the reef is by the anchoring of boats that take the tourists to reef sites "20 percent of a fragile staghorn coral (Acropora cervicornis) reef in the Fort Jefferson National Monument, Florida, was smashed by anchors of boats carrying visitors to the reserve " [23] Souvenir collection is considered as one of the most lethal damage to the reefs and shellfish population. It is not only the reefs that are affected, but a large number of other marine lives that depend upon the reef ecosystem also perish.

The effect of high powered motor boats for surfing and racing on marine life is a social issue also. Most of our tourism sites are also community fishing grounds. Though many studies are not available on these it is accepted that they effect the fish population by driving away the shoals to high sea. The vibration and acoustic effect the egg and juvenile fish. Motorized boats also affect bird sanctuaries and marine life reserves. The European recommended speed standard is 5 knots. "Speed limits of no more than 5 knots should be established for all motorized vessels travelling through shallow coastal waters. Reduced speeds are also necessary in or near sensitive areas such as bird sanctuaries, seal reserves, and inner archipelago areas. Jet skies or other motorized vessels or vehicles should not be permitted in or near sensitive wild life areas, or areas where people have come specifically to enjoy the calm and quite nature." [24]

Of the prime watersport centers in India the Andaman and Nicobar Islands and the Lakshadweep islands are the most potential sites. The Great Nicobar is a Biosphere Reserve. In the Lakshadweep there is already watersport facilities like snorkelling and boating. But again the future of coral reefs in this region is alarming, Quarrying for construction activities has virtually wiped out the reefs here. "The coral reefs and corals

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[21] Ravi Bhushan Kumar, **Coastal Tourism and Environment**

[22] Woodland DJ and Hooper J NA , *The effect of trampling on coral reefs*, **Boil. Conservation** (1977)

[23] G E.Davis, *Anchor damage to coral reef on the East Coast Florida*, **Biol. Conservation** (1977)

[24] Kelly Rig., Tourism and Recreation, **The European Coastal Code – EUCC, Netherlands**

of the Lakshdweep are in danger of partial or total degradation due mainly to human interference, The mortality of corals in Minicoy, Kavaratti, Kiloton and Amini is severe. A recent estimate of *in situ* percentage of dead corals in Minicoy is up to 90 percent, Andortt 50 percent, Kalpeni 80 percent and Suheli Par 30 percent of the surface coverage".[25] Tamil Nadu has a Marine National Park in Gulf of Mannar. There are about 120 species of corals that belong to 33 genera in this National Park Villanguchelli Island of Chidambaranar district was submerged due to indiscriminate removal of the reefs.

All the new coastal tourist centers have water sports in their agenda. Goa plans an underwater world project that will comprise of a submerged acrylic tunnel. "The survey of **National Institute of Oceanography,** Goa, confirms serious deterioration caused by industrial activities and recommended complete protection of the coral reefs and mangroves. The removal of beach materials, cutting of mangroves and collection of marine flora and fauna must be stopped " [26]

Introducing beach tourism and water sports into these regions need detailed and critical study and understanding of the delicate ecosystems. Carrying capacity of the region has to be assessed and strict vigil however painful and expensive has to be maintained. Since these are life systems whose value and importance to human kind is yet to assessed thoroughly.

Social issues

All the new identified beach tourism sites are locations of coastal community habitation and work. This is especially so in the West Coast where the density of population along the coast is very high compared to the East Coast. Also marine fish resource is higher along the West Coast. There are community settlements along these coasts that are still traditional and employ only traditional methods for fishing. This means the fishing activities will generally take place along near shore. Bakel, the *Special Tourism Area* (STA) in Keralam is one such location. Beach tourism and watersports will definitely have its impact on the life and livelihood of these communities.

"Tourism development in the past ten years has undermined the quality of life and the environment of the local people by polluting the water and the surroundings and making life more difficult in economic terms. This has 'undefdeveloped' Goa instead of increasing welfare, argues the NGOs." [27]

Similar is the apprehension of tourism development in the islands. The development programs of the government for Andaman and Nicobar Islands have been insensitive to the local culture and essentially been not in harmony with either the people or ecology. The decline in the community population in these islands is alarming as well as their chances of survival. Their culture and lifestyle is now being [illegible] by tourism industry. "The survival chances of these communities are already threatened by industrialization and the so-called civilization. The population is gradually declining and is almost in the verge of extinction. Five star hotels and tourist homes have even

named their bars and restaurants as the *Onge, the Shompan* etc. with nude paintings and photographs of the native men and women." [28]

Uninhabited islands like Bengaram are becoming populated by tourism activities in the Lakshadweep. Coastal communities are generally traditional in living and rituals Nudism that is related to beach tourism conflicts with the traditional community in our context. In Lakshadweep, Bangaram and Kadmat are creating this problem. Kunhi Koya Thangal, General Secretary of Muslim League Unit says, "Lakshadweep will shortly become another Goa or Kovalam. Our boys are now secretly going to Bangaram to watch nude sunbathing tourists and they are also likely to be influenced by alcohol and drugs. We definitely do not want tourism in these islands, which have been peaceful, all these days." [29]

Some integrated conservation measures:

- **Community acceptance** to be made an integral part of beach tourism plan. Complete cooperation and trust in the local community is a must for the smooth running of tourism. Make the local community equal partners in all aspects of tourism including profit sharing.

