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January 1, 2004

Green Laws for Better Health: The Past That Was and the Future That Maybe - Reflections from the Indian Experience

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Green Laws for Better Health: The Past that was and the Future that may be – Reflections from the Indian Experience

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I. INTRODUCTION

“Public health” is a legal term of art referring specifically to delineated powers, duties, rights, and responsibilities.1 Its meaning, however, has defied precision. Different schools of thought explain its meaning and scope differently. Traditionally, public health discourse has been based on conceptions of population health.2 In medicine, the patient is an individual person, whereas, in public health, the patient is the whole community or population.3 The human rights construction of the public health definition explains its scope on the premise that “the health of most people in the world depends less on access to medical services than on efficient farming, distributive justice, ensuring ‘domestic tranquility,’ and broad-based, sustainable development of natural and built environments.”4 This emerging conception of public health justifies government intervention. Intervention

* Fourth year, The National University of Juridical Sciences, India. This paper has benefited from comments by Ms. Jasmine Joseph, Ms. Rukmini Sen, and my colleagues Deepa Christopher, Kushagra Priyadarshi, Swagata Raha, and Vivek Tewary. All shortcomings are, however, mine.


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involves public officials taking appropriate measures including environmental regulations pursuant to specific legal authority, after balancing private rights and public interests, to protect the health of the public.\(^5\)

There are two criteria common to each of these conceptions. First, each conception regards “public health” as involving the whole or a significant part of the population and secondly, each emphasizes environmental pollution as an important cause of its deterioration. Each conception acknowledges that the environment in which we live greatly affects our health. The household, the workplace, outdoors and transportation environments pose risks to health in a number of different ways, from the poor quality of air many people breathe to the hazards we face as a result of climate change.\(^6\) Poor environmental quality is directly responsible for 25% of all preventable ill-health, including diarrhoeal and acute respiratory diseases.\(^7\) Exposure to air pollution including chemical variants like sulphur and nitrogen dioxide, reactive hydrocarbons and other organic compounds are associated with lung cancer, nasopharynx and acute respiratory infections particularly among children.\(^8\) Of the three million premature deaths in the world that occur each year due to outdoor and indoor air pollution, the greatest number occurs in India.\(^9\) Studies in India reveal a close nexus between genetic disruptions, neurobehavioral problems and exposure to vehicular pollution.\(^10\) India is likely to have about thirty-two million asthma patients by 2010.\(^11\) Noise pollution or “slow poison” is associated with miscarriages, still birth and physical deformities, deafness and hypertension.\(^12\) Threat to human health from hazardous substances is no less alarming. India generates about five million tonnes of waste.\(^13\) The potential for hazardous waste to affect

\(^5\) For a detailed discussion on this conception of “public health,” see Rothstein, supra note 1.


\(^7\) See Unequal and Unhealthy, DOWN TO EARTH, May 31, 2003, at 66.


\(^10\) Study conducted by the Chittaranjan National Cancer Institute and the Calcutta University. For a discussion on the study see Penetrating Evidence, DOWN TO EARTH, Sept. 15, 2002, at 45-6.

\(^11\) See Pranay Lal, Gasping Millions, DOWN TO EARTH, Jan. 15, 2002, at 34.

\(^12\) See supra note 7, at 62.

\(^13\) See Report on State Pollution Control Boards ch. 3 (Planning Commission of India 2001).
the general population is due, for the most part, to exposure over a prolonged time to small amounts of substances in ground water, the food-chain and in the air.\textsuperscript{14} Consequences of such exposure vary from headache, bronchitis, renal failure, secondary hypertension or even formation of tumors.\textsuperscript{15} The interplay of these factors makes public health, \textit{inter alia}, a function of pollution control and environmental standards.

Law is a complex web of conflicting interests. Every legal system consists of institutions that use law as an instrument to create a society envisioned by the highest law that binds the system. The institutions harmonize the conflicting interests; often based on pressures that interest groups exert. Ideally, the law that results from this harmonization process must reflect prioritized concerns of every interest group. In reality, however, the law tends to singularly reflect the interests of the dominant pressure group; which explains why most regulations favor the industry rather than public health concerns. For the purposes of this article, I shall regard these institutions as actors of law. Who, then, are the actors of law in matters of prescribing and maintaining environmental standards in India? I have divided the actors into three categories; the legislature, the executive (including the statutory bodies created by the former), and the judiciary.

This article is a critical analysis of the performance of the actors in maintaining environmental standards in India. Part II is a discussion on the source of environmental law in India. There is little, as a body of environmental law, which is Indian. Most of it is international in character and has become Indian by incorporation. Part III discusses the performance of the legislature. The legislature is the principal body entrusted with law-making. Has the legislature effectively used the instrument of law to prescribe environmental standards? Part IV evaluates the performance of the statutory bodies entrusted with the task of implementing environmental standards in India. Without effective implementation, good laws are as ineffective as bad laws. How has inefficient implementation by the pollution control boards and other agencies contributed to the poor state of public health? Part V discusses the role of judiciary in providing environmental law in India with a sense of direction. Not only has the judiciary assumed the role of a law-maker, but also policy maker and, at times, that of an implementing agency.\textsuperscript{16} The impact of these shifting constitutional dynamics, especially in environmental matters, has been particularly profound.\textsuperscript{17} How effective has environmental adventurism of the judiciary been in promoting public health? In the conclusion, I provide a final audit and a glimpse of the future that may be.

