BECAUSE THE CART SITUATES THE HORSE: Unrecognized Movements Underlying the Indian Supreme Court’s Internalization of International Environmental Law

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The text that follows is intended to serve as an examination of the approaches and methods employed by the Indian Supreme Court in its effort to integrate international environmental norms such as the principle of Sustainable Development, the Precautionary Principle and the Polluter Pays Principle as part of the existing body of binding, municipal rules in India.

Virtually all of Indian legal jurisprudence that speaks to this subject has been developed by the Supreme Court. Likewise, in no small part for this contribution, the Court has developed a reputation for being an activist institution that has since the mid 1980s transformed itself into a guardian of India’s natural environment. But what is forfeited in the pride parade that follows is any serious accounting of the extent to which the Court’s entanglement with international environmental rules has been substantively heavy but methodologically and argumentatively scant and even ahistorical. This is to say that the Court’s movements, as internalized, betray a startling lack of coherence and justification both within the logic of its decisions and externally i.e. with respect to how the Court chooses to view the development of international law—proceeding, instead, through rhetoric, avoidance and ultimately self-referential rationalization.

From this absence of scrutiny begins the story, spread across roughly three decades of judicial decisions and related commentary, of why very little is actually understood about what the principles mean to the Court or how it may choose to apply them from one decision to the next. The commentary attempting to critique this status, proceeding, as it does, from a presumption in favour of the Court’s ability to integrate international rules, is ultimately hamstrung because of its inability to identify the broader scheme of movement, the patterns and trends evidenced by the Court’s logic and method (i.e. the how?).

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Introduction

The text that follows is intended to serve as an examination of the approaches and methods employed by the Indian Supreme Court in its effort to integrate international environmental norms (such as the principle\(^1\) of Sustainable Development (SD), the Precautionary Principle (PCP) and the Polluter Pays Principle (PPP)) as part of the existing body of binding, municipal rules in India.

Virtually all of Indian legal jurisprudence that speaks to this subject has been developed by the Supreme Court. Likewise, in no small part for this contribution, the Indian Supreme Court (Supreme Court or Court) has developed a reputation for being an activist Court\(^2\) that has, since the mid 1980s, transformed itself into a guardian of India’s natural environment.\(^3\) Given the significance and high profile nature of the relevant, competing interests that usually appear before the Court, the Supreme Court’s achievement, thus far, is no small matter and therefore extensively documented. But what is forfeited in the pride parade that follows is any serious accounting of the manner (approach and method) by which the Supreme Court is able to access such non-municipal standards in the first place i.e. there is virtually no assessment of the extent to which the Court’s entanglement with international environmental rules has been substantively heavy but methodologically and argumentatively scant or even ahistorical. By this I mean that the Court’s movements, as internalized into municipal law, betray a startling lack of coherence and justification both within the logic of its decisions and externally i.e. with respect to how the Court chooses to view the development of international law—proceeding, instead, through rhetoric, avoidance and ultimately self-referential rationalization.

Relevant commentary, on the other hand, seems to limit itself to no more than a reiteration of the Court’s opinion: that it may reference international rules in interpreting domestic laws when such former standards are not contrary to municipal law.\(^4\) Specific to the use

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\(^1\) For the purpose of this paper I use “rule” and “principle” interchangeably.
\(^4\) Id. at 222
of environmental principles, the bulk of subject-literature (even such that purports to be critical) limits itself to acknowledging that such principles are borrowed from international environmental agreements, before turning to attempt a critique of the Court’s interpretation. Such an approach, however, references a source (i.e. where found?) and not an actual process of rule finding i.e. there is, seemingly, never any doubt as to how or in what manner this transfer (or borrowing) has been accomplished. Rather, this entire process of adoption and integration is usually presented as a given.

From this absence of scrutiny begins the story, spread across roughly three decades of judicial decisions and related commentary, of why very little is actually understood about what the principles mean to the Court or how it may choose to apply them from one decision to the next. The commentary attempting to critique this status, proceeding, as it does, from a presumption in favour of the Court’s ability to integrate international rules, is ultimately hamstrung because of its inability to identify the broader scheme of movement, the patterns and trends evidenced by the Court’s logic and method (i.e. the how?) from one decision to the next. But such a result is unremarkable given that, to adopt a pastoral metaphor, it makes little sense to wonder where the horse should be made to stand, when the cart itself cannot be identified; my present intention, tout court, is not to historicize environmental law in India but rather to provide a more sincere rendering of the Court’s approach, method and movement as it attempts to use international rules to build a frame for Indian municipal environmental jurisprudence.

5 See G. Sahu, Implications of Indian Supreme Court’s Innovations for Environmental Jurisprudence, 4: 1 LAW, ENVIRONMENT AND DEVELOPMENT JOURNAL 1, 11 (2008), at http://www.lead-journal.org/2008-1.htm (hereinafter Sahu)

6 Id. at 10, where the author writes,

“The Court of India [i.e. the Indian Supreme Court] while administering environmental justice, has evolved certain principles and doctrines within and at times outside the framework of existing environmental law. Environmental principles, such as polluter pays, precautionary principle and public trust doctrine have been adopted by the Court in its concern to protect the environment…It is important to note that these principles have been developed in various international agreements and conferences to control and prevent further environmental degradation.” [Footnotes deleted]

The only attempt at describing process is limited to saying, “Drawing inference from international environmental principles, the Court of India [i.e. the Supreme Court] has applied various principles to resolve domestic environmental problems.” [Emphasis, mine] The use of “inference,” however, raises far more questions than it answers. See also N. R. M. Menon, Legal Aspects of Environmental Protection (text of Prof. S.K. Bose Memorial Lecture at the Centre for Mining Environment, Indian School of Mines, Dhanbad, India, 11th January, 2002) at: http://ismenvis.nic.in/lecture2002.pdf (hereinafter Menon: Legal Aspects)

Towards this end, my argument may be read as follows: The first part provides a rough sketch of the Indian Supreme Court’s relative position with respect to the legitimacy of its decisions; the second portion of the argument analyzes the strategy employed by the Court with respect to international rules in general, while the third section extends the analyses into the Court’s approach towards accessing international environmental rules into domestic decision-making.

I. **Etch-A-Sketching legitimacy**

The voluntary acceptance and consequential internalization of a rule by a society upon which it is levied is intrinsically dependant on the ability of such a rule to maintain legitimacy not only in substance, but also in terms of perception.\(^8\) Legitimacy, in other words, is largely about the fulfillment of expectations. The same, by extension, is true for the legal system housing this rule.\(^9\) The greater the number of acceptable rules and practices offered by a system, the greater is the societal respect for it. The origin of a rule, however, plays a significant role in this process. For instance, when the Legislature enacts a statute, even though some individuals or sections of society may not look upon it favourably, its “substance” will nevertheless be presumed to be legitimate and in furtherance of some recognized public interest, unless and until it is adjudged to be in violation of some constitutional mandate e.g. the Court strikes it down as being *ultra vires* the Constitution (Indian Constitution or Constitution). On the other hand, when the Court interprets or develops a rule (and it is almost universally agreed that courts everywhere do perform his act to some extent)\(^10\) the criteria by which this rule’s (and therefore the Court’s)

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\(^8\) R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256, [1923] All ER 233, where in considering the issue of judicial review, Lord Hewart Chief Justice, establishes the, now oft-cited, adage “Not only must Justice be done; it must also be seen to be done,” or in one of its more commonly used forms “Justice must not only be done but be seen to be done;” Accord, *In re Pinochet*, where the main question (before the Lords of Law of the United Kingdom) was whether Augusto Pinochet (the ex. Head of State of Chile accused of various crimes against humanity) was immune to an arrest warrant issued and executed against him while he was present in England for the purpose of receiving medical attention. Pinochet filed a petition alleging that an order passed against him, be set aside on the ground that Lord Hoffman, one of the judges hearing his case, was at the time of such hearing, a Director and Chairperson of Amnesty International Charity Limited (an organization which had been granted leave to intervene in the trial providing written submissions as well as presentations by counsels, directed against Pinochet’s interest). While Pinochet’s petition made “…no allegation of actual bias against Lord Hoffmann; his claim is based on the requirement that justice should be seen to be done as well as actually being done…” [Emphasis, mine] Placing reliance on the adage, the, then existing, extradition order against Pinochet was vacated and a new hearing ordered, at [http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm](http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm); *R v Racz* [1961] NZLR 227 at 232


\(^10\) There is a substantial volume of decisions and commentary making this point; a few instances are presented here. See Donahue v. Stevenson [1932] AC 56 (“good neighbour” principle with respect to product liability), for an analysis of this decision by Lord Bingham who concludes that the majority decision here *made law*, see, T. BINGHAM, THE BUSINESS OF JUDGING: SELECTED ESSAYS AND SPEECHES 29 (Oxford University Press, Oxford, 2000); Accord Rylands v. Fletcher (1868) LR 3 HL 330 (significantly alters the standard of negligence in tort and enumerates the “strict liability” standard); M.C. Mehta v Union of India and Ors. AIR 1987 SC 1086 (uses “strict liability” but creates “absolute liability” restricting the exceptions allowed as per Rylands v. Fletcher, even further. Court also develops the “deep pocket” theory with respect to environmental pollution and injury to public health). See also E.W. THOMAS, THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES 3-4 (Cambridge University Press, New York, 2005) (hereinafter *Thomas: Judicial Process*) where the
legitimacy is judged, is significantly different. For one thing, the Court’s decisions are not strictly presumed to be legitimate since judges are not democratically elected and therefore not, already, the legitimate representatives of the people accountable to constituents for their decisions. Given this, legitimacy is not automatic and the bar that must be cleared (regularly) is set higher. In addition to this general lag in legitimacy, one other factor that constantly weighs upon the Indian judiciary (specifically) needs to be outlined: the specter of post-coloniality and its long shadow on Indian courts. As explained by Baxi,

“For people living under the conditions of existing postcolonial democratic constitutionalism, the very figure of ‘courts’ and ‘justices’ stands mired in a variety of (mostly unwritten) histories and memories of occupation, subjugation, disadvantage, discrimination and dispossession that Michel Foucault signified as among the sites of ‘tiny and horrible machiavelianisms.’ In colonial timespaces, court and justices signified sites of domination that collaborated in the production of pervasive human rightlessness. And the nationalist struggles for emancipation from colonialism/imperialism were, in a sense, as aspects of ‘guerilla anti-judicial operations’ celebrating forms and ‘acts of popular justice.’ Postcolonial constitutionalisms everywhere remain marked by memories of this struggle often resulting in an abiding distrust of adjudicative power.”

As such, for all the broader legitimizing qualities of the Constitution and claims of the “rule of law,” the Indian Supreme Court enjoys only a modest cache of (inherent) confidence by way of historical experience and therefore feels the need to constantly reiterate a variety of preconditions of legitimate democracy in support of its authority. In other words, the Court—in order to continue to remain respected and perceived as a legitimate source and guardian of municipal law—“must be seen” to exist and operate under certain restrictions deemed to ensure “judicial restraint,” the basis for which expectation was established by the Indian author clarifies that whether or not the rule arising from a given decision is positive (expansive) or negative (restrictive) or is stated creatively (or not so), is irrelevant to the fact that a rule has been created in the course of judicial decision-making. For a limited acceptance of this role (judges making law to fill gaps), see Dworkin: Empire, supra note 9, at 6.

11 See S. P. Sathe, Supreme Court and NBA, 35:46 ECONOMIC AND POLITICAL WEEKLY 3990-3994, at 3994 (Nov. 11-17, 2000) where, in referencing the criticism endured by the Indian Supreme Court for its 1975-76 emergency-era decision, see A. D. M. Jabalpur v. Shiv Kant Shukla, AIR 1976 SC 1207 (hereinafter ADM Jabalpur), as well as its decision with respect to the 1984 Union Carbide-related gas tragedy in Bhopal, see Union Carbide v. Union of India, (1989) 3 SCC 38), Sathe concludes, “Ultimately the court’s strength is not derived from its power to punish but it lies in the confidence of the people that it is fair and just”


13 See Article 50, Constitution (“The State shall take steps to separate the judiciary from the executive in the public services of the State.”). Accord Minerva Mills v. Union of India, AIR 1980 SC 1789, where the Court held that the doctrine of separation of powers was one of the basic structures or essential features of the Constitution.

14 See D. KENNEDY, A CRITIQUE OF ADJUDICATION {Fin de siècle} 13 (Harvard University Press: Cambridge, MA, 1997) (hereinafter Kennedy: Critique) where the author, in the course providing an overview of the rule of law, notes that this “broad” notion requires, “That judges understand themselves to be bound by a norm of interpretive fidelity to the body of legal materials that are relevant to whatever dispute is before them.”
Constituent Assembly in drafting what is arguably the world’s longest and most detailed national constitution. Given this, the judicial interpretation of legislated rules (as well as the creation of new ones) must not only be capable of being traced back to the Constitution (or other legislative measures), but it must, also, not be felt/seen to be (“perception”) contrary to, or without regard for, some closely held local democratic choice. In Vishaka and Others v. State of Rajasthan, these aforementioned parameters are fulfilled by an opportune coincidence when the Court is faced, on the one hand, with an instance of sexual harassment on which the Indian government has no specific legislation, and consequently, on the other hand, with the larger issue of sexual harassment as pertaining to gender equality in India.

II. The logic of internalization of international rules

In Vishaka (1997) a writ was filed before the Court (concurrent with criminal proceedings elsewhere) as a class action (under Art. 32 of the constitution allowing for “Constitutional Remedies”) by members of civil society, in response to the rape of an on-the-job social worker in the State of Rajasthan. Their aim, understandably, was to draw attention to such incidents as evidence of the less-than-equal protections available to women under municipal law and ultimately to ask the Court’s assistance “…in finding suitable methods for realisation of the true concept of ‘gender equality;’ [sic] and to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation.”

The Court, in response, supplied one of its most progressive and resounding decisions upholding the individuals’ right to life and personal liberty under Article 21 of the Indian Constitution (as including human dignity). This decision marked a significant forward step in women’s rights through its furtherance of gender equality and protection from sexual harassment (in and out of the workplace), and for this ratio and its laudable consequences the Court has received heavy acclaim. This glee, however, also served to minimize an assessment of the

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15 See Dworkin: Empire, supra note 9, at 125, discussing how strict conventionalism also bolsters the cause of consistency.