- **Infrastructure development** should be strictly in accordance with the CRZ regulations. A comprehensive understanding and planning of proposed site should be made with Geographical Information System (GIS). Construction of resorts, hotels, parking lots etc. to be located beyond 500 m towards the land ward side from the high tide line. Use existing structures as far as possible. Avoid large constructions and design according to the natural surroundings. Avoid changes in near shore sediment transport patterns, geomorphology of the coastline, natural run-offs and storm water channels, destruction of natural coastal vegetation. Use only indigenous species for landscaping and those that require minimum irrigation and only bio manure.

- **Roads and highways** should not be constructed near shore especially parallel to the coast. Only approach road may be built to the coast. Do not disturb coastal vegetation and natural sand dunes Sensitive habitats and breeding grounds should be avoided at all cost. Encourage walking and cycling and wherever possible public transport systems and 'clean fuel'

- Golf courses strictly not along beaches and beach tourism site.

- **Water sports** to be strictly planned and monitored.
  - Avoid estuaries, shallow waters, sanctuaries and fishing zones.
  - Speed limit of motorized boats to be kept to the minimum the European standard is not more than 5 knots.
  - High powered boats for surfing etc be allowed beyond the fishing zones only.
  - Create special corridors for watersports

[28] Prakash Reddy G & Sudarshan V, **In the debt trap: the hunting and gathering communities of Andaman and Nicobar Islands**

[29] **Coastal Tourism & Ecological Aspects – Beach Tourism**

- Do not allow spilling of petroleum products, discarding plastic and other wastes in the open sea.
- Do not chase or collide with marine animals
- Scuba and underwater diving be permitted arbitrarily and under strict monitoring, especially to areas of coral reefs and other sensitive areas of plant and animals.
- No damaging or collection of these is allowed under any circumstances as part of recreation.
- Discourage souvenir collection and selling of coral, shells etc. near tourism sites.

➢ **Sewage, waste, litter** management must be part of the comprehensive tourism management plans. Waste water treatment and solid waste treatment plants be made compulsory and should be open to local bodies and environmental groups for inspection. Waste management to be strictly undertaken. Avoid non-degradable wastes like plastic carrier bags and drinks cans. Initiate systems like *'deposit on return' to* shops, restaurants and hotels in tourist locations.

➢ **Media** always propagate the tourism potential of a region in a glamorous style. It is equally important that travel writers also point out the ecological and social characteristic of the region. Also the media should be vigilant once tourism activities are on in the region and assess the impacts.

Time has come for all of us to actively participate in the conservation of this last frontier for development. While development is essential, it cannot be at the cost of the very being of the Coast. Let us not forget that our actions on the Coast have a direct impact on the mainland.. We can and must use the resources of the coast but judiciously.

How friendly is eco-tourism

Dr Iqbal Malik

ECO-TRAVEL is becoming a part of the lives of most of the Indians. Corbett Tiger Reserve is visited by 40,000 visitors every year. Kerala's Periyar Sanctuary was visited by 36,000 people in 1993 and Himachal Pradesh received 34,75,000 tourists the same year.

Point Calimere in Tamil Nadu, the Rhododendron sanctuary north of Sikkim or the snow covered peaks of Shrikhand and treks of Sarahan in Himachal Pradesh are a paradise for any one yearning to get away from the humbdrum of the city life.

All of us have a right to experience the tranquillity and natural ambience of places where no man-made sounds deafen the ears, the air is still fresh and water clear and garbage dumps have not overpowered the mountains and the seas.

Though the number of eco-tourists is constantly increasing, the infrastructure and management of the tourism industry is not scientifically planned.

The intensive rise of rapid, unplanned and uncoordinated eco-tourism has resulted in the degradation of environment. This is exerting tremendous pressure on the micro and macro ecosystems which, in turn, is leading to the loss of bio-diversity.

Tourism industry at present has adopted a devastating practice, quite similar to 'jhoom cultivation'. It is constantly in search of unspoiled areas.

Resorts, which once used to be quiet and picturesque, have in the recent past been transformed into patchy forests and crowded habitations repleted with smoke and noise pollution.
The expansion of tourism in Mussoorie has led to severe deforestation and ecological degradation. Excessive quarrying to supply the increasing demands for building materials in Doon Valley has led to massive land slides.

Unplanned municipal expansion of hill resorts located on rivers and lakes has led to the pollution of these water bodies. Del Lake, which 20 years back, was the pride of Srinagar is now a stinking stagnant pool.

Yesteryear's paradises like Shimla, Manali, Dharamshala and Kangra are 'C' category spots now. Lakshadweep coral islands do not have any proper organised sewage and the ground water table is constantly getting contaminated due to influx of tourists. Like hill stations, uncontrolled tourism is affecting our sanctuaries and national parks too. No tourist feels satisfied without having seen a tiger from close quarters during a visit to Bhandavgarh National Park, about 260-km from Khajuraho in Vindhyad hills of Madhya Pradesh, not realising the effects of this mass exposure on the natural behaviour the tiger.