\footnotesize{14. \textit{See Hazardous Waste & Human Health: Report from the British Medical Association} ch. 3 (David Morgan ed. 1991).}  
\footnotesize{15. \textit{Id.}}  
\footnotesize{17. \textit{Id.}}
II. LOCALLING THE SOURCE OF ENVIRONMENTAL LAW IN INDIA

In India, the source of law in environmental matters, unlike others, is primarily international law. However, it was not until the closing decades of the twentieth century that environmental law itself evolved as a branch of international law.\(^8\) This body of law today consists of more than 1000 treaties, declarations, resolutions, judicial decisions, and other legal authorities, most since 1970.\(^9\) The Stockholm Conference was the first milestone reflecting an international consensus on the nature and scope of the environmental challenge confronting world community.\(^{20}\) It led to the adoption of twenty-six guiding principles and since then, international environmental law has looked good for many more. Following the Stockholm Conference and the establishment of the UNEP,\(^{21}\) number of environmental disasters in Bhopal, Chernobyl and Basel in the mid-1980s and the discovery of the hole in the ozone layer over the Atlantic made the global community to wake up to newer environmental challenges.\(^{22}\) The seminal report of the World Commission on Environment and Development (WCED),\(^{23}\) the United Nations Conference on Environment and Development (UNCED)\(^{24}\) in Rio de Janeiro, the unanimously adopted action plan (Agenda 21)\(^{25}\) and the United Nations World Summit on Sustainable Development\(^{26}\) (WSSD) were other important milestones that hastened the development of a distinct discipline on international environmental law.

The core principles that resulted from these declarations, treaties, and conventions include the concept of sustainable development,\(^{27}\) the principle of inter-generational equity\(^{28}\) and intra-generational equity,\(^{29}\) the right to clean environment,\(^{30}\) the Polluter-Pays principle,\(^{31}\) the Precautionary prin-

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22. See supra note 19, at 84.
29. Id.
30. Stockholm Declaration, supra note, 20, Principle 1; Rio Declaration, supra note 24, Principle 1.
31. Rio Declaration, supra note 24, Principle 16; Agenda 21, supra note 25 para. 8.28.
ciple, and the practice of Environmental Impact Assessment. Besides these, numerous treatises on specific aspects of the environment have also been negotiated and signed. The Framework Convention on Climate Change (FCCC), the Kyoto Protocol to the FCCC, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Rotterdam Convention on the Prior Informed consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade are among the most important ones that highlight a public health perspective to environmental law. These treatises and conventions became the principal source of environmental law in India. While many principles have been imported by the legislature and mostly by the judiciary, there are many that remain to be statutorily enacted. As we shall see, the principles that environmentally empower the people still await statutory importation.

III. THE MAKING OF GREEN LAWS IN INDIA

The legislature is arguably the most important actor in prescribing environmental standards in India. The mandate to “improve the public health” and “to protect and improve the environment” may be located in Articles 47 and 48A of the Indian Constitution respectively. Article 51A also casts a duty on every citizen “to protect and improve the natural environment.” While the former was part of the original Constitution, environmental concerns did not feature as a constitutional objective until the insertion of Article 48A. The absence of any constitutional concern for the environment led a jurist to regard the Constitution as suffering from environmental blindness.

This environmental blindness was adequately reflected in the functioning of the legislature. Until 1974, the general law of crimes governed pollution and public health related matters. It was not until the Stockholm Conference that

32. Rio Declaration, supra note 24, Principle 15; Agenda 21, supra note 25 paras. 9.6-9.8.
38. INDIA CONST. (Forty-second Amendment Act, 1976) art. 51, part A.
39. Id.
42. See Robati C. Das, How Effective are the Air and Water Pollution Control Acts, 23 INDIAN B. REV. 171, 174 (1996).
43. Stockholm Declaration, supra note 20.
the environment became a matter of serious debate in India. The legislature reacted to this increasing concern in two ways; by enacting statutes prohibiting acts of pollution and by establishing statutory bodies to implement environmental standards. Over the last two decades, this law-making process has created a large corpus of statutes and rules protecting public health from environmental pollution. These include the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act 1981, the Environment (Protection) Act 1986, the Cigarettes and other Tobacco Products Act 2003, the Bio-Medical Waste (Management and Handling) Rules 1998, the Recycled Plastics Manufacture and Usage Rules 1999, the Municipal Solid Wastes (Management and Handling) Rules 2000, the Noise Pollution Rules 2000, the Ozone Depleting Substances (Regulation) Rules 2000, and the Batteries (Management and Handling) Rules 2001. These efforts, however, have been marked by remarkable failures. The laws lacked teeth and the bodies lacked functional and financial powers. For the purposes of this article, I shall limit the critical analysis to the Water Act (WA), Air Act (AA) and the Indian Environment Protection Act (EPA). The legislatures' use of law in maintaining environmental standards has been a failure primarily for three reasons. It used law reactively, created powerless administrative authorities, and refused to recognize public participation.