16 The controversy surrounding the very first amendment to the Indian Constitution is a fitting example. When the Indian Supreme Court interpreted “equality” and “fraternity” with respect to Article 17 (abolishing the practice of “untouchability”) and Article 23 of the Indian Constitution (prohibiting trafficking in persons and forced labour) to find reservations (or the quota system), as being illegitimate means of pursuing affirmative action, the legislature moved to enact legislation to negate the Court’s action. See Baxi: Dworkin, supra note 12, at 582, where Baxi describes how the ensuing legislation not only countered the Court’s decision but also provided for “…nigh irreversible rights of political participation to India’s millennially excluded Dalits, the Indian Scheduled Castes and Tribes, in derogation of a constitutional rights of adult suffrage (in the sense of the right to contest elections) through the device of legislative reservations.” Accord Mohammed Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945

17 Vishaka and Others v. State of Rajasthan and Others, AIR 1997 SC 3011 (hereinafter Vishaka)

18 Id. at ¶1

19 Part III: Article 21, Constitution (“Fundamental Rights”) which states, “No person shall be deprived of his life or personal liberty except according to procedure established by law.” Accord Maneka Gandhi v. Union of India, AIR 1978 SC 597 (hereinafter Maneka), where the Supreme Court in overruling A. K. Gopalan v. State of Madras, AIR 1950 SC 27 (where the Court had restricted the understanding of “personal liberty” to mean only that such liberty as related to or concerned the person or body of the individual in question), defended its rationale by saying, that “the attempt of the Court should be to expand the reach and ambit of Fundamental Rights rather than to attenuate their meaning and context by a process of judicial construction.”
Court’s process and approach which I argue conveys a major, strategic shift in the Court’s approach towards the internalization of international rules and consequently, its self-perception. This aspect of judgment is the subject of my analysis here.

II.1 Reading strategy

On paragraph 7 of the decision, where Chief Justice Verma writes,

“In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment...the contents of international Conventions and norms are significant...Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions [Arts. 14, 15, 19 (1) (g) and 21 of the Constitution] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Art. 51 (c) and the enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Art. 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It Provides [sic] that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till the Parliament enacts legislation to expressly provide measures needed to curb the evil...” [Emphasis, mine]

The Court’s justification above presents arguments on three separate issues, first the presence of a “gap” in the law; second, how the process by which international rules can be internalized in India, and third, what kinds of rules can be accessed. The Court’s response to each of these issues needs to be understood in the context of the larger goal that the Court set for itself—whereas the general, expansively interpreted language of “Right to life” (Article 21 of the Constitution) would certainly allow the Court to attack sexual harassment of women, such an acknowledgement and any subsequent order against the Government for failing to protect its citizens, was not seen as an adequate response by the judges in Vishaka.20 For this reason, even while allowing the petition under Article 32, and counting the facts as displaying a violation of Fundamental Rights, the Court opted not to throw the ball back to the Government;21 instead, it decided to provide specific sexual harassment prevention guidelines based on the Convention on

20 Vishaka, supra note 17, at ¶3 where the Court writes,

“Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Arts. 14, 19 and 21 are brought before us for redress under Art 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.”

21 I refer here to the traditional mode of action keeping within the separation of powers doctrine (see Constitution of India, at Art. 50) whereby an international obligation would first be acceded to by executive action, followed by legislation being passed under Article 253 of the Constitution, see infra note 46, thereby making such obligations part of municipal law.
the Elimination of All Forms of Discrimination against Women (CEDAW),\textsuperscript{22} an approach that that would not be standard/expected practice even after an affirmation of Fundamental Rights under Article 21. This immense goal, as well the ensuing collaboration between the Supreme Court and the Government of India make Vishaka a landmark decision; these same aspects of the decision, however, also represent factors that were unique to Vishaka but that have since then been overlooked, allowing the Court to continue with an expansive mandate even when the circumstances no longer allow for the same.

\textbf{II.1.1 \textit{“Gap” as opportunity}}

In deciding Vishaka, the Supreme Court notes the lack of Indian legislation on the subject of sexual harassment when it says: “In the absence of legislative measures, the need is to find an effective alternative mechanism to fulfill this felt and urgent social need,”\textsuperscript{23} and again, “In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places…”\textsuperscript{24} international conventions must be used.

Upon taking note of this “gap,” however, the Court does not simply conclude that such lacunae should be filled and/or levy responsibility on the Government.\textsuperscript{25} Instead it writes,

“…When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Arts. 14, 19 and 21 are brought before us for redress under Art 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.”

No doubt identifying a clear absence of binding “rules” with respect to sexual harassment afforded the Court with increased leeway with respect to the manner in which it could resolve the claim. Such an absence presented a situation in which even the most conservative approach taken by the Court, would lead to some law–making, for it would inevitably require the Court to, at the very least, reformulate existing principles (as found in Constitution/statute and/or precedent) to develop what would in effect be specific new rules. The Court, as mentioned, went a step further, and its guidelines while meant to secure Fundamental Rights were drawn, not from domestic but rather from international sources; as such, the Court provided a subtle, new logic through which it could access international rules for the purposes of municipal dispute resolution and rule-making.

Given the heinous and concretely identifiable nature of the offence of sexual harassment and the obvious lack of legislation in India, the Court’s movement (outlined next) quickly grew into a psychological model for judicial method and strategy, seen as being legitimate. From here on, the Court has been able to use such strategies even when there is no real “gap” in the law, as


\textsuperscript{23} Vishaka, supra note 17, at \S 2

\textsuperscript{24} Id., at \S 7. See id., at \S 1, 3

\textsuperscript{25} Id., at \S 3 “The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive…”

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well as when the “gap” is in governmental action and not in the law (see §III.4). Ever mindful of its perennial need to maintain legitimacy, however, the Supreme Court, while often acknowledging activist-leanings (especially with respect to Fundamental Rights under Art. 21 of the Constitution)\(^{26}\) has, nevertheless, consistently attempted to portray its ultimate rule searching methodology as firmly placed within the limits of the Constitution/statutory rules and precedents. To be precise, with respect to fundamental rights like the “right” to a clean environment, the Supreme Court of India has taken to perceiving a “gap” to mean that its rule of choice \textit{may never have been employed,} but nevertheless \textit{already exists} within the larger body of Indian jurisprudence;\(^{27}\) as if an unused law were the same as a non-existent one. Before considering the body of environmental law, however, a brief review the Court’s method with regard to international rules in general is warranted.

\section*{II.1.2 Obfuscating the shift: Reading precedents through Vishaka}

Article 51(c)\(^{28}\) of the Indian Constitution holds the key to the Supreme Court’s ability to access international rules (in the absence of specific legislation) for the purposes of municipal application.\(^{29}\) This scope, however, is qualified by Article 372\(^{30}\) which refers to the continued effectiveness and alteration of “law in force”\(^{31}\) prior to the Indian Constitution coming into effect. This is to say that Indian Courts follow the British tradition as it stood prior to the commencement of the Indian Constitution on 26\(^{th}\) January, 1950, unless the same are expressly amended by the Indian Parliament. Now, up until \textit{Vishaka}, the Court’s approach and statements with regard to the relationship between customary international law (CIL) and municipal law were largely case-specific and generally ambiguous. So, for instance, with respect to how far

\footnote{26 For e.g. with respect to Public Interest Litigation (PIL), see Justice B.N. Kirpal, \textit{Developments in India relating to environmental justice} (UNEP) 3, at http://www.unep.org/law/Symposium/Documents/Country_papers/INDIA%20.doc (hereinafter \textit{Kirpal: UNEP}) where Justice Kirpal describes the “near complete academic agreement that the concerted involvement of the higher judiciary in India with the environment began with the relaxation of the rule of locus standi…” See also U. Baxi, \textit{Taking suffering seriously: Social Action Litigation and the Supreme Court}, 29 \textit{International Commission of Jurists Review} 37-49 (1982).}

\footnote{27 \textit{Vishaka}, supra note 17, at ¶7, “In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of international Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Arts. 14, 15, 19 (1) (g) and 21 of the Constitution and the safeguards against sexual harassment \textit{implicit therein}.” [Emphasis, mine]}

\footnote{28 Article 51(c), \textit{Constitution}: “Promotion of international peace and security— The State shall endeavour to…(c) foster respect for international law and treaty obligations in the dealings of organised people with one another.”}

\footnote{29 S.K. Verma, \textit{International Law in Fifty Years}, supra note 2, 621-649 at 622 where the author says, “Apart from Article 51, there are no categorical provisions to give effect to customary international law at the municipal level.”}

\footnote{30 See Article 372(1), \textit{Constitution}: “Notwithstanding the repeal by the Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India, immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislative or other competent authority.”}

\footnote{31 “[L]aw in force” under this provision, has been held by the Indian Supreme Court, to include British Common Law practices (as applied by courts in India, in the pre-Constitution era), \textit{see} Builders Supply Corporation v. Union of India, AIR 1965 SC 1061; \textit{see also} Director R &D v. Corp. of Calcutta, AIR 1960 SC 1355}
Indian courts are automatically bound by international rules, the Supreme Court in *ADM Jabalpur* (in keeping with the approach of the House of Lords) rejected an argument calling for the enforcement of the Universal Declaration of Human Rights (UDHR) (as reflecting customary international law), not on the merits of the claim itself (i.e. whether or not the UDHR was part of custom) but because, “Nothing which conflicts with the provisions of our Constitution could be enforced here under any disguise.” In *Gramophone*, on the other hand, the Supreme Court in discussing the relationship between municipal rules and CIL, with respect to a doctrinal approach, accepted the binding nature of CIL, but with respect to whether international rules (in general) were binding on Indian courts (without specifically having been prescribed by municipal statute), it favoured the doctrine of incorporation. In this regard, it should be kept in mind, as noted by noted jurist Verma,

“In spite of the Court’s observations to the contrary [in Gramophone], there is no support in the Constitution to uphold the doctrine of incorporation, except finding its basis in article 372, which is also disputable, because the Court has not relied on this article in its judgments.”

And yet, the Court’s maneuvering is perhaps best visible, not in the fact that it favoured incorporation, but rather in how it went about doing this. By favouring incorporation, the Court achieved two things: first, it is able to allow itself to interpret (by harmonizing or otherwise) the UDHR (hereinafter UDHR)

*ADM Jabalpur*, at 1291

*Gramophone* involved the seizure of pirated audio tapes from Singapore being imported into India, on their way for sale in Nepal. The Calcutta High Court, in response to a petition by the authorized license holder to restrain the movement of the tapes, interpreted “import” (under Section 53 of the Indian Copyright Act), restrictively, so that goods in transit were excluded from being considered imported. On appeal, the Supreme Court considered the issue of whether pirated tapes could be taken across India to Nepal (where their importation was no illegal) given that Nepal is landlocked. The Supreme Court disagreed with the High Court and provided a liberal interpretation of “import” (which the Court said was in line with the Berne Convention 1886 and the Universal Copyright Convention of 1952).

*Id.*, at 671

“The comity of Nations requires that the Rules of International Law may be accommodated in the [sic] Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament…when they do…the sovereignty and integrity of the Republic and the supremacy of constituted legislatures…may not be subjected to external rules except to the extent accepted by the legislatures themselves. The doctrine of incorporation also recognizes the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no, Municipal Law must prevail in the case of conflict…National Courts cannot say ‘Yes’ if Parliament has said ‘No’ to a principle of international law…”

Verma in *Fifty Years*, supra note 2, 621-649 at 629

*Gramophone*, at 671, “…But the Courts are under an obligation within reasonable limits, to interpret Municipal Statute to avoid confrontation with the comity of Nations or the well-established principles of International law. But if conflict is inevitable, the latter must yield.”
international law and municipal rules to allow it to read the former (international rules) as part of the latter (municipal rules); second, the Court was able to achieve this without raising a finger itself, so to speak, because in *Gramophone*, the Court arrived at its preference for the doctrine of incorporation through a review of British case law and commentary, presumably keeping in line with the established logic that British Common Law prior to the Constitution’s commencement would be law in India. As such, at no point did the Court “try to evolve its independent position on such a vital issue.” This caveat is especially important because the only way the Supreme Court would be able to accept CIL as being part of the law of the land in India, would be expressly putting forward an interpretation of Article 372 of the Constitution. The Court however, did not expressly use or interpret this provision in the aforementioned decisions.

In addition, the Court did not enter a discussion of whether it was bound to apply CIL in the absence of municipal legislation, executive decision or treaty; nor does the Constitution or the Supreme Court ever outline whether international law is *per se* part of the corpus of municipal rules i.e. without the need for it to be legislated upon.

In this context, the language of paragraph 7 of *Vishaka* states,

“…Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions [Arts. 14, 15, 19 (1) (g) and 21 of the Constitution] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Art. 51 (c) and the enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Art. 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. …”

Here, the Court, first, extends the scope of non-municipal rules that the Court can “read” into the Constitutional provisions addressing fundamental rights to include all Conventions that are “not inconsistent with the fundamental rights and in harmony with its spirit…” This implies, that as between municipal (constitutional) and international rules, the former would supersede the latter, and is an extremely important conclusion, not only because it is repeatedly employed by the Supreme Court’s with respect to the environment and SD, but because through this sentence alone, the Indian Supreme Court elects itself as not mandatorily bound by the

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38 For a further discussion of the Court’s decision in *Gramophone*, see *Verma* in *Fifty Years*, supra note 2, at 626-627

39 Id. at 627

40 Vishaka, supra note 17, at ¶7

41 The phrase “…must be read…,” in the text of ¶7 of *Vishaka* quoted, would imply that the Court is referring to itself and not Parliament, since the latter, authorized to legislate does not need to “read” anything into the text of the Constitution.

42 Vishaka, supra note 17, at ¶14, 15, 27; Prem Shanker Shukla v. Delhi Admn., AIR 1980 SC 1535; People’s Union for Civil Liberties v. Union of India, AIR 997 SC 568 (hereinafter *PUCL*); Nilabati Behera v. State of Orissa, (1993) 2 SCC 746 (where the Court employs the ICCPR to read an enforceable right to compensation into the scope of public law remedies under Art. 32)

43 Gramophone, supra note 34, at 671; Satya v. Teja Singh, AIR 1975 SC 105 at 108 where the Court says, “Every case which comes before an Indian Court must be decided in accordance with Indian Law.” For a general description of this understanding, see D. D. BASU, CONSTITUTIONAL LAW OF INDIA Vol. 1 at 1002 (Universal Law Publishing Co. Pvt. Ltd., Delhi: 2008) (S. C. Kashyap ed.) (hereinafter *Basu: One*)
customary international rules\textsuperscript{44} or the principle of supremacy of international law,\textsuperscript{45} and most importantly because the resulting status is that the Supreme Court has positioned itself as able, but not required to apply CIL as part of municipal rules, giving the Court ample breadth for interpretation.

\textbf{II.1.3 Obfuscation of scope}

The above-described logic belies one further shift in the authority of the Court. With respect to the scope of rules that the Court can read into the relevant constitutional provisions (addressing “fundamental rights…”) the Court begins by describing the scope of its access as “Any International Convention,” so as to not include non-binding declarations, resolutions and so on. Subsequently, however, after it circuitously adopted the executive power of the Government (allowing it to produce sexual harassment guidelines), in the same paragraph, the relevant parts of international law to which the Court has access are expanded to “…the International Conventions and norms,” (as ordinarily only Parliament may, under Art. 253).\textsuperscript{46} The obvious effect being that once the Court’s reasoning, described earlier, is accepted, the Court can automatically “read” more than just “Any International Convention,” as stated earlier in its judgment. In this way, once again, the Supreme Court is able to expand its authority (this time, with respect to the kind of rules it can access, rather than the ability to access at all), without actually, ever, making the distinction between being able to access formally binding international conventions only, and being able to access other international norms in addition to formally binding international conventions.