There are some other negative impacts of unregulated tourism also. In the Maidives, the ratio of tourists to host population is almost 33 per cent, and this has resulted in 'high index of irritation' amongst the locals for the tourists.

While the tourism industry should be making a conscious effort to promote

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camp-ecotourism, in reality the concrete structures dominate even the latest tourist spots.

Under the National Action Plan (NAP), 1992, the Puri-Konark-Bhubaneswar triangle was designated as one of the 15 Special Tourism Areas (STA). By May 1993, a proposal for a 900-hectare 50-hotel tourist complex along the Puri-Konark marine drive was submitted.

The plan would entail the felling of a reserved forest, encroachment on the Balukhanda Black Duck sanctuary and the subsequent exposure of the coast's agriculture to the shifting sands and cyclones that had once prompted the authorities to plant the forest.

Bakal Fort in Kasargod district of Kerala is another STA. It is a Rs 10 billion project, which involves the building of an international airport, 15 luxury resorts, a golf course and a convention centre. Around 3,000 hectares of coconut and tobacco plantations will be destroyed for this supposedly Asia's largest tourist resort.

IN India, the protected area network has increased more than five times in the last two decades. In 1970, there were 1 0 national parks and 127 sanctuaries in an area of 25,000 sq.km. In 1993, the protected area network increased to 1,32,000 sq.km. On this area are located 66 national parks and 421 sanctuaries.

All this is the result of increased consciousness to stop degradation and save our biodiversity. But most of these protected areas are becoming popular tourist destinations.

Eco-tourism or wildlife viewing is the most important non-consumptive use of wildlife, generating millions of dollars annually. The returns from such "use" can be far greater in the long run than their 'consumptive' use.

Banning eco-tourism is not a solution to problems like the risk to various species or irresponsible behaviour by tourists which disturbs animals and damages fragile ecosystem. There are a number of ways to maintain balance between the power and responsibility that we humans are given.

These alternatives allow us to experience "paradise" in any other name, while maintaining harmony with environment, thus ensuring nature's safety.

Tourism industry must promote the wilderness concept in its facilities and lodges or campments should be so designed that they harmonise with existing environment and are simple and easy to manage.

All inputs must be locally produced and most of the revenue must be ploughed back into that habitat and local community developments. It is imperative to minimise all the negative impacts of tourism.

If eco-tourism is not for short-term greed but to conserve species in the long-term it should -sensitise the finer senses of the tourists in the midst of nature. A brief on the ecological characteristic of the region along with do's and don'ts of viewing wildlife must be provided to each tourist.

Wherever feasible, hides should be used to enable game viewing rather than game drives'

Development has seldom been an equitable process - the developed countries always taking more than they give but, eco-tourism can help start redress the imbalance by helping rural developing communities preserve their wildlife, heritage and benefit economically.

Evening News *21 March 1996*

Take another look at tourism

Ann Daniya Usher

As dusk approaches, the plaintive echo of two gibbons calling to each other through the forest can be heard over the constant gurgle of a nearby waterfall. I am sitting by the banks of the Kwae Yai River, talking about the history of this place with Tai Sa, an ethnic Karen whose ancestors have inhabited the forests of this Thai-Burma border region for centuries. He points out elephant tracks just upriver, indicating that a mother and her young have recently passed through.

This spot was to be the site of a large hydro-dam that would have flooded the heart of this forest, blocking off key animal migration routes and drowning several Karen villages. The Thai government reluctantly cancelled the project in 1988 in response to massive opposition that extended from the local villagers to Bangkok scientists, environmentalists and the press.

Now this place is being eyed for Eco-tourism, and from the point of view of the industry and its nature-loving customers, it is an ideal spot

Not only is it beautiful. It is part of almost one million hectares of intact contiguous tropical forest, the bulk of which is protected by Thai law inside two adjoining wildlife sanctuaries: Thung Yai Naresuan and Huay Kha Kaeng. Their location at the conjunction of three vegetation zones - the Indochinese, the Sundaic (or Malayan) and the Himalayan - has created a special variety of flora and fauna. There are, for example, at least 450 species of birds within the sanctuary boundaries. The biological uniqueness of the area was recognized in its designation as a UNESCO World Heritage Site in 1991.

Local people are, however, not certain about whether they would benefit from Eco-tourism. On the contrary, many Karen sense that Eco-tourism represents one more in a long series of state-driven initiatives that would further erode their culture and, possibly, dispossess them of their land.

I try to explain the special meaning of the term 'Eco-tourism' to Tai Sa, telling him that many environmentalists in the West see this form of travel as a key to generate the income needed to conserve the last 'islands' of biodiversity in the tropics. But he is not convinced by my explanation. Karens are forest people, he says. The Karens of Thung Yai have for decades been struggling to defend their culture which, by definition, means fighting to protect the forest ecosystem upon which their society is based. Money has hardly been the issue. Apparently, finding my proposition illogical, he asks: "What does their money have to do with protecting this forest?"

Tai Sa has walked every bit of this territory. He is the kind of person that ecotours in the South depend on to navigate the way through the forest, to direct the elephants, and even to cook and carry packs. A typical Swedish ecotour will have a Swedish guide to explain and arrange and accommodate. But without someone like Tai Sa who knows the terrain, such tours would be impossible.