The legislature's approach to pollution laws has been principally reactive. The WA came in the background of the Stockholm; the AA, the EPA, the National Environment Tribunal Act (NET) and the Public Liability Insurance Act (PLIA) were enacted in the aftermath of the Bhopal disaster, while the rules and notifications were seen as compliance with international obligations. Rather than being preventive, legislatures have emphasized on mitigative laws. They came as succor to harm that, on most occasions, was irreparable. Legislative fervor was no more than an afterthought. This environmental amnesia of the legislature is due, in a large part, to the absence of adequate scientific studies documenting the threats to health and environment and the future challenges. Authentic studies on the relationship between health and environment are few and far between and the few that are commissioned are often not given due attention. Knowledge on the

47. INDIA CODE, The Environment (Protection) Act (1986). There were also related legislations including the National Environment Tribunal Act (1995); The Public Liability Insurance Act (1991).
current perceptions of threat to health from a polluted environment remains appallingly poor. This ignorance has kept the legislatures in a state of indifference to possible pollution hazards, immensely endangering public health.

An independent body is important for effective environmental statutes. The cause of public health cannot be promoted unless agencies function efficiently. While the WA established the Central Pollution Control Board (CPCB) and similar state boards for controlling and prohibiting pollution, their constitution is remarkable for the inadequacy of powers granted to them. The structures reflect an obvious desire on the part of the legislatures to create authorities that would remain subservient to the executive, nullifying the possibility of an independent course of action. A member of a Board holds office for a term of three years from the date of his nomination. This tenure is, however, subject to the right of the Central Government or the state governments to disqualify a member if the same is of the opinion that the member has so abused his position to render his continuance on the Board detrimental to the interest of general public. The latitude granted to the executive for the protection of public interest is a potent instrument for the protection of private interest. Without security of tenure free from the whims of the political executive, effective enforcement of pollution control laws is a chimera. Similarly, the boards are bound by the directions of the Central government or the state governments. The WA also empowers the Central Government and the state governments to supersede the Central and state boards if the former are of the opinion that the latter have persistently defaulted in the performance of the functions imposed by it or that circumstances exist which render it necessary in public interest. Evidently, the powers granted to the executive of the states to interfere with the functioning of the boards in public interest far exceeds the power granted to the boards to perform their functions in public interest. An institutionalized process of systematic interference is ensured within the laws itself that make independent performance of the functions a literal impossibility.

This control over the boards by the executive is best exemplified by the absence of financial independence under the pollution laws. Under the WA, the Central Government may make in each financial year such contributions to the CPCB as it may think necessary to enable the Board to perform its functions under the Act. The state boards, similarly, are dependent on the contributions the state governments may make for the functioning of the board. Apart from

56. Id. ch. II, § 6, cl. 1(g).
57. Id. ch. IV, § 18.
58. Id. ch. VIII, § 61, cl. 1, § 62, cl. 1.
59. Id. ch. VI, § 34.
60. Id. ch. VI, § 35.
such contribution, the "fund" of the boards shall be by way of "gifts, grants, donations, benefactions, fees or otherwise." A comparative analysis of the function of the CPCB and the state boards and the corresponding finances granted to it drives the point home that the legislature never intended these boards to function as meaningful agencies of pollution control. Even institutional requirements of the boards including laboratories and testing centers for effective functioning, are dependent on the functioning of the governments. The discretionary provisions that permeate the statutes are just tools to make the statutory bodies dependent on the executive even for its bare survival.

The provisions of law relating to citizen participation are no less dubious. Participation of the citizenry under the pollution laws is critical for its successful implementation. The laws, however, contain provisions that dissuade people from any proactive role. A court may take cognizance of any offence under the WA, if a complaint is made by a person unless the person has given a notice of less than sixty days of his intention to make a complaint to the Board. While the National Environmental Policy recognizes the contribution of non-governmental organizations (NGOs) and public-spirited individuals in combating the menace of pollution, statutes have refused to provide them with any special status in their working. Rather than provide incentives to participate in implementing the provisions of law, the WA creates unnecessary hurdles. The environmental statutes are also conspicuous by the absence of any reference to the role of panchayats and other bodies of local self-governance. The powers, authorities, and responsibilities of panchayats and the municipalities under the Constitution include water management, non-conventional energy sources, health and sanitation, solid waste management, and water supply for domestic and industrial purposes. Notwithstanding this constitutional vision, statutes do not refer to any collaborative role for the local bodies.

Legislation in the field of environmental law suggests a general lack of thoughtfulness on the part of the legislatures. Hastily drafted, the laws reflect a sense of insincerity to the cause of environment. The laws neither address the complicated relationship between public health and environment protection nor between public health departments and pollution control boards. Environmental

61. Id. ch. VI, §§ 36, 37.
62. Id.
63. Id. ch. IV, § 16.
64. Id. ch. IV, § 17.
65. Agenda 21, supra note 25, para. 23.2
68. See id. para. 11.2.
69. INDIA CODE, Article 243 G, Eleventh Schedule.
70. INDIA CODE, Article 243 W, Twelfth Schedule.
law-making still follows the beaten path of compartmentalized action rather than an integrated approach.\textsuperscript{71} The failure of the legislature in using law as an effective instrument of environmental protection is self evident.