A direct consequence of this is that the Court’s aforementioned authority-through-silence—with respect to whether or not international law is \textit{per se} part of the corpus of municipal rules i.e. without the need for it to be legislated upon (which was partly answered, as described above, by the first sentence of paragraph 7 in as far as “Any international convention” was concerned)—may now be seen to have expanded to cover virtually all international norms. This is especially important with respect to non-binding international declarations or resolutions such as, for instance, those found in the United Nations Conference on the Human Environment (Stockholm, June 1972) (“Stockholm Declaration”)\textsuperscript{47} and the United Nations Conference on Environment and Development (“Rio Declaration”),\textsuperscript{48} all of which, by and large, use language that allow State Parties tremendous leeway in terms of the scope and extent to which they, each,

\begin{itemize}
\item \textsuperscript{44} \textit{ADM Jabalpur}, supra note 11, at 1291
\item \textsuperscript{45} For a discussion of the principle, see M. N. SHAW, INTERNATIONAL LAW, Ch. 4, 99-136 (4\textsuperscript{th} ed., 1998) (hereinafter Shaw)
\item \textsuperscript{46} Article 253, \textit{Constitution}: “Legislation for giving effect to international agreements. - Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.” [Emphasis, mine]
\end{itemize}
wish to implement the agreed upon principles.\textsuperscript{49} The implied expansion of the Supreme Court’s authority to incorporate any and all such norms raises a question of temporality that follows all such preemption. What would happen for instance, if the Court were to employ these principles in a certain way or to a certain extent, and the State (Executive/Legislature), later on, clarified or decides that it understands the principles differently or wishes to implement them to a different (less expansive) extent. Would the Government’s hands now be bound by the previous decision Court? The Court’s language in \textit{Gramophone} that,

\begin{quote}
“Comity of nations or no, Municipal Law must prevail in the case of conflict…National Courts cannot say ‘Yes’ if Parliament has said no to a principle of international law…”\textsuperscript{50}
\end{quote}

fails to consider (or purposely overlooks) the temporal nature of the hypothetical i.e. it presumes that the Executive or Legislature (“Parliament”) would act, meaning not only be party to a non-binding international resolution or declaration but would also have \textit{already} defined the specific nature and extent of its commitment to its principles, before the Judiciary (“National Courts”) had occasion to consider the matter in a dispute. This is only one of a number of possibilities (in terms of timing). In fact, almost all of the Supreme Court’s environmental jurisprudence has been developed under the belief that the Government is slow or refuses to act to protect the Indian natural environment. In this situation when the timing is reversed (as simulated earlier), the Supreme Court’s reasoning would undoubtedly lead to a conflict between the Executive/Legislature and the Judiciary with the Supreme Court serving as the arbiter, and all such pre-judged (and \textit{rightfulness} of their consequences) hanging in the balance.

Whether or not this lack of distinction (between international conventions only and international conventions + norms) is viewed as strategy on the part of the Court or simply an oversight, the resulting language, nevertheless, reflects an important shift in authority, which, as I describe and will show in detail, affords the Court a significant opportunity with respect to the incorporation of international environmental principles.

As noted, earlier, \textit{Vishaka} is an important case, with respect to the development of environmental jurisprudence in India because the Supreme Court’s decision here has not only established substantial ambiguity with respect to how the Court can approach international rules,\textsuperscript{51} but has also facilitated the internalization of a variety of methods and intellectual mechanisms (forms of legal reasoning) to which the Court has returned time and again, in its effort to \textit{find} SD (and the other, related, principles) as being a rule(/s) under municipal law.

\textbf{II.1.4 Moving to environmental disputes: Thematic differences}

What differentiates \textit{Vishaka} from the entire body of case law on environmental/development issues is, \textit{first}, the unique coordination seen to exist between the Supreme Court and the Union

\begin{flushleft}
\textsuperscript{49} See e.g. V. P. NANDA, G. (ROCK) PRING, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY FOR THE 21ST CENTURY 39 (Transnational Publishers, 2004) 22-27 (hereinafter \textit{Nanda})

\textsuperscript{50} \textit{Gramophone}, supra note 34, at 671

\textsuperscript{51} \textit{Vishaka}, supra note 17, at ¶16 where the Court says “…it is further emphasised that this [i.e. the Court’s guidelines] would be treated as the law declared by this Court under Art. 141 of the [Indian] Constitution.”
\end{flushleft}
Government through which the specific judicial guidelines were developed. As described in the decision,

“The exercise performed by the Court in this matter is with this common perception shared with the learned Solicitor General and other members of the Bar who rendered valuable assistance in the performance of this difficult task in public interest... The progress made at each hearing culminated in the formulation of guidelines to which the Union of India gave its consent through the learned Solicitor General, indicating that these should be the guidelines and norms declared by this Court to govern the behaviour of the employers and all others at the work places to curb this social evil.”

This compliance and coordination is rarely seen in environmental jurisprudence, where more often than not, the Supreme Court appears to be pulling teeth in achieving governmental compliance and/or interfering with the latter’s prerogative.

One obvious reason for this difference is to do with the nature of the right itself: In the context of the variety of dimensions that the Court has given to the right to life under Article 21, the issue of sexual harassment and assault, specifically, with respect to women in the workplace, is one that is very well understood and concretized. This is to say, that the right involved here is immediate and (more often than not) tangible. For instance, when referencing the CEDAW in the course of reflecting on municipal guidelines, the Court is able to point to specific, well defined obligations (binding legal rules) undertaken (ratified) by the Government of India. But even when using a binding convention, the Supreme Court moves towards Constitution/legislations as it attempts to find a new dimension to pre-existing law, as found in this case, in the Constitution. Now, once written guidelines have been developed in Vishaka, what is required of the Court is a standard assessment of whether the facts of an incident (resulting in the dispute) are seen to violate specific elements enumerated in these guidelines.

52 Vishaka, supra note 17, at ¶8, 9

53 Sahu, supra note 5, at 5-8. See also Sathe, supra note7, at 29, 40; Divan & Rosencranz, supra note 7, at 148

54 Vishaka, supra note 17, at ¶12, 13

55 Accordingly, the Supreme Court in Vishaka, supra note 17, at ¶ 13, uses Government of India’s commitment at an international conference, to for the purpose of construing the nature and ambit of [the] constitutional guarantee of gender equality in our Constitution.” Accord Apparel Export Promotion Council v. A. K. Chopra, AIR 1999 SC 625 where, in ¶27, the Court says, “In our opinion, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse and the Courts are under a constitutional obligation to protect and preserve those fundamental rights.”

56 Vishaka, supra note 17, at ¶16

57 See Baxi in Not Infallible, supra note 3, at 208 where the author while acknowledging that a national (Court constructed) definition of ‘sexual harassment’ “actually empowers the hegemonic local against the insurgent local spaces,” notes that this innovation also “impoverishes” because it makes the local rely on “a definitional enterprise that remains broadly uninformed by the varieties of experience sex-based aggression.” He nevertheless admits that having procedures (for the investigation of, work-place related, sexual harassment claims) in place is specially, locally empowering. See also S. Chandra, Gender Injustice: Supreme Court Mandate, 34: 27 ECONOMIC AND POLITICAL WEEKLY 1750-1751 (July 3-9, 1999)
In addition, in such cases of sexual harassment there are no two equally important and valuable rights of which one must be prioritized, as is the case with respect to cases where environmental protection stands perpendicular to economic development. With regard to environmental/development disputes, however, the Government of India is obligated (and perhaps more importantly, expected) to secure both interests in furtherance of enhancing the quality of life of its citizens. As such, very often a State government or the Union of India is found to be the defendant in public interest litigations surrounding environmental disputes.

III. The method of accessing international environmental rules

On this aspect, I begin my discussion from a point in Indian environmental jurisprudence when the Supreme Court has already expanded the constitutional mandate for the “Protection of life and personal liberty” (under Article 21) to include, *inter alia*, the right to live in a pollution free environment\(^\text{58}\) as well as the right to development,\(^\text{59}\) and consider the following aspects: *first*, the Court’s strategy in decisions that introduce the logic of using international environmental law into municipal jurisprudence; *second*, the Court’s logic in building domestic environmental jurisprudence through subsequent decisions; and *finally*, appreciating the false passage (intentional or not) of the historical development of international law on which the Court relies.

In considering environmental disputes the Indian Supreme Court finds itself bereft of two important advantages that characterized *Vishaka*. The first of these, broadly speaking, is that presence of government legislated municipal environmental rules which narrows down opportunities for legitimate judicial action based on the rationale that no law exists (as was the case in *Vishaka*). Secondly, in the case of environmental disputes there is no action that is clearly in the public interest since both environmental protection and economic development (usually found in opposition) are seen as being valuable interests. As such the judges clearly expect their decisions to be more closely scrutinized than, say, was *Vishaka* for its message of social equality and stamping out of the evil of sexual harassment. For these reasons, where the history of the Indian Supreme Court is replete with instances of the judges openly testing their tether,\(^\text{60}\) the

\(^{58}\) See Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh, AIR 1985 SC 652 (hereinafter *Rural Litigation Kendra*) the Court’s orders were structured around its understanding that environmental rights were protected under Article 21 of the *Constitution*. See also *Subhas Kumar*, where the Supreme Court observes that, “The right to live is a fundamental right under Article 21 of the Constitution, and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution…” *See also* Bombay Dyeing and Mfg. Co. Ltd. AIR 2006 SC 1489 (hereinafter *Bombay Dyeing*), where at ¶93, the Court opines “Expansive meaning of such [constitutional and fundamental] rights had all along been given by the Courts by taking recourse to creative interpretation which lead to creation of new rights. By way of example, we may point out that by interpreting Article 21, this Court has created new rights including right to environmental protection.”

\(^{59}\) See Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan, (1997) 11 SCC 121 where Justice Ramaswamy, chastises the government for its inability to, “ameliorate the conditions of the rural people by providing regular source of livelihood or infrastructural facilities like health, education, sanitation etc…” *See also* State of Himachal Pradesh v. Umed Ram Sharma, AIR 1986 SC 847 (the Court includes the right to good roads as a fundamental right under Art. 21)

\(^{60}\) See e.g. *Baxi: Dworkin*, supra note 12, at 582. See also Granville Austin, *The Supreme Court and the Struggle for Custody of the Constitution in Not Infallible*, supra note 3, at 1-15. See also P. B. Mehta, *India’s Judiciary: The Promise of Uncertainty* in *SUPREME COURT VERSUS THE CONSTITUTION: A CHALLENGE TO FEDERALISM* 155-177, at 156 (Pran Chopra ed.), (Sage Publications, New Delhi, 2006) (hereinafter *Mehta: Uncertainty*)
Court, in the case of environmental disputes, tends to justify its access to principles such as SD, PCP and PPP, drawn from international environmental rules, relatively narrowly: by reinventing its understanding of “gaps” in the law and “finding” such rules within the details of existing Indian constitutional and environmental laws.  

III.1 Affecting introspection, intensifying legitimation

Given the aforementioned situational limitations with respect to the environment, the Supreme Court reaches outwards (towards the international plane) to access SD (and related principles), all the while looking inward i.e. pretending to find these rules in the details of pre-existing legal rules in India. The Court achieves this larger goal by various permutations of three approaches: first, by establishing its ability to access international rules (as was the goal in Vishaka, Gramophone and ADM Jabalpur); then, in subsequent cases, by “isolating” various principles from existing statutes (or by showing that these principles have “found reflection in the Constitution in some form,” occasionally supplemented with not-strictly-legal sources,); and/or finally, by simply relying on precedent.

I address each of the above mechanisms in the next section, but to begin with it is helpful to outline, roughly, a map of how the effects of the Court’s strategy can be expected to play out. In looking to apply the (allegedly) pre-existing principles successfully, the Court, being,

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61 See Dworkin: Empire, supra note 9, at 116-117, summarizing the constitutive characteristics of “Conventionalism.” Given the Supreme Court’s expansion of Article 21 of the Constitution to include “rights” such as the right to environment, the Court’s approach cannot be described as “Pragmatism.” Id. at 153-160. In addition, given the fact that prior to 1996, there is no acknowledged history of political or judicial incorporation of principles such as SD, PCP or PPP into Indian municipal law. Further, claiming the principle of “absolute liability” and the “deep pocket” theory developed by Justice Bhagwati, see M.C. Mehta v Union of India and Ors. AIR 1987 SC 1086, as somehow evidencing PPP is inaccurate because these principles are, in their meaning, substantial different from the international construction of PPP as being restitutive and not punitive. Further still, given the Supreme Court’s clear acknowledgment that these principle were only developing during the time of the decisions discussed here, gives further credence to my belief that the Court’s approach and reasoning cannot be seen as upholding pre-existing values and therefore be described as “Law as Integrity,” Id., at Ch. 6, 7

62 See Kirpal: UNEP, supra note 26, at 5

63 Rural Litigation Kendra, supra note 58, at ¶18, 24, where the Court substantiates its consideration of the environmental consequences of mining in the Doon valley region, by drawing on poets (Kalidas) and ancient literature (the Atharva Veda). Accord K.M. Chinnappa and T.N. Godavarman Thirumalpad v. Union of India (UOI) and Ors., AIR 2003 SC 724, ¶15, 16, 29 where the Court references wisdom from such eclectic sources such as Albert Einstein, Zarathustra, King Ashoka, and a (story) conversation between the Indian Chief of Seattle and the Great White Chief of Washington, when the latter offered to buy the former’s lands.

64 In the very instance of judgment, the Supreme Court’s decision will actually form part of the corpus of binding (environment related) rules that will govern the decisions of all lower Courts, see M. S. I. Hussain v. State of Maharashtra, AIR 1976 SC 1992, where the Indian Supreme Court observes it to be the duty of High Courts across the country law per art. 141 of the Constitution, to apply the law as proclaimed by the Supreme Court, by giving such reasons and explanations as necessary to justify its opinion on the subject matter at hand. See also R. Dworkin, Is Law a System of Rules? in ESSAYS IN LEGAL PHILOSOPHY 37 (Robert S. Summers ed.) (Basil Blackwell, Oxford, 1970) describing the notion that a “rule” that is not valid or applied to a specific set of facts, has no effect on the decision. In addition, even if one of the parties to a dispute is unhappy with the decision itself, this group and its supporters be they government entities, commentators and activists or other cause-related intelligentsia, or even the public at large will not find the Court’s choice of authorities and reasoning to be so flagrantly unjustifiable and unfair that the Court’s institutional legitimacy will be placed in real jeopardy.
exclusively, a creature of the Constitution, uses this same source document to formally situate itself in a position of authority. In so situating itself, the Court accomplishes three distinct goals: First, it formally establishes itself as the primary interpreter of law in India through a source document (i.e. the Constitution) which is accepted as having been formulated and given by the people to themselves. Second, the immediate and consequential result of this formal recognition is that, in the minds of citizens, the solemn authority and reverence with which the Constitution is viewed (in being seen as the people’s text), is now transferred to the Supreme Court. These first two steps can and are, in the course of everyday understanding, seen to be synonymous; for instance, a lay-citizen of India knows that the Supreme Court is the highest Court of law and everyone must respect its decisions, but he/she may not (and often does not) realize that the source of this authority and the ensuing reverence, is not something natural, but rather, the dense and detailed, positivistic source document that is the Indian Constitution. But the institutional legitimation does not end there. It is telling that over the course of time, even within judicial decisions (unless this very issue is contested, for instance, when asking if the Supreme Court is bound by its own decisions), or argument and general discussion (within and outside the legal community), the idea that the Supreme Court’s decision is binding on all other Courts (vertical stare decisis), has varied from needing to be enforced as a constitutional mandate to simply being accepted and noted as part of common knowledge and parlance.