Asked how he would feel about serving as a guide, Tai Sa speaks with a determination that is borne out of years of struggle: "For people who really care about the future of Thung Yai, if they want to come and study, to learn about the forest, we will do everything to help them.

and they don't need to pay us anything. But these tourists would just come for their own selfish pleasure. Let them keep their money. I will not be their guide."

The implication, repeated on numerous occasions and in many different words by Karen elders in these parts, is: Here we are fighting for our lives. If you want a playground, if you are looking for Disneyland, then go somewhere else. But if you see our struggle as part of your own, then come, and we will welcome you.

Tai Sa's stand reflects the gap that has separated much of the industrialized world's 'scientific' concern about biodiversity conservation in the South, from the 'social and political ecology' of the day-to-day struggles in tropical forest countries. As one of a very few non-Thai rangers in the country working as sanctuary management staff, Tai Sa experiences this conflict acutely.

A sanctuary ranger, Tai Sa fears that commercial ecotour groups would - like beach tourism and golf courses and sex tours in Thailand - expand out of control. As a Karen, he cringes at the prospect of religious ceremonies being turned into mere curiosities, to be performed on command according to the tourists' schedule. Judging by the way mountain people in Northern Thailand have been exploited and degraded by the 'trekking' business, there is every indication that the same thing would happen here.

The Karens of Thung Yai are already threatened from all sides. In addition to the proposed dam, illegal poaching of game by influential outsiders, logging concessions, and military 'security' roads have endangered the integrity of this ecosystem over the years. The fact that every one of these was thwarted reflects the strength of the local resistance, which includes both Karen and Thai villagers from the surrounding provinces, and environmental allies in the cities. But development itself has become another threat. The same bureaucracy that accuses them of being backward and tries to bring schools, clinics and running water into the villages, now claims that they are too 'developed" to be living inside a wildlife sanctuary. It is partly for this reason, that the Karens are so wary of development. As one Karen elder puts it: "When you talk about development, do you mean material or spiritual development? Because if you are highly developed spiritually, the material goods do not bring happiness."

Ironically, the international interest sparked by the designation of these sanctuaries as a World Heritage Site has increased the precariousness of the Karens' situation. Though they have inhabited the area since before the founding of Bangkok, and paid annual tribute to a long line of Thai kings, they have no legal title to the land. State forestry officials who have wanted to evict the Karens from Thung Yai since it was established as a sanctuary two decades ago, now find new support from those who still argue that to secure the biodiversity, the Karens have to leave.

Though commercial tourism is not normally permitted inside Thai wildlife sanctuaries, there is growing pressure from the tourism industry and other quarters to open up Thung Yai and Huay Kha Khaeng specially to ecotourists. A World Bank biodiversity project, under the Global Environment Facility, proposes the introduction of ecotourism as one 'sustainable" way to use the area. The same project identifies the Karen people living there as a threat to the biological diversity and, while reluctant to propose forced eviction, recommends their removal from the sanctuary.

With a characteristic twist, Tai Sa notes: "We have our ancestors to blame for our predicament. If they had not protected these forests over so many centuries, we would not be threatened with eviction today."

Tai Sa challenges us to take another look at Eco-tourism. Marketed as a rare opportunity to see 'wild' nature, 'exotic' natives in their 'original' state, with the security of knowing that your money is helping to protect the environment, the ecotourism package is summed up perfectly by one Swedish travel magazine, which calls it "travel with a clean conscience". (resa med rent samvete) This may be the stuff of dreams, but it has about as much to do with the reality of tropical forest societies, as it does with Sweden's own Northern "wilderness".

Ecotourism feeds on the same kinds of romantic notions about nature that underly much of the Western - and especially American - conservation ethic. It paints an idyllic vision of a nature separate from civilization; one that is pristine, untrammeled, and unblemished by humans except, of course, for primitive (photogenic) indigenous people. It offers an escape from a drab, dehumanized urban life and a chance to enter a strange, beautiful and endangered world. A little more expensive than the average five-countries-eight-days tour, it provides the added promise of cleansing your conscience while you enjoy your annual holiday.

Hidden behind this cheap mythology is the complex political and cultural history of the place be it Thung Yai or the Brazilian Amazon or Yellowstone (the world's first national park) in the United States. Also obscured by such cliches are the indelible marks made by human societies on supposedly-wild nature over centuries, or even millennia, of habitation.

The Amazon forest is no more "virgin' today than Yellowstone was when, in 1872, the last Miwok Indians were driven out in order to make the new park "safe' for the 19th century version of ecotourists. Just as the area that we now call Yellowstone was shaped for thousands of years by the fires, planting and husbandry of the Shoshone, Crow, Bannock and Blackfoot, so the biological diversity of the Amazon is as much a "product' of human genius as it is a product of nature.

Similarly, the Karen people have vast knowledge of the forest ecosystem, using it for collecting vegetables and medicines, building material and fibers, as well as for their agriculture. Studies reveal that the diversity of plant species in the regenerated forest of a Karen fallow can actually be higher than the surrounding "natural" forest. "Perhaps the government realizes that we have a culture that understands nature conservation better than the forestry scientists - and that's why they want to destroy it by forcing us to leave." says Tai Sa.