IV. POLLUTION CONTROL BOARDS: A TALE OF INEFFICIENT IMPLEMENTATION

A committed enforcement mechanism is essential for a "green" environment. Laws do not act by themselves. They require people who can faithfully implement them. The functioning of the Boards under the environmental statutes, however, leaves much to be desired. The CPCB is required to advise the Central Government on matters concerning the prevention and control of water pollution,\textsuperscript{72} coordinate the activities of the state boards, resolve disputes among them\textsuperscript{73} and provide technical assistance and guidance to the state boards.\textsuperscript{74} Boards lay down standards for treatment of sewage and trade effluents to be discharged into any particular stream having regard to the tolerance limits of pollution permissible in the water of the stream, after the discharge of such effluents.\textsuperscript{75} Prior consent of the state boards is required to establish any industry, operation or process or any treatment and disposal system. The boards may grant consent or refuse it\textsuperscript{76} and are empowered to revoke the same.\textsuperscript{77} Boards also have the power of entry and inspection,\textsuperscript{78} to take samples for the purpose of analysis, and the power to issue mandatory written directions to any person, officer or authority.\textsuperscript{79} After the enactment of the AA, the CPCB and the state boards constituted under the WA were entrusted with additional powers and functions for the prevention and control of air pollution.\textsuperscript{80}

Reality, however, is different. Political interference, lack of funds and technical expertise coupled with corrupt liaisons with the perpetrators of law has made the public the victims of a polluted environment. Even judicial strictures, too many to recount all; have not affected its slovenly attitude. In \textit{M.C. Mehta v. Union of India},\textsuperscript{81} the Court observed that "[n]otwithstanding the comprehensive provisions contained in the [WA] Act no effective steps appear to have been taken by the State Board to prevent the discharge of effluents. . . ."\textsuperscript{82} In a later case the
Court observed that the "enactment of law, but its infringement is worse than not enacting a law at all," noting that there was "complete laxity in the implementation of the [EPA] Act and other related statutes." 83

A corrupt liaison between the board and the industrial lobby has made the pollution law an ideal cover for private profit. Rather than punish, the laws protect polluters. The assessment of Orissa's environment pollution by the Comptroller and Auditor General (CAG) has brought to light the inefficiency of the Orissa Pollution Control Board (OPCB). 84 The CAG has rebuked the state government and the Board for their sloppy approach in tackling industrial pollution and not holding urban bodies responsible for their failure to dispose solid wastes. 85 It came down heavily on the OPCB for failing to initiate punitive action against 102 local bodies, 91 stone crushing units, 12 industries, and open cast mines, although it should have kept these polluters under closer surveillance. 86

The continuing pollution of the Ganges from sewage and industrial effluents, especially from the leather tanneries also indicates the levels of inefficiency that boards suffer from. 87 On many occasions Boards have even refused to acknowledge impending health hazards. A study conducted by Eco Friends, an NGO based in Kanpur, reveals that sewage treatment plants (STPs) installed in Kanpur under the Ganga Action Plan (GAP) have proved ineffective. 88 In the downstream villages of Wajidpur and Sheikpur, which are in the vicinity of leather tanneries sited in the Jajmou area, treated water from the STPs is used for irrigation purposes. Local villagers have begun to suffer from severe health problems including skin ailments like rashes, boils, papules, vesicles and eczema. 89 Unfortunately the CPCB touts GAP as a successful venture. 90 While officials of the Board insist that the quality of the water has improved, Board's own figures contradict its claims. 91

These agencies often do not hesitate in obvious violation of laws. In 2003, the Union Ministry of Road Transport and Highways (MRTH) agreed to the truckers' demand to waive the proposed Mumbai High Court ban on fifteen year old commercial vehicles in the city. 92 Defying an earlier Supreme Court decision, 93 the Ministry argued that as long as vehicles meet the prescribed, emissions,

85. Id.
86. Id.
87. See generally R. Srinivasan, More Dirt on GAP, DOWN TO EARTH, Dec. 15, 2003, at 42.
88. Id.
89. Id.
90. Id.
91. Id.
fitness and road safety related norms they should be allowed to ply on the roads. In its eagerness to assuage the truckers, the MRTH has been silent on the existing legal provisions of the Central Motor Vehicles Rules that already bar national permit to twelve year old goods carriages and fifteen year old trucks on interstate roads.\textsuperscript{94} The MRTH has clearly ignored health implications of the law that requires retiring older and more polluting vehicles to avoid the city core.

Due to a lack of funds and technical expertise in the form of laboratories, study centers have contributed to the abysmal performance of the boards. Depriving the enforcement agencies of funds has meant inadequate technical staff and supporting infrastructure for monitoring and control.\textsuperscript{95} Barely six months after the introduction of a law to check noise and air pollution from generator sets came into force, the Delhi Pollution Control Committee (DPCC) has been found guilty of watering it down.\textsuperscript{96} Regulations have been amended to do away with Clause 9, which required captive power plants to abide by the emission standards of the Union or the state governments.\textsuperscript{97} Prior to the amendment, environmental clearance by the DPCC was mandatory. However, the authorities could not satisfy the demand of the customers, given the absence of any qualified laboratory for testing in Delhi. The authorities, therefore, took the easy way out; they did away with the regulations. The Bihar Pollution Control Board (BPCB), which administers the second most populous state, is continuously starved of funds.\textsuperscript{98}

Ten years after the WA was enacted, the BPCB did not have a single laboratory or analyst to test effluent samples.\textsuperscript{99} The environmental statutes do not clearly spell out the accountability of these Boards. While provisions for dissolution of Boards for non-performance exist,\textsuperscript{100} they have, in reality, been used only to further political ends. In 1992 the Haryana Boards was dissolved when it served a prosecution notice on the Chief Minister’s son-in-law.\textsuperscript{101} Unless statutes create meaningful accountability for non performance of Boards, effective functioning may remain a distant dream.