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65 Part V, Chapter IV (“The Union Judiciary”), Art. 124, Constitution: “Establishment and Constitution of Supreme Court.”

66 Articles 141, 142, Constitution; Accord M. S. I. Hussain v. State of Maharashtra, AIR 1976 SC 1992; C. I. T. v. S. E. W., AIR 1993 SC 43 at ¶39 where the Supreme Court distinguishes between the binding parts of its decision (i.e. the ratio decidendi) and others that do not hold such value (for e.g. findings on fact or other observations by the Court i.e. its obiter dicta)

67 See Director of Settlements Andhra Pradesh v. M. R. Apparao, AIR 2002 SC 1598, where the Supreme Court states that any decision of a High Court intended to reverse a previous holding of the Supreme Court’s, or reinstate a previous High Court decision that has been overruled by the Supreme Court, is automatically nullity or void ab initio. The absolute nature of such a nullity is evidenced by the Court’s ruling in Sompal Singh v. Sunil Rathi, AIR 2005 SC 1488, where it held that in so setting aside a common decision of the High Court, any and all writs issued by the High Court via its own decision, shall be rendered ineffective.

68 Pmbl. to the Constitution adopted 26th November 1949, as amended via § 2 of the Constitution (Forty-second Amendment) Act, 1976, effective as of 3rd January, 1977, “WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:….do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.” The Court has further formalized this understanding through its decisions, see e.g. Golak Nath v. State of Punjab, AIR 1967 SC 1643 (where Justice Hidayatullah described the Preamble as the “soul of the Constitution – eternal and unalterable”) and Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 (where the judges developed the idea that the meaning of provisions found under the “Directive Principles of State Policy” and “Fundamental Rights” are to be understood in accordance of the aims presented in the Preamble).


70 United States Internal Revenue Serv. v. Osborne (In re Osborne), 76 F. 3d 306, 96-1 U.S. Tax Cas. (CCH) ¶ 50,185 (9th Cir. 1996) (hereinafter In re Osborne); Accord State of Andhra Pradesh v. A. P. Jaiswal, AIR 2001 SC 499, where the Supreme Court explains the principle to have been developed in furtherance of public policy to maintain consistency, seen to be essential to the administration of justice.

71 See Suganthi Suresh Kumar v. Jagdeeshan, AIR 2002 SC 184, where the Supreme Court emphasizes that applying the ratios of its decisions is not only a matter of discipline to be observed by High Court, but also a
whereby it is unnecessary for one to know, acknowledge, or reference the relevant constitutional provision.\(^{72}\)

The rough schema presented here is telling because this same legitimation effect is what carried the Court, when, in *Vishaka*, as noted by Baxi, the judges used their “power to declare law under Article 141 of the Constitution, a power which ordinarily only binds courts and tribunals throughout India, to make [sic] law binding upon all citizens of India…”\(^{73}\)[Emphasis, mine] This reach of the Court is worth appreciating because it exemplifies the *third* goal (whereby all of the abovementioned authority and reverence is put into action) by showing that the judges of other municipal Courts and the citizenry, as a whole, have *accepted* and *internalized* the “idea” that in deciding or arguing a case at any municipal dispute resolution forum, everyone needs to navigate within the boundaries (rules, approaches, reasoning and so on) established by the Supreme Court’s previous decisions on the subject.

Now, having established a general framework within which to read the Court’s rationale, the remainder of my argument will consider specific decisions across the entire body of the Supreme Court driven environmental jurisprudence. The goal, I would emphasize, is not to ask whether the Court has itself breached the law in accessing such international rules for the purposes of dispute resolution, but rather to identify the specific mechanisms and reasoning through which the judges’ operational logic moves.

**III.2 Circumstances, self-awareness, strategy**

In reaching to affirm SD as part of Indian law, the Court tries to find the most secure position possible but appears to overplay its hand because based on its reasoning in *ADM Jabalpur*, *Gramophone*, *Vishaka* (and even *PUCL*) the Court does not necessarily need a rule to be a part of CIL in order to exercise its authority to enforce the same. But in *Vellore*,\(^{74}\) this is the approach it, nevertheless, chooses.

This excess, however, clarifies a few important aspects of the difficult circumstances faced by the Court at the time: On the face of it, it would seem that the Court, either, does not appreciate the import of expanding its authority from “Any international convention” to “international conventions and norms;” or, being aware that neither the Stockholm Declaration,\(^{75}\) nor the Brundtland Commission’s report, nor further the Rio Declaration,\(^{76}\) are binding

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\(^{72}\) For instance in any number of cases, a few of which are noted below, various points of law have been held by the Supreme Court itself, and various lower courts as constituting the *law of the land* in India, without the judges feeling the need to actually discuss or state how this is possible. *See Narmada* §52; *Gramophone Co. of India Ltd. v. B. B. Pandey*, AIR 1984 SC 667; *PUCL v. Union of India*, AIR 997 SC 568.

\(^{73}\) *See Baxi in Fifty Years*, supra note 2, at 204

\(^{74}\) *Vellore Citizens’ Welfare Forum v. Union of India and Ors.*, AIR 1996 SC 2715 (hereinafter *Vellore*) at ¶ 10-14

\(^{75}\) *Stockholm Declaration*, supra note 47

\(^{76}\) *Rio Declaration*, supra note 48
international instruments (in addition to the fact that they allow national governments’ significant latitude with respect to enforcement), the Court is not satisfied to rely on them as mere developing norms. The first possibility, however, may be dispelled on temporality alone, since Vishaka (1997) follows Vellore (1996), the Court going into Vellore has at its disposal, its reasoning from ADM Jabalpur and Gramophone. This is important to keep in mind because my discussion of Vishaka is not meant to imply that the Court in Vellore referenced Vishaka, but rather that reading the two judgments leaves little doubt that they both draw from comparable approaches and motives on the part of the Supreme Court i.e. the Court’s choice of reasoning, rhetoric and approach in Vishaka is found to have even more context and character when read alongside Vellore. Further, given that the Supreme Court, in Vellore, is trying to build, virtually from scratch, a body of environmental jurisprudence, I believe the Court consciously opts as part of its overall strategy to ground its rationale in the most hallowed international standard that it can find—by portraying them as binding political commitments through CIL.

In addition, these previous decisions are of little help because by 1996, when the Court considers Vellore, the Indian legislature had already promulgated a number of environmental statutes; as such, the Court cannot identify a “gap,” or dearth of binding rules (as it does in Vishaka), nor does it wish to entangle itself in having to provide an express interpretation of Article 372 of the Constitution (as previously avoided in both ADM Jabalpur and Gramophone). Instead, the judges in Vellore, attempt to develop a logic that ostensibly looks towards sites of municipal jurisprudence (Constitution and statutes) but is actually based on an external premise i.e. the status of certain principles in international law.

III.3 Movement on scale

This choice, however, makes the explanatory aspect of the Court’s decision in Vellore more difficult since in looking to take step beyond the logic of avoidance established through ADM Jabalpur and Gramophone the Court is forced to find a new redefinition for its ability to access and apply principles of international environmental law. Accordingly, in Vellore the Court rationalizes this choice through sometimes vague and inconsistent language, featuring minimal sources of legal support (as justifications). For instance, the Court, in that decision, proceeds by tracing a recent history of SD (including the assertion that “Sustainable Development” as a concept was developed at the Stockholm Conference), and upon quoting the Brundtland Commission’s Report, the Court concludes, “We have no hesitation in holding that ‘Sustainable Development’ as a balancing concept between ecology and development has been accepted as a part of the Customary International Law…” The Court does not, however, provide evidence of the fulfillment of any of the characteristic authorities (e.g. instances of state practice, decisions by international tribunals, treaties or other forms of opinion juris, commentary and so on) to support the creation of CIL and, in fact, continues with a qualification: “…though its [SD’s] salient features have yet to be finalised by the International Law jurists.”

77 Vellore, supra note 74, at ¶ 10-14
78 See discussion of Gramophone and ADM Jabalpur decisions, , §II.1.2
79 The Stockholm Declaration does not reference this principle, see §III.4.1
80 Vellore, supra note 74, at ¶10
81 Id.
Court’s proclamation immediately becomes a statement of binding (municipal) law, the Court, in not providing authorities in support (outside of the aforementioned, heavily contested, non-binding instruments) seems to completely ignore the qualifications of state practice or opinio juris, held to be the traditionally constitutive elements of CIL. Therefore, there is no real answer to the how of the Court’s conclusion. This is important because SD, PPP, PCP (even now, but certainly as far back as 1996-1997 when these cases were heard) were heavily contested as legal rules having risen to CIL status. In fact the most significant obstacles in affording these principles the status of CIL, is that there is no discernable uniformity with respect to the understanding or application of any of these principles in countries across the world. Even noted jurist Philippe Sands (cited by the Court, subsequently, in Kenchappa) who advocates that the principle of SD (only) now forms part of the corpus of CIL, only began doing so around 1999, finding confidence, I believe, in the ICJ’s employment of SD as part of its decision in Gabčíkovo - Nagymaros (September, 1997). Now, given the relevant history of the development of international environmental law (see e.g. §III.6) the Supreme Court’s inability to substantiate how any of these principles are part of CIL is not surprising; a perusal of international legal sources and commentary would have made it obvious to the judges that, as one prominent scholar writes (in 2000), “in international law, these principles [i.e. SD, PPP, PCP] are still controversial and cannot be stated to be part of the [sic] customary international law.” The Court’s approach here (in willful, or not, ignorance of the meaning of CIL) is not only characteristic of the generalized side-stepping employed by the Court throughout its internalization of international standards, but is seen to run through the gamut of decisions actually applying these principles towards dispute resolution. What is important to note is that the Court is ultimately able to “successfully” proclaim the creation of custom with virtually no evidence in support of this important conclusion. I address this “how” next.


84 See Karnataka Industrial Areas Development Board v. Sri. C. Kenchappa and Others, AIR 2006 SC 2038 at ¶28


86 Case Concerning the Gabčíkovo - Nagymaros Project (Hungary v. Slovakia) 1997 ICJ Rep. 78, at (hereinafter Gabčíkovo - Nagymaros) ¶140; 37 I.L.M. 162 (1998), where the Court acknowledges the concept of SD. It is worthwhile to note that SD was interpreted and used by both Hungary and Slovakia in support of their respective claims, and essentially provided the ICJ with an opening to ask the parties to negotiate further towards a mutually satisfactory solution:

“This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find the solution…”

See also Birnie & Boyle, supra note 83, at 95, 96

87 See Verma, in Fifty Years, supra note 2, at 627.
III.4 The status of first principles

The Court, in *Vellore*, continues by listing out some “salient principles” of SD “as culled-out from” the Brundtland Report “and other international documents”\(^{88}\) (including the PPP and the PCP) and then states its view that these principles are “essential features”\(^9\) of SD. While the Court’s understanding and implementation of these principles is beyond the scope my immediate argument, it is relevant to note that not only does the Court draw on SD, but it appears to not give a second thought to extending this CIL status onto PPP and PCP,\(^90\) whose value as binding international legal standards continues to be heavily tested.\(^91\) Then, to strengthen its position, the Court proceeds to locate these principles in municipal jurisprudence; it lists a variety of constitutional provisions\(^92\) and statutes\(^93\) to declare that PPP and PCP form part of Indian environmental law. With respect to the constitutional provisions cited, the Court continues its trend of adopting an expansive interpretation of fundamental rights and the technically non-enforceable (but aspiration-heavy) language of Directive Principles of States Policy\(^94\) and

\(^{88}\) See *Vellore*, supra note 74, at ¶11

\(^{89}\) Id.

\(^{90}\) In contrast to the Supreme Court’s aggressive interpretation witnessed in *Vellore*, international courts/tribunals and other dispute resolution bodies have historically taken a far more cautious and nuanced approach in addressing principles such as SD and PCP, see *Birnie & Boyle*, supra note 83, at 119. See also D. Bodansky, *Proceedings of the American Society of International Law*, 413-417 (1991) where the author recommends caution in applying the PCP, to the extent that while it could be adopted as a general goal, it may not be wise to trust it to resolve difficult problems of environmental regulation; C. D. Stone, *Is There a precautionary Principle*, 31:7 ENVTL. L. REP. 10789-90 (2001)

\(^{91}\) There is an expansive array of literature on this point, a few instances will suffice. Take for instance the fact that even though the European Union argued in favour of the customary status of the PCP in the Beef Hormones Case (while the United States argued against this notion), see EC Measures Concerning Meat and Meat Products (Hormones), AB-1997-4, Report of the Appellate Body Doc. No. WT/DS26/AB/4, WT/DS48/AB/R (Jan. 16, 1998) at ¶16, 43, 60, individual European countries by themselves, exemplified by France and the United Kingdom, have argued against the PCP having CIL status, see for e.g. P. Sand, *The Precautionary Principle: A European Perspective*, 6 HUMAN & ECOLOGICAL RISK ASSESSMENT (2000) (hereinafter Sand: Risk) at 448. For a more comprehensive discussion of the diversity of contrary opinions that exist with respect the legal status of the PCP, see *Birnie & Boyle*, supra note 83, at 118-119; D. Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 INDIANA J. GLOBAL LEG. STUD. 105 (1995)

\(^{92}\) The Court in ¶13 of *Vellore*, supra note 74, references Art. 21 of the *Constitution* (guaranteeing protection of life and personal liberty) as well as Art. 47 (Directive Principles of State Policy: “Duty of the State to raise the level of nutrition and the standard of living and to improve public health – The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the State shall endeavour to bring about prohibition of the consumption except from medicinal purposes of intoxicating drinks and of drugs which are injurious to health.”), Art. 48A. (Directive Principles of State Policy: “Protection and improvement of environment and safeguarding of forests and wild life - The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country”) and Art. 51A(g) (Fundamental Duties (of individual citizens): Duty “to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures”)

\(^{93}\) See *Vellore*, supra note 74, at ¶13, 18-21

\(^{94}\) For a formal understanding of this distinction, see Justice K. G. Balakrishnan, Chief Justice of India, *The Constitutional Guarantees of Rights and Political Freedoms*, Working paper, 40\(^{th}\) Anniversary of the founding of the Constitutional Juridicature of Egypt 12-13 (March 7-9, 2009) (hereinafter *Balakrishnan CJI: Egypt*) where the
Fundamental Duties (of individual citizens), whereas with respect to the specialized statutes on the other hand, it would be less than sincere to say that the Court reviews them in any real depth or with any specificity—for instance, it lists a number of legislations (the Water Act of 1974, the Air Act of 1981 and the Environment (Protection) Act of 1986), and then proceeds to describe what are, presumably, the key aspects reflecting PPP or PCP. This set up, however, is misleading, and unlike in the case of constitutional provisions (where the Court has tremendous room for interpretation), the Court’s analysis of the statues is superficial and simplistic: for instance, with respect to the Water Act, the Supreme Court says,

“The Water Act provides for the Constitution [sic] of the Central Pollution Control Board by the Central Government and the Constitution of the State Pollution Control Boards by various State Governments in the country. The Boards function under the control of the Governments concerned. The Water Act prohibits the use of streams and wells for disposal of polluting matters… [A]lso provides for restrictions on outlets and discharge of effluents without obtaining consent from the Board…Prosecution and penalties have been provided which include sentence of imprisonment.”