Karen knowledge - as much part of the 'heritage' of this World Heritage Site as the tigers and tapirs and wild buffalo - is connected to a system of beliefs about the natural environment that combines Buddhism with animism.

Gibbons are, for example, held sacred by the Karen. According to their belief, the killing of gibbons - which are likened to humans because they are one of our primate-cousins that pair for life - is equivalent to murder. There are three nature spirits, the goddesses of the river *Mae Khongkha*, the earth *Mae thorance*, and the rice *Mae phosop*, each of whom is worshipped in elaborate ceremonies at key moments in the cycle - farm site selection, burning, planting, harvesting, New Year. As such, the concept of private property does not exist in traditional Karen communities. Tai Sa explains: 'We have to ask for permission to use the land from the earth goddess, and show thanks by offering flowers and incense and candles." Land is a manifestation of the goddess, and therefore cannot be owned.

Much of Karen culture has stayed alive in Thung Yai because of the relative isolation of the communities from the dominant society. If the Karens are forced to leave, they will almost certainly be resettled outside the forest on rectangular plots of private land. Given the dismal

fate of similar resettlement villages, little of their knowledge, cultural heritage, or even language is likely to survive for long.

Imagine a scenario in which Thung Yai is closed to one group and opened to another, in the name of conservation. Ecotourists coming to the sanctuary to watch birds and observe the biological diversity would be carefully shielded from the conflicts that perceded their arrival. Their only hint would perhaps be their silent guide - someone like Tai Sa - who would lead them through the forest. It would not be the first time that an ecotourism site rested on the exploitation of its original inhabitants, but this would not lessen the tragedy for the Karens □

ECOTOURISM:

A Tool for Sustainable Development

David Barkin

Abstract:

Ecotourism, to be successful, must promote sustainable development by establishing a durable productive base that allows local inhabitants and ecotourist service providers to enjoy rising standards of living. An ecotourist project must incorporate the social dimensions of productive organization and environmental conservation. Based on the experience of the over wintering reserves of the Monarch Butterfly in west-central Mexico, we suggest that unless ecotourism actively incorporates the local society into service planning and provision, and includes programs to meet the fundamental needs for income and employment for all people in the region, the special qualities of the site and its flora and fauna may be irreparably damaged.

Introduction

Ecotourism projects must go beyond prevailing notions of "the overlap between nature tourism and sustainable tourism"(1) to encompass the social dimensions of productive organization and environmental conservation. Ecotourism must do more than create a series of activities to attract visitors, offering them an opportunity to interact with nature in such a way as to make it possible to preserve or enhance the special qualities of the site and its flora and fauna, while allowing local inhabitants and future visitors to continue to enjoy these qualities. They must also establish a durable productive base to allow the local inhabitants and ecotourist service providers to enjoy a sustainable standard of living while offering these services.

The study of ecotourism offers many opportunities to reflect on the importance of sustainability, and the possibilities of implementing approaches, which move us in a new direction. But it also suggests that there are significant obstacles. Overcoming these obstacles requires more than well-intentioned policies; it requires a new correlation of social forces, a move towards broad-based democratic participation in all aspects of life, within each country and in the concert of nations. Strategies to face these challenges must respond to the dual challenges of insulating these communities from further encroachment and assuring their viability.

The obstacles are an integral part of the world system, a system of increasing duality, polarized between the rich and poor --nations, regions, communities, and individuals. A small number of nations dominate the global power structure, guiding production and determining welfare levels. The remaining nations compete among themselves to offer lucrative conditions that will entice the corporate and financial powers to locate within their boundaries. Similarly, regions and communities within nations engage in self-destructive forms of bargaining --compromising the welfare of their workers and the building of their own infrastructure-- in an attempt to outbid each other for the fruits of global growth. The regions unable to attract investment suffer the ignoble fate of losers in a permanent economic olympics, condemned to oblivion on the world stage, their populations doomed to marginality and permanent poverty.

Sustainability is not possible as long as the expansion of capital enlarges the ranks of the poor and impedes their access to the resources needed for mere survival. Capitalism no longer needs growing armies of unemployed to ensure low wages, nor need it control vast areas to secure regular access to the raw materials and primary products for its productive machine; these inputs are now assured by new institutional arrangements that modified social and productive structures to fit the needs of capital. At present, however, great excesses are generated, excesses that impoverish people and ravage their regions. Profound changes are required to facilitate a strategy of sustainable development: in the last section we explore such an approach, suggesting that ecotourist development strategies may contribute to promoting a new form of dualism: [i]a dual structure that allows people to rebuild their rural societies, produce goods and services in a sustainable fashion while expanding the environmental stewardship services they have always provided.[i]

Research shows that when given the chance and access to resources, the poor are more likely than other groups to engage in direct actions to protect and improve the environment. From this perspective, an alternative development model requires new ways to encourage the direct participation of peasant and indigenous communities in a program of job creation in rural areas to increase incomes and improve living standards. By proposing policies that encourage and safeguard rural producers in their efforts to become once again a vibrant and viable social and productive force, this essay proposes to contribute to an awareness of the deliberate steps needed to promote sustainability.