Boards have often lived in blissful oblivion, at times even denying impending perils. The laxity is evident from their attitude towards the arsenic problem in India. Nine districts in West Bengal have arsenic levels in groundwater above the World Health Organization maximum permissible limit of 0.05 mg/l.\textsuperscript{102} Arsenic consumption causes hard boils, ulcers, gangrene and many other complications including liver and spleen enlargement and cirrhosis of the liver. In a study

\textsuperscript{94} Id.
\textsuperscript{95} Shyam Divan & Armin RosenCranz, Environmental Law and Policy in India 3 (2001).
\textsuperscript{96} See Nidhi Jamwal, Controls Switched Off, Down to Earth, Feb. 15, 2003, at 36.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{100} See The Water Act, supra note 45.
\textsuperscript{101} See Haryana Pollution Board Disbanded, Times of India (Delhi), May 13, 1992.
\textsuperscript{102} Arsenic, Down to Earth, Apr. 15, 2003, at 30.
conducted by the School of Environmental Studies at Jadavpur University, it was found that 2700 villages and more than six million people from the nine affected districts are consuming arsenic contaminated water. The Government of West Bengal has steadily ignored the extent of this environmental hazard. Until recently, the government officially stated that there were only a few arsenic patients in West Bengal. Unfortunately, the attitude is still the same. The future of the affected millions is clearly not bright. While arsenic problem is largely confined to West Bengal, fluorosis is endemic in nineteen states in India. Reports suggest that about sixty-five million people, including six million children, are affected by it. Fluoride levels in India's groundwater vary from 1 mg/l to 48 mg/l in comparison to the WHO guideline of a maximum permissible limit of 1.5 mg/l. A study conducted by the Fluorosis Research and Rural Development Foundation has identified 59,111 problem villages with fluoride levels above 1.5 mg/l. Administrative authorities are yet to wake up to the impending health peril from fluorosis.

Agencies have often indicated an aversion to challenge entrenched commercial interests. Pesticides have been a known enemy of health for a long time. They persist in the environment and slowly, through the food and water, enter human bodies and accumulate in body fat. Studies conducted by researchers from the Columbia University (US) suggest a strong link between prenatal exposure to chlorpyrifos and low birth weight and smaller head size of infants. Tests conducted on bottled water recently suggested the presence of multiple residues of up to five pesticides in a single glass of bottled water. Another study conducted by the Delhi based Indian Agricultural Research Institute, found high levels of pesticides in 68.2% of the eighty-six vegetables tested. However, India continues to use such pesticides on a large scale. In 2000, it was the fourth most used pesticide in the country. Pesticides in India are regulated under the 1968 Insecticides Act, and the Central Insecticides Board acts as the nodal regulatory body. Significantly, the Act does not recognize the environmental hazards of pesticides or the threat they may pose to health. The workings of the regulatory bodies have also been questioned by many. The pesticide lobby has always had a say in policy matters and so far it has thwarted all moves by the government to make the law more stringent. An ideal instance of the supremacy of commercial interest is the enactment of the 2003 CTPA, which

103. Id. at 32.
104. Id. at 34.
105. Wah India, DOWN TO EARTH, Apr. 15, 2003 at 36.
106. Id.
107. Id.
110. Id.
prohibits smoking in public places and sale of cigarettes to persons below the age of eighteen. A year after its enactment, the Act remains to be brought into force. The consequences of pressure from the tobacco lobby are self evident.

These instances reflect the larger canvass of inefficiency that marks the workings of Boards and other agencies. On most occasions, authorities have been unaware of the perils to health and environment. And when aware, they have exemplified a hesitant attitude. Their working is influenced more by extraneous reasons than a faithful implementation of the law. Unless Boards are provided with functional and financial independence, commercial and political interests will continue to enjoy the protection of the law. The use of law by administrative agencies has clearly not been an effective instrument in combating the menace of pollution. Unless law creates independent agencies, health and environment may well remain the unfortunate casualty.

V. ENVIRONMENTAL ADVENTURISM: A JUDICIAL CLEANING UP OF THE ENVIRONMENT

In matters of environment and public health, the Indian judiciary has been in limelight, often for the right, and of late, for the wrong reasons. Some regard the judiciary as a “saviour,” others as a “pioneer” and more recently as a usurper in environmental matters. An evaluation of this pioneering role may be studied in three, distinct functional phases. The first phase was remarkable for the creativity the Court exhibited in evolving a new rights jurisprudence inspired by the social justice philosophy of the Constitution. The second phase was a period of judicial law-making when the Court added to our body of environmental law either by developing new jurisprudence or importing principles into the existing corpus. Particularly remarkable was the evolution of the absolute liability principle, the importation of the polluter pays principle, the doctrine of public trust and the principle of sustainable development. The involvement of the Court in the third phase, however, has been the most controversial. The Court acted as a super-executive, making policies and creating institutions for its implementation. Irrespective of the success or failure of such a course of action, the executive role of the Court has been questioned, not without valid reasons altogether. This section evaluates the performance of the judiciary

in using law to champion the cause of environmental standards and the consequences it holds for the future.