Further, with respect to the Air Act the Court says,

“The Air Act provides that the Central Pollution Control Board and the State Pollution Control Boards constituted under the Water Act shall also perform the powers and functions under the Air Act… [T]he main function of the Boards, under the Air Act, is to improve the quality of the air and to prevent, control and abate air pollution in the country…”

author notes, “While the fundamental rights of citizens enumerated in Part III of the Constitution are justiciable before the higher judiciary, Part IV [of the Constitution] deals with the ‘Directive Principles of State Policy’ that largely enumerate objectives pertaining to socio-economic entitlements…they are the creative part of the Constitution, and fundamental to the governance of the country. However, the key feature is that the Directive Principles are ‘non-justiciable’ but are yet supposed to be the basis for executive and legislative actions…” [Emphasis, mine] This understanding however, is now more simplistic than anything else, as the Chief Justice notes, later in this working paper, the Indian Supreme Court has, since its initial drive to expand the ambit of Art. 21 rights, undertaken a complex exercise of “harmonization” to blur the distinctions between Part III and Part IV, see id., at 13-16 and again at 28-29 (discussing the political consequences of making positive socio-economic rights justiciable).

95 The Court, in fact, does little more than simply quote the constitutional provisions (¶13) which by themselves bear no specific relation to the international legal principles found in the Stockholm Declaration, other than the fact that they are all broad principles that we enacted via the Forty-Second Amendment Act of 1972, following the Stockholm Conference, see Menon: Legal Aspects. I imagine the Court is expecting the reader to be mindful of the fact that given the general nature of the constitutional mandates and this Court’s tendency to aggressively expand fundamental rights, there is little to limit what may be read into these mandates.

96 The Water (Prevention and Control of Pollution) Act, 1974 (Act No. 6 of 1974) (hereinafter Water Act)
98 See Vellore, supra note 74, at ¶13
99 Id.
The documented history and timing of both statutes, arriving soon after Stockholm Convention, supports the opinion that they were legislated in furtherance of India’s commitments made at the conference.\textsuperscript{100} With respect to the import of specific provisions, however, the Court’s reading achieves little. For instance, with respect to each such statute, the Court is somehow able to see, in the very establishment of a “Pollution Control Board,”\textsuperscript{101} and the fact that the statute is meant to prevent pollution as well as the presence of a penalty (not compensatory or restitutive) provision,\textsuperscript{102} some obvious fulfillment of the elements or requirements that would qualify the law as one employing PPP or PCP.\textsuperscript{103} My own review of the statutes has been less successful leading me to recognize, once again, the unfortunate trend of “creative” side-stepping that I identified earlier as being one of the unacknowledged hallmarks of the Court’s environmental decisions employing SD, PPP and PCP. Specific to Vellore, it should be noted, however, that the Court, the arguments above notwithstanding, has “no hesitation in holding that the precautionary principle and the polluter pays principle are [i.e. found to be] part of the environmental law of the country.”\textsuperscript{104}

\textbf{III.4.1 The Environment (Protection) Act as evidence of the Precautionary Principle and Polluter Pays}

What is perhaps even more perplexing is the Court’s attempt to use the Environment (Protection) Act of 1986 (“Environment Act”), as proof of PPP and PCP being pre-existing features of Indian municipal law. The Court never really explains how, insisting that the Environment Act fulfills India’s commitments made at Stockholm and contributes towards showing the municipal pre-existence of PPP or PCP. This is difficult to accept since PPP was never accepted at the Stockholm Conference and is therefore never mentioned in the Stockholm Declaration. In addition, the penalty provisions in the Environment Act are geared towards payment of fines and imprisonment and not towards compensation or payments for the restitution of the damaged environment.\textsuperscript{105}

For that matter SD is not explicitly coined until the Brundtland Commission report of 1987,\textsuperscript{106} even though the Court generalizes this point by saying,

\begin{itemize}
  \item \textsuperscript{100} See Sheila Jasanoff, \textit{Managing India’s Environment}, 28:8 \textit{ENVIRONMENT} 12, 14 (Oct., 1986) (hereinafter Jasanoff)
  \item \textsuperscript{101} In this respect, it is worth noting that in the case of the Environment (Protection) Act, 1986, discussed next, it took, more then, a decade and reminders by the Supreme Court in \textit{Vellore}, for the Central Government to establish authorities foreseen by that statute, see Justice Sunil Ambwani, \textit{Environmental Justice: Scope and Access}, text of Valedictory Address at the Workshop on Sustainable Development for the Subordinate Judiciary (New Delhi, 19-21\textsuperscript{st} August, 2006), at http://districtcourtallahabad.up.nic.in/articles/environmental.pdf, at 14
  \item \textsuperscript{102} Water Act, at Ch. VII: §14, 15; Air Act, at Ch. VI: §37-40. \textit{See generally} Har Govind, \textit{Recent Developments in Environmental Protection in India: Pollution Control}, 18:8 \textit{AMBIO} 429-433 at 430 (1989)
  \item \textsuperscript{103} See H. Salve, \textit{Justice Between Generations: Environment and Social Justice in Not Infallible}, supra note3, 360-280, at 368 where the author provides an instance of the Court’s evolving tendency to read “buzzwords” such as SD, PCP, PPP and so on, into Article 21 of the \textit{Constitution}.
  \item \textsuperscript{104} See \textit{Vellore}, supra note 74, at ¶14
  \item \textsuperscript{105} See Jasanoff, supra note 100, at 16
\end{itemize}
‘…‘Sustainable Development’ as a concept came to known for the first time in the Stockholm Declaration of 1972…Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development.”

Now, presumably (and this is, as I will show, not particularly helpful), the Court attempts to show the 1986 (municipal) statute as fulfilling India’s Stockholm commitments because the Court interprets the second clause of Principle 21 of the Stockholm Declaration as requiring State Parties to apply the PCP. My presumption, above, is based on the Court’s description (in *Vellore*) of the meaning of PCP “in the context of municipal law,” which employs language describing a fairly radical and liberal interpretation of precaution after it has evolved from being a mere possibility under Stockholm’s Principle 21 (1972) to Rio’s Principle 15 (1992). In addition, my presumption is governed by the realization that the only other option would be for the Court to employ Principle 6 of Stockholm, to apply what has been called the “Assimilative Capacity principle,” which is not only not PCP (which the Court claims to be using) but the predecessor to the PCP, which the notion of the PCP explicitly rejects. The Court, for its own part, never enters into a discussion of the issue, so it is impossible to be certain.

I advance two contentions in response: *Firstly*, the Rio Declaration (1992) is widely accepted as the site (text and timing) where the consensus of the international community participating in the Rio Conference, shifted, visibly, from the restrictive, sovereign-biased Principle 21 standard (which some refer to as the “preventive principle,”) to the PCP. The Court, for its part, never enters into a discussion of the issue, so it is impossible to be certain.

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107 See *Vellore*, supra note 74, at ¶10

108 Principle 21 of the Stockholm Declaration which reads: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” [Emphasis, mine]

109 See *Vellore*, supra note 74, at ¶11 where the Court defines one of the characteristics of PCP by saying: “The ‘Onus of proof’ is on the actor or the developer/industrialist to show that his action is environmentally benign.” This is a definition of precaution that has arisen out of Principle 15 of the *Rio Declaration*, see supra note 48

110 See *Sand: Risk*, supra note 91, at 448, where Sand refers to this understanding of the PCP to be its “most radical variant.”

111 *Stockholm Declaration*, supra note 47, at Principle 6, under which only when pollution was such as to overwhelm the restorative, or assimilative, capabilities of the nature environment, could action be taken in opposition to a given activity.


113 The Court returns to this point, in 2004, in A.P. Pollution Control Board v. Prof. M.V. Nayudu (Retd.) and Ors., (1996) 5 SCC 718, see my discussion of the decision in *Six degrees* (§III.5)


115 I refer to this as the Principle 21 standard, as opposed to Sunkin, Ong and Wright (cite above) who use “preventive principle” to describe the import of the second clause of Principle 21. With respect to this distinction I am inclined to go along with Sands, who provides two distinctions between the two: first, that Principle 21 arises “from the application of respect for the principle of sovereignty, whereas the preventive principle seeks to minimise environmental damage as an objective in itself,” and second, “under the preventive principle a State may be under
(whereby for the first time, against the presence or expectation of an activity posing a threat to the environment, the lack of scientific uncertainty could not be used as an excuse to block measures against such an activity, and this principle when accepted in its entirety, would move the burden onto the pursuer of any such activity to prove that possible pollution would fall below the minimum stipulations as decided by the State Party). Secondly, given that Principle 21 of the Stockholm Declaration exemplified, both at the time of Stockholm and ever since (with respect to international environmental law) the affirmation of state sovereignty over natural resources (and state responsibility for transboundary harm), a dichotomy that has long been accepted as reflecting CIL, the Indian Supreme Court’s attempt to read the PCP into this clause, while not entirely without support, reflects either, the Court’s failure to appreciate the difference between the circumstances of Stockholm (1972) and Rio (1992) and the consequent shift in the nature and scope of principles of international environmental law, or, a willful ignorance of this difference which the Court then exploits to read into the Stockholm principles, values conveyed two decades later in Rio (which is much closer in time to the Vellore decision).

Another reason why the Court’s reasoning does not hold up, is because when it defines what specifically PCP means “in the context of municipal law,” it does not reference, but quotes language directly from the 1990 Bergen Ministerial Declaration on Sustainable Development in the ECE Region, which is acknowledged as the first international instrument to and obligation to prevent damage to the environment within its own jurisdiction including by means of appropriate regulatory, administrative and other measures,” see Sands: PIEL, at 246. It is important to keep in mind that the Supreme Court is using the Stockholm Declaration to claim that it has located PCP within Indian (municipal) legislation, and not the preventive principle (in this sense, whether or not we agree with Sunkin, et. al, or Sands as to the difference described above, is irrelevant).

116 Rio Declaration, supra note 48, at Principle 15: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

117 See e.g. D. Bodansky, Deconstructing the precautionary Principle in BRINGING NEW LAW TO OCEAN WATERS Ch. 16, at 390 (D. Caron, H. Scheiber, eds.) (Brill, 2004). This shifting of the burden of proof with respect to international environmental law is significant because it is the exact opposite of the traditional understanding see e.g. Lotus (Fr. v. Turk.), (1927) P.C.I.J. (ser. A) No.10, at 18. See also Nottebohm (Guat. v. Liech.), 1955 I.C.J. 4 (Apr. 6); Case Concerning Rights of Nationals of the United States of America in Morocco (Fr. v. US), 1952 I.C.J. 176 (Aug. 27); Fisheries (UK v. Iceland), 1974 I.C.J. 116 (Jul. 25, 1974). See also SCHWARZENEGGER, INTERNATIONAL LAW 643 (Universal law publishing Co. ed., 2000) (1947); G. Fitzmaurice, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE, 1951–1954: General Principles and Sources of Law, 30 BRIT. Y. B. INT’L L. 1, 9 (1953).

118 See A. KISS, D. SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 348-349 (Transactional Publishers, 1991)


120 See descriptions supplied by the Supreme Court, “The Precautionary Principle:- ... means : (i)... (ii)” in Vellore, supra note 74, at ¶11. Description “(iii)” leads me to believe that the Court is interpreting the second clause of Principle 21 of Stockholm Declaration, as discussed earlier.

121 Bergen Ministerial Declaration on Sustainable Development in the ECE Region, adopted on 16th May, 1990, at Bergen, Norway, A/CONF.151/PC/10, Annex I, (hereinafter Bergen Declaration), at ¶7, “In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or
treat the PCP “as one of general application and linked to sustainable development.” Now, as a temporal issue, neither the Stockholm Conference (1972), nor the Water Act (1974), the Air Act (1981), nor even the Environment (Protection) Act (1986) (the last of which, I discuss below) contains the notions of PCP or PPP that the Court keeps finding (first as CIL, and then within municipal laws) through a variety of generalizations. Much like its approach in Vishaka and Gramophone, the Court’s strategy in Vellore is largely based on side stepping what are significant and obvious questions. So here, once again, in Vellore (which it considers in 1996) the Court, although bound by statutes and instruments based on pre-1992 notions, nevertheless consistently draws on principles that were only introduced (not even necessarily affirmed far from being raised to the level of CIL, especially with regard to non-transboundary i.e. domestic pollution) at the Rio Conference (only mentioned once in Vellore) and have gained credence since. Once again, we are faced with the previously identified strategy that runs through the entire body of the Court-devised environmental jurisprudence in India.

As may by now be self-evident, a major part of the Court’s difficulty stems from its need to show the pre-existence of internationally-sourced principles within municipal law. In pursuit of this goal, the Court has limited options and must justify its conclusions around the only instrument mentioned (even if cursorily) in such municipal statutes i.e. the Stockholm Declaration. Based on this understanding—coupled with the Court’s obvious desire to build from scratch, a body of domestic environmental jurisprudence—I am inclined to believe that the obfuscation here may have been intentional and not a result of ignorance on the part of the Court. To take some liberty with a description that has, so often, been used to describe the Indian Supreme Court’s approach: “creativity” is not what is missing here.

III.4.2 The Environment (Protection) Act and the Supreme Court’s understanding of Stockholm Conference

One other aspect of the Court’s approach in Vellore merits comment. I have addressed here, in brief, why I think the Court’s reliance on Stockholm—in support of its expansive (liberal) reading of Indian environmental law—is itself questionable. A more elaborate discussion is presented later in the argument (see §III.6) since the overall (persuasive) impact of this reliance must be understood in the context of not only Vellore, but the larger body of environment related decisions.

Regardless, for now I return to Vellore where the Court reviews the Environment (Protection) Act of 1986. It begins by quoting from the Statement of Objects and Reasons (of the 1986 Act) where the statute recognizes increasing levels of pollution, India’s participation in the United Nations Conference on the Human Environment (Stockholm, June 1972) and describes the purpose of the statute as follows:

irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”

122 See Sands: PIEL, supra note 106, at 269

123 The Court mentions the Rio Conference (not even any aspect of the Declaration itself) in the course of tracing the development of SD from the Stockholm Conference forward, leading to the Court’s conclusion that SD is a part of CIL. As argued earlier in my discussion of Vellore, see §III.3 and §III.4, the Court proceeds in shocking avoidance (willful or not) of the characteristics of CIL, and does nothing to justify its conclusion.
“While several measures have been taken for environmental protection both before and after the Conference, the need for a general legislation further to implement the decisions of the Conference, has become increasingly evident...Existing laws generally focus on specific types of pollution or on specific categories of hazardous substances. Some major areas of environmental hazardous [sic] are not covered.”

The Court then lists out what it views as relevant provisions and clarifies that “It is [thus] obvious that the Environment Act contains useful provisions for controlling pollution. The main purpose of the Act is to create an authority or authorities…with adequate powers to control pollution and protect the environment.”