Ecotourism is widely believed to be the perfect economic activity to promote both sustainability and development. In this essay we examine the relationship between these two goals and end up with some reflections on the organization of specific projects.

A. Sustainability

Sustainable development has become a powerful and controversial theme, creating seemingly impossible goals for policy makers and development practitioners. Prevailing trickle-down approaches to economic development enrich a few and stimulate growth in "modern" economies and sectors within traditional societies, but they do not address most people's needs; moreover, they contribute to depleting the world's store of natural wealth and to a deterioration in the quality of our natural environment. A new discourse of sustainability is emerging, one that troubles thoughtful people, who are realizing the difficulty of implementing such an approach. When fully understood, people realize that [i] present levels of per capital resource consumption in the richer countries cannot possibly be maintained much less generalized[i] to people living in the rest of the world.

[i]In the ultimate analysis, we rediscover that in present conditions, the very accumulation of wealth creates poverty.[i] While the poor often survive in scandalous conditions and are forced to contribute to further degradation, they do so because they know no alternatives. Even in the poorest of countries, social chasms not only prevent resources from being used to ameliorate their situation, but actually compound the damage by forcing people from their communities and denying them the opportunities to devise their own solutions. For this reason, the search for sustainability involves a dual strategy: on the one hand, it must involve an unleashing of the bonds that restrain people from strengthening their own organizations, or creating new ones, to use their relatively meager resources to search for an alternative and autonomous resolution to their problems. On the other hand, a sustainable development strategy must contribute to the forging of a new social pact, cemented in the recognition that the eradication of poverty and the democratic incorporation of the disenfranchised into a more diverse productive structure are essential.

[i]Sustainability, then, is about the struggle for diversity in all its dimensions. [i] International campaigns to conserve germplasm, to protect endangered species, and to create reserves of the biosphere are multiplying in reaction to the mounting offensive, while communities and their hard pressed members struggle against powerful external forces to defend their individuality, their rights and ability to survive while trying to provide for their brethren. The concern for biodiversity, in its broadest sense, encompasses not only threatened flora and fauna, but also the survivability of these human communities, as stewards of the natural environment and as producers. Internationalization has stymied this movement towards diversity. The powerful economic groups that shape the world economy (transnational corporations and financial institutions, and influential local powers, among others) are striving to break down these individual or regional traits, molding us into more homogenous and tractable social groups. They would position us to support the existing structure of inequality and to engage in productive employment; and, for those lucky enough to enjoy high enough incomes, to become customers.

B. Self-sufficiency and the relationship between production and consumption

A crucial issue in developing a strategy of sustainability is that of self-sufficiency. The existing process of integration into the global trading system promotes specialization based on mono-cropping systems. Although sustainability does not lead to autarchy, it is conducive to a much lower degree of specialization in all areas of production and social organization. Historically, food self-sufficiency emerged as a necessity in many societies because of the precariousness of international trading systems; specific culinary traditions developed on the basis of highly localized knowledge of fruits and vegetables, herbs and spices. Although the introduction of green revolution technologies raised the productive potential of food producers tremendously, we soon found out how hard it was to reach this potential and the high social and environmental costs that such a program might entail.

Food self-sufficiency is a controversial objective that cogently raises the question of autonomy. Although development practitioners are virtually unanimous in rejecting calls for extreme specialization, there is general agreement on two contradictory factors in the debate:

1) Local production of basic commodities that can be produced equally well but more efficiently elsewhere is a luxury few societies can afford, [i]if and only if[i] the resources not dedicated to the production of these traded goods can find productive employment elsewhere; and

2) There are probably few exceptions to the observation that greater local production of such commodities contributes to higher nutritional standards and better health indices. In the context of today's societies, in which inequality is the rule and the forces discriminating against the rural poor legion, a greater degree of autonomy in the provision of the material basis for an adequate standard of living is likely to be an important part of any program of regional sustainability. It will contribute to creating more productive jobs and an interest in better stewardship over natural resources.

There are many parts of the world in which such a strategy would be a wasteful luxury. It would divert resources from other uses that could better contribute to improving well being. But even when the importation of basic needs is advisable, people concerned with sustainable development raise questions about modifying local diets so that they are more at tuned to the productive possibilities of their regions; in the current scene, the tendency to substitute imported products for traditional foods is having terrible consequences for human welfare in

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many societies. (2)

Food self-sufficiency, however, is only part of a broader strategy of productive diversification whose tenets are very much a part of the sustainability movement. Historically, rural denizens never have been 'just' farmers, or anything else, for that matter. Rather, rural communities were characterized by the [i]diversity of the productive activities in which they engaged to assure their subsistence.[i] It was only the aberration of transferring models of large-scale commercial agriculture to development thinking in the Third World that misled many into ignoring the multifaceted nature of traditional rural productive systems. Sustainable development strategies directly face this problem, attempting to reintroduce this diversity, as they grapple with problems of appropriate scales of operation and product mix.