The creative role of the judiciary has been significant from two perspectives; first in recognizing the elevated status of the directive principles of state policy and secondly, in creating an expansive meaning of the right to life under Article 21 that included the right to health and the right to a clean and wholesome environment. Based on the historic Maneka\textsuperscript{119} thesis of "just, fair and reasonable" law, the Court redrafted constitutional jurisprudence in India, though not without glaring inconsistencies. The right to life under Article 21 gradually became the repository of all rights not mentioned under Article 19 but seemingly important for a meaningful life. This phase of judicial creativity began when the Court evolved a new understanding of the relationship between fundamental rights and directive principles as one of harmony and not conflict. In \textit{Minerva Mills v. Union of India}, the Court held that "[p]art III and IV of the Constitution together constitute the commitment to social revolution and they together are the conscience of the Constitution. . . . \textit{The two paths are like the two wheels of a chariot, one no less important then the other.}"\textsuperscript{120} Drawing from this philosophy of the heightened importance of the directive principles, the Court interpreted fundamental rights under Part III in the light of the provisions of Part IV. In \textit{M.C. Mehta v. Kamal Nath},\textsuperscript{121} the Court held that "[a]ny disturbance of the basic environment elements, namely air, water and soil which are necessary for life would be regarded as hazardous for life within the meaning of Article 21."\textsuperscript{122} The right to life and human dignity encompasses within its ambit the protection and preservation of environment, ecological balance free from pollution of air, water and sanitation without which life cannot be enjoyed.\textsuperscript{123} In recognizing the right to a clean environment, it drew inspiration from articles 48A and 51A of the Constitution.\textsuperscript{124} In \textit{Andhra Pradesh Pollution Control Board v. M. Nayudu}\textsuperscript{125} the Court observed that environmental concerns under Article 32 were of equal importance as human rights concerns and traceable to Article 21: "while environmental aspects concern ‘life’, human rights aspects concern ‘liberty.’" This recognition of the right to clean environment and consequently, the right to clean air\textsuperscript{126} and to clean water,\textsuperscript{127} was a culmination of the series of judgments

\textsuperscript{119.} Gandhi v. Union of India, (1978) 1 S.C.C. 248.
\textsuperscript{122.} Id. para. 7.
\textsuperscript{127.} Id.
that recognized the duty of the state to protect and preserve the environment.\footnote{128} The evolution of the right to health, similarly, under Article 21 was invariably linked with the right to a clean environment, no less because without the latter the former was impossible. The genesis of the fundamental right to health under Article 21 may be traced to the decisions of the Court wherein it regarded public health as a compelling state interest to restrict the freedom of trade and business of the citizens. While these cases did not recognize a right to public health under Article 21, the Court recognized public health as a valid ground for imposing restrictions on the exercise of rights that may injure public health.\footnote{129} This compelling state interest to protect and improve the health of the public was subsequently recognized as a worker’s occupational right to health.\footnote{130} This right was finally widened to include a general right to health of all persons against environmental pollution.\footnote{131} The Court observed the “maintenance and improvement of public health has to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depend the building of the society. . . .”\footnote{132} The interdependence of health and ecology was firmly secured under Part III of the Constitution when the Court held that in a balance of scale, life health and ecology was more important than unemployment and the consequent loss of revenue resulting from the closure of pollution industries.\footnote{133} The recognition of the right to a clean environment and the right to health were important milestones in the creative phase of the judiciary’s contribution towards environmental standards.

The judicial law-making phase commenced with the evolution of the principle of absolute liability as part of tort law in India. The phase characterized a deep anguish on the part of the Court to provide environmental law-making in India with a sense of purpose. In \textit{M.C. Mehta v. Union of India}, the Court, while rejecting the application of the principle settled in \textit{Rylands v. Fletcher},\footnote{134} held that the “rule evolved in the nineteenth century at a time when developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure.”\footnote{135} Justifying the need for newer principles of liability, the Court observed that “as new situations arise the

law has to be evolved in order to meet the challenges of the new situations. Law cannot afford to remain static." In this background, it suggested that:

an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken.

This principle of liability, earlier unknown in our environmental jurisprudence, was explained on two grounds. First, if any enterprise is permitted to carry on an inherently dangerous activity for its profit, the law must presume such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous activity. And secondly, the enterprise alone has the resources to discover and guard against the dangers and to provide warning against potential hazards.

This law-making adventure of the Court found new expression in Indian Council for Enviro-Legal Action v. Union of India when it held that the polluter pays principle was part of the law of the land. Explaining the principle, the Court observed it was not the role of the government to meet the cost either in the prevention of such damage or in carrying out remedial action, because the effect of this would be to shift the financial burden of the pollution incident to the taxpayer. The polluter pays principle, it is noted, "demands that the financial costs of preventing or remedying the damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution."

Continuing its newly found penchant for environmental law-making, the Court went a step further in Vellore Citizens’ Welfare Forum v. Union of India, holding that the precautionary principle was part of our environmental law. The Court surveyed the constitutional and statutory provisions of environmental law in India and concluded that the principle could be located in the same. It reasoned that the principle had acquired the status of customary international law and therefore, became part of domestic law. The final phase of judicial law-making was important for the decision of the Court in

136. Id. para. 31.
137. Id.
138. Id.
139. Id.
141. Id. para. 67.
144. Id. para. 14.
145. Id. para. 15.
The Court upheld the doctrine of public trust as being applicable to India. It explained the doctrine was based on the principle that certain resources like the air, the sea, fresh water and the forests have such great importance to the people as a whole that it would be wholly unjustified to make them the subject of private ownership. Developed in the ancient Roman Empire, the doctrine of public trust imposes upon the state a duty to ensure that the environment is used not for purposes inimical to public health. Imported from international law, these principles overnight became part of environmental jurisprudence in India. But the importation process raised new questions; how stable and certain was the environmental legal system in India?