Now, an environmental protection statute will obviously outline how the environment should be protected and one such as the 1986 Act is even more general because it aims to establish an institutional structure to coordinate and divide up authority towards governance responsibilities. What is relevant here is that outside of the cursory acknowledgment that the statute has been developed as an umbrella legislation (to further the goals of the Stockholm Declaration), neither the statute, nor the Court’s simple review of the provisions, is able to point to any specific instances where the aforementioned principles (i.e. SD, PCP, PPP), drawn from international law, can be found.

At this point, a factor worth considering is the fourteen year gap between the Stockholm Conference in 1972, and the legislation of the 1986 Environment Act. In the decade following Stockholm, the issue of environmental protection was indeed gaining importance in India, as seen, for instance in the recommendations of the Tiwari Committee (established in 1980 by India Gandhi) leading to the creation of the Department of Environment (later absorbed in the Ministry of Environment and Forests).

With respect to the Environment Act itself, however, literature from the time is both unambiguous and unequivocal on the point that the statute was legislated in response to the tragedy in Bhopal on the night of 3rd December 1984, which brought to the fore the inability of the Government of India to adequately regulate and monitor hazardous industries such as the Union Carbide pesticide plant from where the gas, responsible for the death of thousands and

124 See Vellore, supra note 74, at ¶18
125 Id., at ¶19, 20 (addressing the creation of governing institutions, powers and duties of the Government, standards of emission of environmental pollutants and provide descriptions of factors to be considered in reviewing location of industries)
126 Id., at ¶21
127 It should be noted however, that the Environment Act provides an expansive definition of “environment,” as including “…water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property,” see Environment Act, at §2(a).
128 See Jasanoff, supra note 100, at 14
129 See The Environment (Protection) Act, 1986, at http://www.dpcc.delhigovt.nic.in/actenv.htm, which provides a description of the legislation’s background prepared by the Delhi Pollution Control Committee, a body created under the 1986 statute.
130 See Bhopal Information Center: Chronology, at http://www.bhopal.com/chrono.htm
continuing (inter-generational) injury to others, leaked. The fallout from this failure placed the Department of Environment under “...considerable pressure both from the prime minister’s office and from the press and general public to design ‘comprehensive legislation’ for controlling toxic and hazardous substances,” leading to the legislation of the Environment Act. A simple reading of the statute makes this focus even more obvious: the heavy-handed language with respect to the increased powers (and responsibilities) of governmental institutions and officials with respect to the regulation, monitoring and supervision of hazardous industries, operations or processes, as well as the levying of imprisonment for the violation or contravention of the statute, for instance, are both easy tells.

Given this specific goal, the provisions of the Environment Act are (as expected) general and staple enough that it is difficult to see which (or what quality, orientation) of them would have been excluded had the Stockholm Declaration not existed; participating in the Stockholm Conference may have caused Parliament to legislate to improve coordination between agencies, but it does not automatically follow that specific principles find form in the statute. Again, this

“In the wake of the Bhopal disaster, it was widely observed that Indian laws do not adequately protect public health and safety against industrial hazards.”


133 See Jasanoff, supra note 100, at 16

134 See Rosencranz: Bhopal, supra note 131, at 338, “The Bhopal disaster focused attention on the inadequacy of existing law governing the manufacture, transport, storage and disposal of toxic chemicals”

135 Id., at 337. See also Environment Act, 1986, at §3(5)

136 See Environment Act, 1986, at §3(5). It should be kept in mind that while the Environment Act penalizes in cases of contravention, it does not serve as a compensatory statute i.e. it does not, for instance, involve the mandates of the PPP. In addition it should be noted that while the Stockholm Declaration does not actually endorse the PPP standard, it does provide, in Principle 22, support for the development of municipal compensatory mechanisms. But, once again, given its actual focus, the Environment Act of 1986, does not reflect any such mechanism.

137 The closest parallels that I can draw are found in Rule 5(1) of the subsequent Environment (Protection) Rules, “Prohibition and restriction on the location of industries and the carrying on processes and operations in different areas - (1) The Central Government may take into consideration the following factors while prohibiting or restricting the location of industries and carrying on of processes and operations in different areas:…(v) The biological diversity of the area which, in the opinion of the Central Government, needs to be preserved, (vi) Environmentally compatible land use...(viii) Proximity to a protected area under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 or a sanctuary, National Park, game reserve or closed area notified, as such under the Wild Life (Protection) Act, 1972, or places protected under any treaty, agreement or convention with any other country or countries or in pursuance of any decision made in any international conference, association or other body.” It is difficult to see how these provisions reflect principles outlined in the Stockholm Declaration and/or are such that they would not, otherwise, have been part of any umbrella (environmental) legislation.
is not altogether surprising, since this legislation, as acknowledged by the Court itself, is meant to be an outline for the establishment and coordination of governmental authorities.

This deficiency seems to be (inadvertently) acknowledged by the Court in the course of supplying final orders in Vellore when it directs the Central Government to establish an authority as foreseen under Section 3(3) of the Environment Act by saying that,

“The authority so constituted by the Central Government shall implement the “precautionary principle” and the “polluter pays” principle…”

It may certainly be argued that this (above) instruction was required because as noticed by the Court, earlier in the decision:

“[T]he main purpose of the Act is to create an authority or authorities under Section 3(3) of the Act with adequate powers to control pollution and protect the environment. It is a pity that till date no authority has been constituted by the Central Government. The work which is required to be done by an authority in terms of Section 3(3) read with other provisions of the Act is being done by this Court and the other Courts in the country. It is high time that the Central Government realises its responsibility and statutory duty to protect the degrading environment in the country…It is, therefore, necessary for this Court to direct the Central Government to take immediate action under the provisions of the Environment Act.”

It does not (naturally) follow, however, that the Court needs to tell the Government what specific principles, factors or considerations the Government should ensure are implemented; especially since, until this point, the Court has insisted that SD, PCP, PPP are all to be found in the language of the statute in fulfillment of India’s Stockholm commitments. The Court it seems is perfectly aware that the Environment Act of 1986 reflects no such principles and, by its order in Vellore, the Court seeks to infuse not (even) into the provisions of the Act, but into the actual implementation of these provisions, the virtues of SD, PCP and PPP. In this sense, the Court is not identifying these principles and then interpreting them for the Government’s benefit, rather it is introducing them and telling the Government to ensure the incorporation of these principles in the course of actions taken to implement the law. Now, it may well be queried whether the Court couldn’t simply be reading principles such as SD, PCP and PPP into the statute? The answer to

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138 See Vellore, supra note 74, at ¶18, the Statement of Objects and Purposes of the Environment Act, 1986 continues by clarifying that, “Because of a multiplicity of regulatory agencies, there is need for an authority which can assume the lead role for studying, planning and implementing long-term requirement of environmental safety and to give direction to, and co-ordinate a system of speedy and adequate response to emergency situations threatening the environment…In view of what has been stated above, there is urgent need for the enactment of a general legislation on environmental protection which inter alia, should enable co-ordination of activities of the various regulatory agencies, creation of an authority or authorities with adequate powers for environmental protection, regulation of discharge of environmental pollutants and handling of hazardous substances, speedy response in the event of accidents threatening environment and deterrent [sic] punishment to those who endanger human environment, safety and health."

139 See Jasanoff, supra note100, at 31

140 Vellore, supra note 74, at ¶27, Order No. 2

141 Id., at ¶21
this query is to be found in the Court’s stated approach in Vellore i.e. in deciding Vellore the Court never hints that there is a dearth of specific, applicable legislation on the relevant issues; in other words, there is no perceivable “gap” in Vellore along the lines encountered by the Court in Vishaka where the Court openly “read” international rules into provisions of the Indian Constitution. Instead the “gap” now becomes the inability of the executive and administrative agencies to apply rules that, apparently, already exist. This trend continues through the bulk of environmental disputes so that even in cases when the Supreme Court justifies its decisions based on the grounds of the failure of the Executive to implement legislation, the logic of the decision moves as if the rules underlying the judicial argument already exist but have not been applied. And this is what the Court claims to be doing. This distinction is important because based on its claim that these principles pre-exist in Indian municipal law, the Court can proceed to shore up its legitimacy (i.e. the judges are only interpreting the law, not making it) by ostensibly “finding” these principles in the Constitution and the aforementioned statutes. My identification of this distinction, which is altogether ignored in Vellore, is borne true by the Supreme Court’s own decision, almost a decade later, in Jayal (2004), when in discussing this same Environment (Protection) Act of 1986, the Court observes

“If the Act is not armed with the powers to ensure sustainable development, it will become a barren shell… [S]ustainable development could be achieved only by strict compliance of the directions under the Act.” [Emphasis, mine]

The Court’s reasoning in Jayal seems at odds with its Vellore assertion that the Environment Act was legislated to give the government increased powers of regulation, in furtherance of India’s Stockholm Conference commitments. To the contrary, the implication in Jayal seems to be that the Court sees a clear need to empower the statute with a specific SD, PCP, PPP orientation which must then be implemented through governmental action.

It is also telling that by the end of the Court’s description of the Environment Act/Rules in Vellore, its assertion in favour of the statute gets progressively vague until the decision finally concludes,

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142 Vishaka, supra note 17, at ¶7. See also discussion in §II.1.1

143 See M. P. Singh, The Supreme Court and Fundamental Rights in Fifty Years, supra note 2, 1-100 at 36. For instance, the Delhi High Court (by its order of 11th February, 2009, as delivered by Chief Justice A. P. Shah and Justice Dr. S Muralidhar), has expressly placed on the record, its dissatisfaction with the Ministry of Environment and Forests for its inability (or unwillingness) to give adequate form and authority to “National Environment Appellate Authority” as instructed by the High Court some three years prior, at http://www.accessinitiative.org/blog/2009/02/access-justice-victory-india. See also K. Kohli, “High Court pulls up the NEAA,” at http://www.indiatogether.org/2009/feb/env-neaa.htm

144 In this respect the Court’s reasoning is seen to breach the “negative” claim of conventionalism, see Dworkin: Empire, supra note 9, at 118

“Conventionalism protects the authority of convention by insisting that conventional practices establish the end as well as the beginning of the past’s power over the present…If convention is silent there is no law, and the force of that negative claim is exactly that judges should not then pretend that their decisions flow in some other way from what has already been decided.” [Emphasis, mine]

145 See N. D. Jayal and Anr. v. Union of India (UOI) and Ors., (2004) 9 SCC 362 (hereinafter Jayal), at ¶25. See also my discussion in §III.5.2
“It is thus obvious that the Environment Act contains useful provisions for controlling pollution. The main purpose of the Act is to create an authority or authorities under...the Act with adequate powers to control pollution and protect the environment.”146 [Emphasis, mine]

This displays a significantly lower standard of confidence than saying that it reflects not only CIL principles but also specific principles found in the Stockholm Declaration.

As such, while virtually any environmental protection legislation can potentially be described as reflecting India’s commitments under the Stockholm Declaration, the Environment (Protection) Act of 1986 serves as a poor (albeit strategic) choice for the purposes of furthering the Court’s goal of finding SD, PPP or PCP as being pre-existing within municipal legislation, in Vellore. This point is perhaps most starkly visible, if one reads, in contrast to the abovementioned statute, India’s National Environmental Policy of 2006 (where the principles discussed above are very obviously reflected).147

The rational thread connecting the relevant international principles to the abovementioned (municipal) laws, albeit for noble reasons, is a faint and cerebral one148 in that it involves an expansive interpretation of fundamental rights and non-enforceable Directive Principles of States Policy, Fundamental Duties (of individual citizens), supplemented by a vague and inconclusive reading of statutes, together, taken to mean149 the same thing as some illusory assumed-to-be-globally-agreed-upon [i.e. CIL] understanding of the status of SD, PPP and PCP.150 This strategically generalized approach provides the Court with a significant leeway with respect to possible meanings, value, interpretations and ultimately the application of these principles, seen, perhaps most shockingly, in the NBA151 decision where the Supreme Court proceeds with a shocking reversal of psychology abandoning the passion and righteousness found in Vellore, to pretend as if the fulfillment of these aforementioned principles can somehow be presumed, are not time-sensitive, and may otherwise be considered unnecessary for certain development projects (i.e. are generally inapplicable).152

146 See Vellore, supra note74, at ¶2
148 I refer here to Justice Kirpal’s description quoted at the beginning of this discussion where he, subsequently, refers to these principles as being “isolated,” or, seen to have “reflection in the Constitution in some form,” see Kirpal: UNEP, supra note 26, at 5
149 Consider for instance, how the Court, later on, in Research Foundation For Science Technology and Natural Resources Policy v. Union of India (UOI) and Anr., (2005)13 SCC 186 (hereinafter Research Foundation (2005)) at ¶32 addresses this same conclusion: “In Vellore Citizens' Welfare Forum v. Union of India and Ors., a three Judge Bench of this Court, after referring to the principles evolved in various international conferences and to the concept, of ‘sustainable development,’ inter alia, held that the precautionary principle and polluter pays principle have now emerged and govern the law in our country, as is clear from Articles 47, 48A, 51A(g) of our Constitution and that, in fact, in the various environmental statutes including the Environment (Protection Act, 1986, these concepts are already implied.” I, myself, find the contrast between saying, “as is clear from…” and “…in fact, these concepts are already implied,” to be most telling.
150 It should be noted, however, that, in his Dissenting Opinion in the Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment in the 1974 Nuclear Tests case, ICJ Reports, 1995, at 288, 342, Judge Weeramantry noted that the PCP was gaining support as an environmental principle.
152 For an appropriate critique of the NBA decision see Visvanathan: NBA, supra note 7.
III.4.3 The authenticity of CIL identification

Following this desperate reach to confirm the status of CIL, in *Vellore*, the Court creates an anticipatory buffer by describing PPP and PCP as only *sort-of* CIL, when it says:

“Yes, even otherwise, once these principles [i.e. PPP, PCP] are accepted as part of Customary International Law there would be no difficulty in accepting them as part of the domestic law.”

This may be understood to mean some or all of the following: (1) The Court sees SD as being part of CIL, but its “essential features” (i.e. PPP and PCP) may or may not be customary; (2) At the time of this decision PPP and PCP may not actually *be found* to exist as a part of Indian municipal jurisprudence; and (3) The Court, in some small sense, acknowledges the weakness of its earlier argument adopting—with “no hesitation”—these principles as being part of CIL.

Then the Court revisits its earlier rationale, but once again, only tentatively, to say, “It is almost accepted proposition of law that the rule of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law.”

In this last argument, the Court’s rationale for accessing the aforementioned principles to deliver judgment in *Vellore*, may be paraphrased as saying that, even if these principles are not yet part of CIL, when, in the future, they become so, then the Court will most likely be able to employ them in its decisions.

And on this basis, the Supreme Court nevertheless, establishes them as part of its ratio in *Vellore* (1996) itself, thereby creating a new standard of environmental jurisprudence in India.