C. A strategy of democratic participation for rural diversification and productive improvement

Sustainable development is an approach to productive reorganization that encompasses the combined experiences of local groups throughout the world. The techniques for implementation vary greatly among regions and ecosystems. A single common denominator pervades this work: the need for effective democratic participation in the design and implementation of projects. Another lesson from recent experience is the importance of creating networks to support and defend this work; without the mutual reinforcement that the international grouping of NGOs provides, the individual units would not be as effective in obtaining funds for their projects, in obtaining technical assistance for their implementation, and political support against intransigent or incredulous local and national politicians and institutions. (Friedmann and Rangan, 1993)

Sustainable development, however, is not an approach that will be accepted, simply because "its time has come." In the final analysis, it involves a political struggle for control over the productive apparatus. It requires a redefinition of not only what and how we produce but also of who will be allowed produce and for what ends. For organizations involved in projects of sustainable development in rural areas, the conflict will centre around control of mechanisms of local political and economic power, and the use of resources. The struggle to assure a greater voice in the process for peasants, indigenous populations, women, and other underprivileged minorities, will not assure that their decisions will lead to sustainable development. But broad-based democratic participation is the best way create the basis for a more equitable distribution of wealth, one of the first prerequisites for forging a strategy of sustainable development.

D. Dualistic Development: A strategy for sustainability

Global integration is creating opportunities for some, nightmares for many. In this juxtaposition of winners and losers, a new strategy for rural development is required: a strategy that re-values the contribution of traditional production strategies. In the present world economy, the vast majority of rural producers in the third world cannot compete on world markets. Unless insulated in some way, their traditional products only have ready markets within the narrow confines of poor communities suffering a similar fate.

But these marginal rural producers offer an important promise: they can support themselves and make important contributions to the rest of society. Present policies are driving peasants from their traditional activities and communities. (Barkin, Batt and DeWalt 1991) Peasants and indigenous communities must receive support to continue living and producing in their own regions. Even by the strictest criteria of neo-classical economics, this approach should

not be dismissed as inefficient protectionism, since most of the resources involved in this process would have little or no opportunity cost for society as a whole.(3)

In effect, we are proposing the formalization of a dual economy. By recognizing the permanence of a sharply stratified society, the country will be in a better position to design policies that recognize and take advantage of these differences to improve the welfare of people in both sectors. A strategy that offers succour to rural communities, a means to make productive diversification possible, will make the management of growth easier in those areas developing links with the international economy. But more importantly, such a strategy will offer an opportunity for the society to actively confront the challenges of environmental management and conservation in a meaningful way, with a group of people uniquely qualified for such activities. (4)

The dual economy is not new. Unlike the present version that permeates all our societies, confronting rich and poor, the proposal calls for creating structures so that one segment of society that 'chooses' to live in rural areas finds support from the rest of the nation to implement an alternative regional development program. The new variant starts from the inherited base of rural production, improving productivity by using the techniques of agroecology. It also involves incorporating new activities that build on the cultural and resource base of the community and the region for further development. It requires very specific responses to a general problem and therefore depends heavily on local involvement in design and implementation. While the broad outlines are widely discussed, the specifics require investment programs for direct producers and their partners. (5)

What is new is the introduction of an explicit strategy to strengthen the social and economic base for a dual structure. By recognizing and encouraging the marginal groups to create an alternative that would offer marginal groups better prospects for their own development, the dual economy proposal might be mistaken to be the simple formalization of the "war on poverty" or "solidarity" approach to the alleviation of the worst effects of marginality. This would be erroneous. Rather than a simple transfer of resources to compensate groups for their poverty, we require an integrated set of productive projects that offer rural communities the opportunity to generate goods and services that will contribute to raising their living standards while also improving the environment in which they live.

E. The Limitations of Ecotourism: The Monarch Butterfly

The Monarch butterfly and its 5,000 mile trek between Canada and Mexico have come to symbolize the bridge that is bringing the three nations of North America closer together, forging a single trading bloc. The phenomenon of the over-wintering of the Monarch Butterfly was "discovered" some 20 years ago (1974-1976) when researchers from the University of Florida finally traced the flight path from Canada. Of course, their presence was well known to local residents and to a broader segment of the population in west-central Mexico from time immemorial, but with the publication of the details of the journey in 'Scientific American' and 'National Geographic' magazines, its social and economic significance altered conditions in the region.

Once announced to the world, the spectacle of the wintering lepidoptera began to attract hundreds of thousands of visitors who make the pilgrimage to the reserves that were created so that this winged caller might enjoy some degree of protection from the ravages of encroachment by human activities. As a result, many of the people living in the region have come to resent the intruder; its annual visits have brought increasing government regulation of their lives, effective appropriation of their lands, intense social conflict and heightened

immiserization.

There are serious social and economic problems in the protected area. Many of these problems are simply local manifestations of the larger crisis of Mexican society, making it difficult for poor rural producers to survive by continuing their traditional activities. In this protected area, people have been particularly affected by specific conservation measures that intensified the adjustment process. The declaration of certain important are as to be part of the nuclear and buffer zones of the reserve, led to a prohibition or severe restriction on traditional forestry activities, without offering the communities or their members compensation for the re classification of their lands or alternative productive opportunities with which they might earn a livelihood elsewhere in the region.