The genesis of the controversial phase in the late 1990s may be traced to the late 1980s. Rather than judicial interpretation, the Court diverted its focus to matters arguably within the domain of policy making. It acted as a super-executive, drafting environmental policies and taking steps for their implementation. Jurist Upendra Baxi describes this judicial takeover of “the administration in a particular arena from the executive” as a “creeping jurisdiction.” Though initiated in the 1980s, the usurpation process was not institutionalized before the late 1990s. It began with a series of directives popularly known as Ganga Pollution cases, but found newer manifestation in the Euro norms cases and, thereafter, in the introduction of CNG fuel in Delhi. The methodology adopted by the Court has been vividly described by Shyam Divan:

"Short of putting on their gum boots and wading into the murky waters of the Ganga to clean up the mess, a bench of the Supreme Court has been doing a whole lot and more to restore the health of the river. . . . A new wisdom guides its approach. Dismayed at the persistent flouting of Parliament’s mandate to clean the rivers, by the polluters and pollution control board alike, the court is unwilling to sit idly by. The rigor of the formal court procedures and statutory requirements are diluted in favour of a summary, result oriented approach. The main thrust is to substitute the ineffective administrative directives issued by the pollution control boards under the Water Act and the Environment (Protection) Act, with judicial orders, the disobedience of which invites contempt of court action and penalties."

A review of the nature of orders in these cases easily drives home the

147. Id.
151. Shyam Divan, Cleaning the Ganga, ECONOMIC AND POLITICAL WEEKLY, July 1, 1995, at 1557.
usurpation role. In the Kanpur Tanneries Case, the Court asked the Central Government to direct all the educational institutions to teach for one hour in a week lessons relating to the protection and improvement of the natural environment including forests, lakes, rivers and wildlife. It ordered the Central Government to get text books written for the said purpose and distribute them to the educational institutions free of cost! It suggested the holding programs of “Keep the city clean, Keep the town clean, and Keep the village clean” at least once a year. In M.C. Mehta v. Union of India the Court ordered the State Governments to enforce as a condition of license on all cinema halls and video parlors exhibition, free of cost, of at least two slide/messages on each show undertaken by them. What was earlier being regarded as creeping jurisdiction was no longer far fetched. The directions given in the Calcutta Tanneries case were more invasive of the executive authority. Amongst others, the Court set a deadline for the closure of polluting tanneries, imposed a deposit fee on the price of the land, ordered the State Government to set up a unified single agency consisting of all departments concerned to act as a nodal agency, directed the State Government to appoint an Authority to assess the ecological loss to the region and asked the same to frame schemes in consultation with NEERI and the CPCB for reversing such loss. These were orders passed nearly a decade after the Court had rebuked, in the strongest possible words, the Kanpur tanneries. For those who believed that the Court could effectively function as an administrative body exercising executive powers, the failures could not be more prominent.

The administrative role of the Court reached new heights of controversy while introducing CNG as the alternative fuel in Delhi. In M.C. Mehta v. Union of India, noting the harmful consequences of vehicular pollution on the general health of people, the Court ordered the implementation of directions to restrict plying of commercial vehicles including taxis that were fifteen years old and restriction on plying of goods vehicles during the daytime. This was followed by a relentless spate of executive directives. The Court ordered the conversion of the city bus fleet in Delhi to a single mode of CNG, directed all private

153. Id.
154. Id.
155. Id.
158. Id.
159. Id.
160. Id.
161. Id.
163. Id. para. 2.
164. Id. para. 3.
vehicles to conform to the Euro-I and Euro-II norms\textsuperscript{165} and prohibited registration of diesel driven vehicles after January 4, 2000, unless those conformed to Euro II norms.\textsuperscript{166} Worse, in \textit{M.C. Mehta v. Union of India}, the Court laid down pointers that were to become part of the "Auto Policy" of the Government of India.\textsuperscript{167}

Most of these orders were passed in pursuance of the report of the Bhure Lal Committee set up under the EPA. Even though inspired by the urge to protect public health against the carcinogenic effects of suspended particles in the air, implementation of such norms cannot be achieved without the active and willing participation of the executive. The failure of this activism of the judicial administration was evident when the Court observed in \textit{M.C. Mehta v. Union of India} that it was distressed by certain reports appearing in the print and electronic media, exhibiting a defiant attitude of the Delhi Administration to comply with the orders.\textsuperscript{168} That attitude, the Court noted, "if correct, was wholly objectionable and not correct in law."\textsuperscript{169} It almost pleaded that its concern "in passing various orders since 1986 has been only one, namely \textit{to protect the health of the people}. . . ."\textsuperscript{170} To the plea of the Central Government that there was shortage of CNG to ensure a complete conversion of all vehicles the Court responded with the following words:

\begin{quote}
If there is short supply of an essential commodity, then the priority must be of public health, as opposed to the health of the balance sheet of a private company. To enable industries to cut their losses, or to make more profit at the cost of public health, is not a sign of good governance, and this is contrary to the constitutional mandate. . . .\textsuperscript{171}
\end{quote}