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153 *Vellore*, supra note 74, at ¶15
154 *Id.* at ¶11
155 *Id.*, at ¶15. The Court uses virtually the exact same language, a year later in *PUCL*, supra note 42, at ¶23 (“It is almost accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law”)
156 This winding rhetoric however, is soon internalized a clear statement of law (adequately explained and justified), see V. Venkatesan, *The dilution of a principle*, 24:22 FRONTLINE (Nov. 03-16, 2007), at http://hinduonnet.com/fline/fl2422/stories/20071116505108000.htm (hereinafter *Venkatesan: Dilution*), where in discussing the Blue Lady decision, the author, when supplying a background on the status of the relevant laws, writes: “...in the Vellore Citizens’ Welfare Forum case, the Supreme Court observed that these principles [the PPP, PCP] were accepted as part of the customary international law and hence there should be no difficulty in accepting them as part of Indian law.” In reality, as I have shown above, the Court (with almost no justification) observed SD to be part of CIL, and then described the PPP and the PCP as having become part of the law of the land, due to their “pre-existence” in India’s constitutional provisions. This was followed by the buffer that even if the PPP and the PCP are not yet CIL, then once they do attain such status there will be no difficulty in using them as rules of municipal jurisprudence. All of this weaving however, is by the time of the above-cited article on the Blue Lady, boiled down into a simple statement that the Court had accepted these principles as part of the law of the land, because it found them to represent CIL. This is even more surprising (and its implications, far reaching) because both the author and his readership are typically representative of the mainstream intelligentsia in India.
157 *Id.* See Ashok H. Desai and S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in *Not Infallible*, supra note 3, 159-192, at 172-173, where the authors, in discussing *Vellore*, write: “The Court...drew on the concept of sustainable development...which had become part of customary international law. Among the
It is certainly conceivable, given the ICJ’s acceptance of the principle of SD in its Gabčíkovo - Nagymaros decision of 1997, as elaborated upon by Sands (1998-1999), that the Indian Supreme Court had some intuitive sense of the imminent consolidation of this principle at the international stage, and in this sense, the Court’s acceptance and application of the principle is a testament to the wisdom and foresight of its judges; however, given that it decided Vellore in 1996, the Court’s reasoning and approach, as I have attempted to show, involved a fair amount of unacknowledged stretching. And further still, to go ahead and include PPP and PCP as also having become part of CIL (even while acknowledging they may not be customary), is evidence, as observed earlier, of a distinct temporal side-step, so to speak.\(^{158}\)

### III.5 Six degrees

From here on, with respect to the acceptance of these principles (drawn from international sources) as having been “found” in sites of municipal jurisprudence, the majority of decisions proceed by relying on the Court’s own precedent. This is not to say that all other decisions reference Vellore exclusively (though most do), but rather that Vellore stands as a patriarch of sorts whose authority is built upon in subsequent decisions. It may be helpful to understand the subsequent decisions as reflecting permutations of two kinds of characteristics: decisions that have some original qualities in addition to their own reliance on precedents like Vellore (§III.5.1 and §III.5.3 below); and a second stream of decisions which wholeheartedly internalize and regurgitate the language of precedent (§III.5.2 below).

#### III.5.1 Nayudu (or, the one that tries to rehabilitate Vellore)

The Court’s treatment of the present subject, in Nayudu,\(^{159}\) (1999) is worth considering because even though the Court returns to Vellore to locate international principles/standards in municipal precedent, it nevertheless displays some original qualities by essentially undertaking a rehabilitation and extension of its reasoning in Vellore.\(^{160}\) In this sense, it functions as a supplement or sequel of sorts. While reciting its reliance on a number of non-binding international instruments, the Court does not however, provide any analysis or explanation.

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\(^{158}\) The Supreme Court’s conclusion here leads me to wonder what would be the consequence if, following this decision, India were to appear before an international tribunal, say the ICJ, and contend that these principles were part of CIL relying, at least in part, on Vellore (and others that I discuss next) of the Indian Supreme Court. While the Court’s conclusion (i.e. its proclamation that these principles were certainly part of CIL) would be valuable as a “supplementary” source under Article 38(1)(d) of the Statute of the ICJ, the Supreme Court’s shaky, underlying reasoning (including the obvious lack of supporting authorities) followed by the Court’s subsequent hesitation in ¶15, would no doubt gravely weaken the import and overall, persuasive weight of the Court’s conclusions.

\(^{159}\) See A.P. Pollution Control Board v. Prof. M.V. Nayudu (Retd.) and Ors., AIR 1999 SC 812 (hereinafter Nayudu)

\(^{160}\) Id. at ¶29-38
towards justifying its standing observation that these principles (SD, PCP and PPP) are customary.

With respect to the PCP, in *Nayudu*, the Court says that this principle has replaced the “Assimilative Capacity principle”\(^\text{161}\) which the Court identifies as located in Principle 6 of the Stockholm Declaration. The Court does not, however, say that this “Assimilative Capacity principle” is what it had relied on when it referenced the meaning of PCP (as reflecting a reversed burden of proof, see §III.4.1), in *Vellore*. This becomes relevant when, later on in this decision, once again identifies the source of the shift in the burden of proof that accompanies its understanding of the PCP. It traces this “basic shift” as having “occurred initially” between 1972 and 1982\(^\text{162}\) and identifies Principle 11 of the World Charter for Nature\(^\text{163}\) as the site where the same is originally reflected, before being incorporated into Principle 15 of the Rio Declaration. At this point the Court quotes Principle 15 and says, “[I]n other words, inadequacies of science is [sic] the real basis that has led to the precautionary principle of 1982.”\(^\text{164}\) Next, the decision in *Nayudu* takes note of the UNEP Governing Council’s 1989 recommended use of the PCP, and finally cites Bamako Convention\(^\text{165}\) (as an instance where the standard for the applicability of the PCP was estimably lowered).\(^\text{166}\)

This reflects a substantial effort to build on the base of *Vellore* (see §III.4.1), and certainly merits comment. *First*, it is worth noting how, much like in *Vellore*, the Court never comes out and make a clear claim, for instance, the way it claimed SD was part of CIL in *Vellore* (even though, later on, it stepped back from this blatant assertion); I refer to language such as “basic shift” and “occurred initially,” used by the Court to generalize its justifications, which is not surprising, because at the time when the Court was considering *Nayudu* (1999), and especially at the time referenced by the Court i.e. 1972-1982, there was very little certainty about the PCP.

*Second*, it becomes apparent, on reading Principle 11 of the World Charter for Nature (1982), that the PCP is certainly evolving towards its form in Principle 15 of the Rio

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\(^{161}\) Id. at ¶ 31

\(^{162}\) Id. at ¶ 32


\(^{164}\) *Nayudu*, supra note 159, at ¶ 33

\(^{165}\) Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Bamako, 29th January, 1991 (hereinafter *Bamako Convention*), at art. 4(3)(f) whereby the standards of “preventive” and “precautionary” are linked and the threat no longer needs to be “serious” or “irreversible.” Further the Bamako Convention also lowers the overall scientific threshold after which the PCP may be applicable.

\(^{166}\) The global impact of the Bamako Convention of 1991 as regional arrangement between 12 African countries, however, is less than significant towards ascertaining the status of PCP globally. In contrast the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, adopted under the auspices of the UNECE, in Helsinki, 17th March 1992, in force as of 6th October 1996; 31 I.L.M. 1312 (1992), that followed soon after, limits the application of the PCP to transboundary effects alone, and the level of environmental damage that needs to be shown prior to the application of the principle is once again raised far higher than the Bamako Convention.
Declaration,\textsuperscript{167} however, the first binding and generally applicable acknowledgement of the principle is traced to the 1990 Bergen Ministerial Declaration on Sustainable Development.\textsuperscript{168} Still, assuming arguendo that the World Charter for Nature (1982) was the first to present the PCP (as the Court defined it in \textit{Vellore}, i.e. along the lines of Rio), the Court does not seem to realize that merely by being sort-of acknowledged in a non-binding instrument such as the World Charter for Nature, does not establish the PCP (as found in Principle 15 of Rio) as a standing, globally accepted principle of law that creates a binding obligation upon a sovereign state. This deficiency seems to mirror the dearth of authorities (in support of SD, PCP, PPP being part of CIL) and the complete avoidance of the characteristics of international custom, discussed in my assessment of \textit{Vellore}.\textsuperscript{169}

Third, when the Court turns to discuss of the kind of burden of proof that characterizes its understanding of the PCP, it references Justice Kuldip Singh’s opinion in \textit{Vellore}, to the end that the “…‘onus of proof’ is on the actor or the developer/industrialist to show that his action is environmentally benign,”\textsuperscript{170} and notes, accordingly, that the PCP has led to the creation of this reversed burden of proof.\textsuperscript{171} In quoting Principle 15 of the Rio Declaration, and connecting this reversal of burden of proof as emanating from Principle 15, the Court gives the impression that it is only now, in \textit{Nayudu} (1999), relying on Principle 15 of the Rio Declaration, when in fact, it had relied on this principle in \textit{Vellore}, but on that occasion it found PCP to be customary (without any analysis or justification) and then somehow traced this liberal version of the PCP (characterized by reversal of the burden of proof) to the Stockholm Conference (where for all

\textsuperscript{167} See World Charter for Nature, at Principle 11, “Activities which might have an impact on nature shall be controlled, and the best available technologies that minimize significant risks to nature or other adverse effects shall be used; in particular:

(a) Activities which are likely to cause irreversible damage to nature shall be avoided; (b) Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed; (c) Activities which may disturb nature shall be preceded by assessment of their consequences, and environmental impact studies of development projects shall be conducted sufficiently in advance, and if they are to be undertaken, such activities shall be planned and carried out so as to minimize potential adverse effects; (d) Agriculture, grazing, forestry and fisheries practices shall be adapted to the natural characteristics and constraints of given areas; (e) Areas degraded by human activities shall be rehabilitated for purposes in accord with their natural potential and compatible with the well-being of affected populations.”

\textsuperscript{168} Bergen Declaration, at ¶7. See also Ministerial Declaration of the Second International North Sea Conference, London, 25\textsuperscript{th} Nov. 1987, which in pmbl. ¶VII, accepted that “in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary,” at http://www.vliz.be/imisdocs/publications/140155.pdf. PERSPECTIVES ON THE PRECAUTIONARY PRINCIPLE 209 (R. Harding, E. Fisher eds.) (Federation Press, 1999). Earlier, in 1984, the Pmbl. to the Ministerial Declaration of the International Conference on the Protection of the North Sea (Bremen, 1st Nov., 1984) noted that states, “must not wait for proof of harmful effects before taking action.” See also PARACOM Recommendation 89/1 (1989) supporting the “precautionary principle.”

\textsuperscript{169} See Nayudu, supra note 159, at ¶34 where the Court references the First Report of Dr. Sreenivasa Rao Pemmaraju, Special - Rapporteur, International Law Commission ¶16-72 (3\textsuperscript{rd} April, 1998) to the end that while the PCP is part of CIL, it is still “evolving.”

\textsuperscript{170} For a discussion of PCP in \textit{Vellore}, see §III.4.1

\textsuperscript{171} See Nayudu, supra note 159, at ¶36
intents and purposes it did not exist). Now, in Nayudu, however, it acknowledges that the PCP’s predecessor, the “Assimilative Capacity principle,” is the version/form of precaution to be found in Principle 6 and 7 of the Stockholm Declaration, but, as noted earlier, the Court in Vellore already applied the PCP. This leads me to believe that my earlier inference (see §III.4.1) was in fact accurate: The Supreme Court, when deciding Vellore (in 1996), realized that in looking to apply a principle of precaution, it could only access the Stockholm Declaration referenced in various statutes (so as to maintain its legitimacy by appearing to “find” the principle within the details of pre-existing Indian legal sites). Accordingly its rhetoric references Indian’s commitments under the Stockholm Declaration so that the decision may read as if the Court is interpreting the rule of precaution present within the second clause of Principle 21 of Stockholm Declaration (i.e. the “prevention principle”). In reality, however, the Court’s underlying logic betrays an interpretation of the rule (found in Principle 21 of the Stockholm Declaration) in a manner wholly alien to that instrument (and the, then prevailing international consensus) i.e. the Court interpreted India’s unspecified commitment (under Stockholm) along the lines the rule of “precaution” would come to be understood only as recently as 1992 under the Rio Declaration.

Finally, the Court follows up by citing a variety of commentary from the late 1990s to explain the meaning and import of the PCP. Now, it could well be that the Court presents the most recent research in its decision, but nevertheless the timing of the commentary referenced by the Court is telling as to when this specific notion of PCP, and reversed burden of proof, began to receive mainstream acknowledgement and acceptance. The Court however, had already found these aspects, as well as the principle of PCP as being customary and existing as far back as in the Stockholm Declaration (1972), per its decision in Vellore.

III.5.2 Jyal (or, the one that reuses Vellore)

In Jyal (often referred to as the “Tehri Dam case”), the Supreme Court returns to the exaggerated connection (whereby the Environment Act (1986) is seen to represent a fulfillment of the principles committed to under the Stockholm Declaration) proposed by it in Vellore. The Court, in that decision, proclaimed that SD was customary, and then proceeded to cite constitutional provisions and then statutory law in an effort to find SD’s essential features (such as PPP and PCP) within sites of Indian (municipal) jurisprudence.

The Supreme Court returns to this logic in Jyal, when, with respect to the PCP the Court says,

“The precautionary principle accepted by India being a party and significatory [sic] to international agreement and understandings in the field of environment has

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172 For a discussion of PCP in Vellore, see §III.4.1. See also Nayudu, supra note 159, at ¶31
173 See Nayudu, supra note 159, at ¶36-38
174 Id. at ¶33-38, where the Court cites commentaries published in 1988, 1992 and 1998
175 See Jyal, supra note 145.
176 For a discussion of PCP in Vellore, see §III.4.1
177 See Jyal, supra note 145, at ¶25, 126
become part of domestic law i.e. Environmental (Protection) Act."

Even though the Court states this as a given, the reasoning on which the Court relies (as I have argued in Vellore), is at best, feeble.

III.5.3  **Kenchappa (or, the one pretending to bolster Vellore)**

*Kenchappa*, 179 is another decision worth considering because even though it arrives relatively late (in 2006), 180 it nevertheless displays some potentially original reasoning to the extent that it recognizes a variety of international instruments and related documents, reviewing, for instance, the Stockholm Declaration, 181 the Brundtland Commission’s Report, 182 the Rio Declaration, 183 the World Summit on Sustainable Development 184 (“Johannesburg Declaration”), *Caring for the Earth: A strategy for Sustainable Living* (prepared by the World Conservation Union and the World Wildlife Fund for Nature) 185 and even the commentary of jurist, Philippe Sands. 186 What is interesting (though not surprising) is that once it has reviewed (often quoting the text of) these aforementioned sources, the Court, in looking to find these sources (so as to access their constituent principles) as pre-existing within sites of Indian jurisprudence, returns, immediately, to its own decisions in *Vellore* 187 and *Essar* 188 (I discuss *Essar* next). And in this sense, *Kenchappa* does not provide an original rationale 189 but much like *Research Foundation*

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178 *Id.*, at ¶ 126

179 See Karnataka Industrial Areas Development Board v. Sri. C. Kenchappa and Others, AIR 2006 SC 2038 (hereinafter *Kenchappa*)

180 I choose *Kenchappa* not only because it provides a run-through of the variety of international sources that the Supreme Court has recognized but also because, own to its location as more recent decision, it is easy to see how the series of Court decisions preceding it largely involves decisions referring back to one or a few select original cases. For instance, in ¶19 of *Kenchappa*, the Supreme Court quotes from *Essar Oil Ltd. v. Halar Utkarsh Samiti and Others*, AIR 2004 SC 1834 (hereinafter *Essar*), while pointing out that the excerpt from *Essar* is a direct quote from *Indian Council for Enviro Legal Action v. Union of India*, (1996) 5 SCC 287 (hereinafter *Enviro Legal Action*), at ¶31

181 See *Kenchappa*, supra note 179, at ¶ 18-20

182 *Id.* at ¶ 20, 21

183 *Id.* at ¶ 22-25

184 *Id.* at ¶ 26, 27

185 *Id.* at ¶ 26, 27

186 *Id.* at ¶ 28

187 *Id.* at ¶ 29, 32

188 See *Essar*, at supra note 180. As described earlier, the Court in *Kenchappa* quotes *Essar* and acknowledges that its chosen excerpt (found in *Essar*) is, in turn, a quote from *Rural Litigation Kendra*, supra note 58.