The region's problems and those of the communities did not begin in1986 and cannot be attributed solely to the butterflies. Local systems of control by economic elites and political bosses were an important part of the local scene long before the visitors acquired their new found fame. Industrial demand for sources of pulp, and local mechanisms to concentrate the wealth and opportunities were already creating pressures on the forests and dividing individual communities as well as pitting one against another. The opportunities created by the unbridled expansion of tourism and the arbitrary distribution of the spoils among a very small group of people compounded the problems.

In this environment, a new approach to regional development is required. While there is a general recognition that ecotourism can offer more opportunities to the people, it is also clear that without other, complementary productive activities that create jobs and income, the people in the region will continue their environmentally destructive activities that also threaten the viability of the fir forests in which the Monarch nests.

A local network of NGOs and confederations of communities and productive groups has begun to play an important role in creating these opportunities. There appears to be an understanding of the great cost that was incurred as a result of the internecine warfare that the strategies of bureaucratic imposition created. The principal limitation, I think, is the lack of a mechanism for the various groups to implement realistic productive strategies; they need information about resources and markets, as well as mechanism to channel available resources more effectively. The organizations require a process of local co-operation, constructed on a firm basis of broad-based effective local participation. This is the route to creating a "dual society" in which ecotourism would contribute to an overall strategy of sustainable development.

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ENDNOTES

1. A definition offered by a leading scholarly participant in the discussions of the theme, Kreg Lindberg, of Charles Stuart University in Australia, in the Internet discussion group "Green-travel" (@igc.apc.org) on 14 March 1996. He adds: "because 'true' ecotourism (i.e., verifiably sustainable nature tourism) is comparatively rare, perhaps we are left with ecotourism as a goal."

2. The complexity of the task of ending hunger is widely recognized. But recent literature has stressed the social rather than the technical (or supply-based) origins of famine and hunger; Sen (1981, 1982) is a particularly effective exponent of this point, while others have gone into greater detail about the "social origins" of food strategies and crises (Barkin et al. 1990; Garcia 1981; Barraclough 1991). The "modernization" of urban diets in Nigeria, by substituting wheat and rice for sorghum and millet, is an egregious case of creating dependency, reducing opportunities for peasant producers and raising the social cost of feeding a nation (see Andrea and Beckman 1985).

3. Many analysts dismiss peasant producers as working on too small a scale and with too few resources to be efficient. While it is possible and even necessary to promote increased productivity, consistent with a strategy of sustainable production, as defined by agro-ecologists, the proposal to encourage them to remain as productive members of their communities should be implemented under existing conditions.

In much of Latin America, if peasants ceased to produce basic crops, the lands and inputs are not often simply transferable to other farmers for commercial output. The low opportunity costs of primary production in peasant and indigenous regions derives from the lack of alternative productive employment for the people and the lands in this sector. Although the people would generally have to seek income in the "informal sector," their contribution to national output would be meager. The difference between the social criteria for evaluating the cost of this style of production and the market valuation is based on the determination of the sacrifices 'society' would make in undertaking one or the

other option. The theoretical basis for this approach harks back to the initial essay of W. Arthur Lewis (1954) and subsequent developments that find their latest expression in the call for a "neo-structuralist" approach to development for Latin America (Sunkel, 1993).

4. Much of the literature on popular participation emphasizes the multifaceted contribution that the productive incorporation of marginal groups can make to society. (Friedmann 1992; Friedmann and Rangan 1993;Stiefel and Wolfe 1994) While very little has been done on specific strategies for sustainability in poor rural communities, it is clear that much of the experience recounted by practitioners with grassroots groups (e.g. Glade and Reilly 1993) is consistent with the principles enunciated by theorists and analysts like Altieri (1987).

5. For the more general discussion, see Adelman 1984 and Barkin 1990, ch7. FUNDE (1994) offers a specific program for the re-conversion of El Salvador based on the principles discussed in Section 4 of this paper. The proposals of groups like the IAF and RIAD offer specific examples of ongoing grassroots efforts to implement initiatives like those discussed in the text. The Ecology and Development Center in Mexico is pursuing a program of regional development consistent with the proposed strategy. (Chapela and Barkin 1995)

CALL OUTS

P. 2: A dual structure that allows people to rebuild their rural societies, produce goods and services in a sustainable fashion while expanding the environmental stewardship services they have always provided.

The poor are more likely than other groups to engage in direct actions to protect and improve the environment.

P. 4: Rural communities were characterized by the diversity of the productive activities in which they engaged to assure their subsistence.

p. 5: We are proposing the formalization of a dual economy. By recognizing the permanence of a sharply stratified society, the country will be in a better position to design policies that recognize and take advantage of these differences to improve the welfare of people in both sectors.

P. 6: the proposal calls for creating structures so that one segment of society that 'chooses' to live in rural areas finds support from the rest of the nation to implement an alternative regional development program.

P. 6: Rather than a simple transfer of resources to compensate groups for their poverty, we require an integrated set of productive projects that offer rural communities the opportunity to generate goods and services that will contribute to raising their living standards while also improving the environment in which they live.

P. 7: The problem of ecotourism in the Monarch butterfly reserves are discussed at length along with a proposal for an alternative dualistic strategy in Gonzalo Chapela and David Barkin, 'Monarcas y Campesinos: Una estrategia de desarrollo sustentable.'

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