189 See *Kenchappa*, supra note 179, at ¶29-40, where, for instance, the Court identifies *Vellore* and M. C. Mehta v. Union of India (UOI), (1997) 2 SCC 353, as sites of municipal law where PCP may be found.
(2005), Intellectuals Forum (2006) and Milk Producers (2006) (each of which follows Kenchappa), it is just one more in a long series of Supreme Court decisions that all stand as good law simply by looking inward towards earlier decisions.

III.6 False passage (or, the Court and Stockholm revisited)

One final aspect of the Court’s logic (and/or assumptions), common to Vellore (1996), Nayudu (1999), Jayal (2004), Essar (2004) and Kenchappa (2006), merits comment because it is unclear from the language of these decisions whether the Court is at all aware of or chooses to ignore the circumstances and legacy of the Stockholm Declaration. I mention this because in 1972 when states convened to participate in the Conference on the Human Environment (Stockholm Conference), “international environmental law” was only just being conceived and State Parties (especially developing nations) were extremely protective of their sovereign control over domestic natural resources, as is explicitly reflected in Principle 21 of the resulting Stockholm Declaration which effectively established a definitive trend in international environmental

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190 See Research Foundation (2005), supra note 149, at ¶32, where the Court returns to Vellore to explain that PCP and PPP have already been “held to be part of the environmental law of the country,” and at ¶33 where the Court reiterates its own comments from an earlier order in this same dispute (Research Foundation For Science Technology National Resource Policy v. Union of India and Anr., 2003 (9) SCALE 303, “The legal position regarding applicability of the precautionary principle and polluter pays principle which are part of the concept of sustainable development in our country is now well settled,” and further refers to Nayudu, supra note159, which once again returns to Vellore, supra note 74.

191 See Intellectuals Forum, Tirupathi v. State of A.P. and Ors., AIR 2006 SC 1350 (hereinafter Intellectuals Forum) which references Essar, Enviro Legal Action, Nayudu, M.C. Mehta v. Union of India (Taj Trapezium Case) (1997) 2 SCC 653, State of Himachal Pradesh v. Ganesh Wood Products (1995) 3 SCC 363 (hereinafter Ganesh Wood Products) and Narmada Bachao Andolan v. Union of India (2002) 10 SCC 664. This decision is actually more relevant with regard to the Court’s understanding of the principles themselves; with respect to the present subject, the Court’s reference to these decisions only indirectly locates them within municipal jurisprudence.

192 Consider Milk Producers Association, Orissa and Others v. State of Orissa and Others, AIR 2006 SC 3508 (hereinafter Milk Producers) where the Court in ¶16 goes about its reasoning by referencing that DPT has been accepted in M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388, the principle of intergenerational equity has been recognized in Ganesh Wood Products and PCP is found in Vellore, supra note 74.

193 There are a number of other decisions which, much like Kenchappa, reference earlier decisions, with some original conceptions, in order to locate the Court’s authority to apply these international sources and their comprising principles, within the ambit of municipal rules. See e.g. M.C. Mehta v. Union of India and Others, (1997) 2 SCC 411 at ¶20; M. C. Mehta v. Kamal Nath and Ors., (1997) 1 SCC 388 at ¶30-32 (references Vellore, and includes DPT as part of law of the land); T. N. Godavarman Thirumulpad v. Union of India (UOI) and Ors., AIR 2005 SC 4256; N. D. Jayal and Anr. v. Union of India (UOI) and Ors., (2004) 9 SCC 362 at ¶ 24, 126; the Taj Trapezium case, supra note 191, at ¶13, 14; Research Foundation (2005), supra note 149, at ¶24, 32 and 33 (references Vellore and Research Foundation (2003)); Nayudu, supra note 159, at ¶30 (references Vellore); M. C. Mehta v. Union of India (UOI), (1997) 2 SCC 411 at ¶20; M. C. Mehta v. Union of India (UOI), (1997) 1 SCC 388 at ¶15, 30, 32; S. Jagannath v. Union of India (UOI), AIR 1997 SC 811 at ¶ 41 (references Vellore and Enviro Legal Action); Bombay Dyeing, supra note 58, at ¶93 is one more instance of this trend.

194 I have maintained this as a separate section rather than structuring it as continuation of §III.4.2 because this critique if tacked onto that part of the argument would only have applied to Vellore. At this later stage, on the other hand, it is easier to identify how the Court understanding and use of Stockholm has affected not only earlier decisions with some original rationale but the entire body of precedent-based environmental jurisprudence in India.

195 Stockholm Declaration, supra note 47, at Principle 21
instruments whereby the first clause of the text (with respect to the Stockholm Declaration, of Principle 21) pays homage to the sovereignty of the State, while the second clause develops a major exception with respect to transboundary adverse impact resulting from domestic activities. In fact, the strength and esteem of this dichotomy found in Principle 21, is acknowledged by the International Court of Justice as being part of CIL. In addition, at the Conference in 1972, developing countries, in particular, vociferously defended their right to growth and development to the extent that discussions were in jeopardy and Principle 11 of the resulting Stockholm Declaration was designed to reflect these demands by stating that, “environmental practices of all States should enhance and not adversely affect the present or future development potential of developing countries.”

The Stockholm Declaration is by far the most statist of all international instruments addressing international environmental issues, to the extent that even two decades later, the

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197 The importance of permanent sovereignty over natural resources to states is obvious from the volume and variety of international instruments that accept this tenet. For a selection of such instruments, see Sands: PIEL, supra note 106, at 237. See also Nanda, supra note 49, at 39.

198 See Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), (1996) ICJ Rep. 226 at ¶29. See also comments of Judge Weeramantry (dissent), Judge Koroma and Ad Hoc Judge Palmer, in (1995) ICJ Rep. at 347, 378 and 408 at ¶80, respectively.


“Development and Environment

44. Considerable emphasis was placed by speakers from developing countries upon the fact that for two-thirds of the world’s population the human environment was dominated by poverty, malnutrition, illiteracy and misery, and that the urgent task facing mankind was to solve those immediate and formidable problems. The priority of developing countries was development. Until the gap between the poor and the rich countries was substantially narrowed, little if any progress could be made in improving the human environment. Many speakers from developing countries agreed, however, that environmental considerations would have to be incorporated into national development strategies in order to avoid the mistakes made by developed countries in their development, to utilize human and natural resources more efficiently, and to enhance the quality of life of their peoples. Many speakers endorsed the statement of the Secretary-General of the Conference that there need be no clash between the concern for development and the concern for the environment, that support for environmental action must not be an excuse for reducing development, and that there must be a substantial increase in development assistance with due consideration for environmental factors. There was also general agreement that a philosophy of "no growth" was absolutely unacceptable."

see also, ¶36, 37

200 See Nanda, supra note 49, at 24

201 Stockholm Declaration, supra note 47, at Principle 11

202 One instance of this is found by contrasting the language of Stockholm Declaration, Id., at Principle 23:

“Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases
The Rio Conference (1992) was “unable to improve significantly upon, develop, scale back or otherwise alter the language in adopting Principle 2.”203 A fair example of this status may be found in the Indian Government’s National Conservation Strategy and Policy Statement on Environment and Development (of 1992).204

The Supreme Court, however, displays no awareness of any of the abovementioned during its review of the Stockholm Declaration over the course of number of decisions. In fact, the Supreme Court’s heavy handed reliance is, at least in one sense, telling of its approach. Take, for instance, the Court’s recognition of the Stockholm Declaration in Essar, as follows: “In our opinion this [the interpretation of a certain municipal legislation] must be done keeping in mind the Stockholm Declaration of 1972 which has been described as the ‘Magna-Carta of our environment.’”205 In and of itself the Court’s description, taking into account the nature and circumstances leading up to the conception of the Stockholm Declaration, may seem somewhat dramatic, but the weakness of this description is made obvious when the original source to which the Court refers (by saying, “which has been described”) is consulted.

The Magna Carta analogy referenced by the Supreme Court in Essar, is drawn from statements made by the representative of the Holy See (to the Stockholm Conference) while participating in the 21st Plenary Meeting of the Conference convened, on the 16th of June 1972, to discuss the Report of the Working Group206 on the Declaration of the Human Environment:

“The representative of the Holy See said that one approach would be to view the Declaration as a fundamental document, a kind of Magna Carta, but he did not think it could be so viewed in its existing form. A number of improvements and clarifications had been made in the new version. However, the legitimate concern to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.”

to Rio Declaration, supra note 48, at Principle 11.

“States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.”

both of which address the same issue, but with distinctly different language; consider the difference between Stockholm Declaration requiring that it is “essential in all cases consider systems of values prevailing in each country” and “the extent of applicability of standards,” and Rio, restricting itself to “standards….should reflect the environmental and developmental context.

203 See Sands: PIEL, supra note 106, at 236.

204 See National Conservation Strategy and Policy Statement on Environment and Development (1992), prepared by the Ministry of Environment & Forests (Government of India), at http://moef.nic.in/downloads/about-the-ministry/introduction-csps.pdf, at 7.3 where the document reads, “The Indian approach to global environmental problems is generally in keeping with other developing countries and has the following basic elements: Our economic development cannot be hampered in the name of the global environment, which we have done nothing to damage and can do little to save…”

205 See Essar, supra note 180, ¶25

206 See Stockholm Declaration, supra note 47, at Annex 11. The Working Group on the Stockholm Declaration was established by the Conference at its 7th plenary meeting.
to have development reconciled with ecology had altered the balance that had existed in the original version. The Holy See regretted that some basic principles such as that of ‘The polluter must pay,’ and the concept moral and ecological justice, had not found a place in the [Stockholm] Declaration. Nevertheless, in a spirit of cooperation, the Holy See supported the Declaration.”

It is worth emphasizing that the text discussed at this 21st Plenary Meeting was, ultimately, adopted as the final text of the Stockholm Declaration. This same text is where the Indian Supreme Court finds its authority in *Essar*, by employing an incomplete (or asymmetric) reading of the original discussions at the Stockholm Conference which leaves out the rejection of this description by the very representative who coined the analogy.

The story, however, does not end here. In treating *Essar* as evidencing some original rationale with regard to this “authority,” the Supreme Court when adopting the “Magna Carta” analogy in *Kenchappa*, gives no indication that the analogy did not originally arise in the mind of the Court in *Essar*. Instead, in *Kenchappa*, the Court references only its own decision saying: “In Essar...this Court aptly observed Stockholm Declaration as ‘Magna Carta of our environment.’” The immediate effect of this approach is two-fold: *first*, in proceeding so, any and all doubts that could have been raised, as to the authenticity of value or actual weight of this moniker, by tracing the analogy to its original source, are lost; and *second*, this categorization is found to have—in just two short years between *Essar* (2004) and *Kenchappa* (2006)—become part of the Court’s standing identification of the Stockholm Declaration, and thereby now serves to formally legitimate all future arguments where the Court chooses to rely on the Stockholm Declaration.

These conclusions are not only important for themselves i.e. it’s not just a question of how could the Court call it the Magna Carta? but rather, *first*, they reflect the Court’s overall understanding of the status and history of these principles in international law (thereby serving as a comments on the judges interpretive orientation), and *second*, because, as described earlier, while not being part of its ratio *per se*, these conclusions reflect important additions to the Court’s repertoire of arguments which bring to bear significant persuasive value on the Court’s effort to legitimate the use of this authority as one more step towards building what is, ostensibly, a robust body of environmental jurisprudence.

I should reiterate that my point in critiquing the Supreme Court’s decisions in *Vellore*, *Essar* and *Kenchappa* amongst others, is not to provide an assessment of whether or not SD, PPP, PCP were actually part of CIL at the time of the Court’s decision; but rather, to show that the Supreme Court’s rationale, its reliance of authorities (for instance, its reliance on the Stockholm Declaration in support of its efforts to further an extremely liberal environmental position), indicates a shallow (intentionally or not) appreciation of the status of these instruments, their status and legacy. As such, across decisions, the Court’s argument is established through unclear and relatively unstable (or unsubstantiated) reasoning and perpetuated to create a standing body of municipal legal rules, via closely construed precedent.

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208 See *Kenchappa*, supra note 179, at ¶19
Coda

As prefaced initially, an internal reading of the Supreme Court’s decisions set against the development of principles such as SD, PPP and PCP at the international plane, opens the door to far more questions that the Court’s justifications can dam.

What is important here is not just the substantive merit of accessing international rules themselves but rather how the Court’s rhetoric and argumentation consciously, strategically and consistently pursues a method that allows for maximum leeway and minimal rationale-based accountability; this is important because the absence of such an acknowledgment is a clear index of why existing subject-literature, is incapable of explaining and effectively critiquing the method, approach and underlying mindset with which the Supreme Court proceeds, subsequently, to understand, interpret and apply these aforementioned principles.

Lacking an appreciation of the Court’s method and strategy, commentators can only rely on ratio-comparisons and the unfortunate consequences of decisions to supply a repetitive and shallow critique of the Court’s jurisprudence that, all its grumbling notwithstanding, must ultimately buy in to the judges’ skewed justifications as if their conclusions (somehow) flow naturally from the principles themselves.

The nature of judicial arguments and premises (both acknowledged and not) speak not only to the judges desire to construct a body of municipal law, but to the judges sense of self-awareness with respect to their place in India’s democratic milieu. All of this is often summed, in literature, as constituting the Court’s “creativity,” but it is a creativity that has an expansive agenda and reflects the well documented struggle of the Supreme Court to expand the scope of its authority while constantly showing itself as working within the confines of the Constitution and democratic theory more generally.

Fortunately for the Court, there are few who would argue against the incorporation of principles that benefit the natural environment, and to this extent the Court’s motivations are certainly commendable, but original intentions can only hold so much credit when we consider that they belong to an institution whose proclamations form the supreme law of the land. As such, the movements identified in this paper form a legend of sorts against which all subsequent Supreme Court decisions employing principles such as SD must be understood. To put it differently, without appreciating the location of the cart, any query towards where the horse should be brought to stand, can only be answered by whim and not rationality.