While the same may be true, it does not necessarily follow that anything that affects public health is within the jurisdiction of the Court. It is unlikely that any of these decisions have sensitized the executive to act with greater alacrity in environmental matters. The only effect may have been to retard the possible evolution of responsible bureaucracy. The inefficacies of these judicial ventures with laudable objectives are evident by the constant flouting of the orders passed in \textit{Murli Deora v. Union of India}.\textsuperscript{172} Noting the adverse effects of passive smoking, the Court directed the prohibition of smoking in public places until statutory provisions were enacted and implemented in this regard.\textsuperscript{173} It is

\begin{footnotes}
\item[166] Id.
\item[169] Id. para. 11.
\item[173] Id. para. 9.
\end{footnotes}
unlikely that the judgment by itself would have stopped the nuisance of smoking in public.

While the judicial use of law for maintaining environmental standards has been appreciable, its scant regard for constitutionally conferred jurisdiction has raised doubts. It created new rights, incorporated legal principles, and even attempted implementation. A large measure of its success is attributable to the insulated ambience in which the judiciary still functions in India. While the creative phase was welcomed in most circles, the law-making and policy-making phases have found many critics. The judiciary’s use of law to import legal principles into our environmental jurisprudence without any precedent does not augur well for the stated objective of legal stability. If courts use their authority to interpret environmental statutes with principles that have had little or no history in India, certainty as the hallmark of law may well be replaced by cruel uncertainty. By indulging in policy-making, the Court has denied the bureaucracy its rightful place in the constitutional dynamics. The cases have become a crutch, preventing the growth of strong bureaucracy. In many instances the administrative agencies have been reduced to preparing knee jerk reactions responses to judicial orders. Despite more than a decade of judicial activism there is no indication of a better performance by the pollution control boards, municipalities and forest departments or that these entities are institutionally stronger or more capable of discharging their responsibilities today. It is more likely the administrative agencies will revert to their old ways the moment judicial oversight wanes. The future may not be as green as the Court may wish for.

VI. CONCLUSION

Pollution affects public health. An efficient legal infrastructure is essential for maintaining environmental standards. Public health is interconnected with the manner in which standards are set and implemented. The nexus is both direct and proportional: it makes the use of law a singularly potent instrument in prescribing and maintaining standards. However, the manner in which law is used to curb environmental pollution to promote public health requires careful consideration. The performance of the actors in maintaining environmental standards has been inadequate. Both the legislature and implementing bodies have shown remarkable indifference to the cause of pollution control and public health. A lackadaisical attitude remains writ large on the actions of both. While the judiciary has played its environmental role, the radius of its success remains

175. Id.
176. Id.
rather limited. Deeper reflection on the reasons for the failure of the legislature and its implementing bodies and the limited success of the judiciary suggests two vital reasons; structural and substantive.

Within the peripheries of environmental concerns, structurally, the judiciary is the only actor that has largely remained relatively insulated from the pressures of politics and the industrial lobby. Not have many instances of corruption and illegal liaisons; especially in the higher judiciary come to light. Unconcerned by the loss of private profit, the Court has shown commitment for public health and a clean environment. As argued earlier, it has at times used, creatively and on other occasions controversially, law to maintain environmental standards for promoting public health. In contrast, both the legislature and the executive have been consumed by the influential industrial lobby and law is no more than an instrument to protect private profit concerns. Reactive law-making coupled with the legislature’s refusal to establish independent executive bodies has meant a vicious circle. Industries pollute, authorities fail to enforce, and the legislature reacts with new laws that bark but don’t bite. The process reoccurs. While corrupt liaisons have inhibited the effective use of law by the executive, political interference in their working has not helped things either. Absence of adequate research facilities including laboratories and testing centers makes implementation of most standards a dead letter. Law enforcement, not surprisingly, is therefore achieved more in violation than in compliance.

While the Court’s use of law for championing the cause of the environment and public health has been undeniably appreciable, the caveat against the evolution of an independent bureaucracy is to too prominent to be overlooked. Courts need to move out of this administrative role. There is a need for autonomous environmental regulators with adequate budgetary control that can implement our environmental laws. Unless the appointment, tenure, and functioning of the agencies are made independent of the political whims, effective use of law may remain a distant dream. This independent agency may be in the form of a constitutional commission, rather than a statutory body. The current powers, functions and duties of the CPCB may be transferred to a constitutional environmental commission with the state boards in a hierarchical arrangement under the national commission. While judicial concern for the environment with constitutional limits is welcome, the same has remained restricted to its upper echelons. Unless environmental adventurism of the judiciary percolates to the consciousness of the sub-ordinate court structure in India, the benefits may become more short-lived than otherwise believed. There is a compelling need to sensitize the lower judiciary to the pitfalls of a polluted environment and the consequent harm to public health.

The substantive reason for the failure of all three actors lies in their inability to

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evolve an integrated approach to pollution and public health. An integrated policy requires weighted concern of possible effects on all interest groups. When a policy requires that a polluting industry be closed down because of non-compliance, the outcome must be carefully considered. Closure implies unemployment and, therefore, poverty. Curiously, studies increasingly suggest the poor are the most vulnerable to these health hazards. While environmental pollution undeniably affects all, the poor are disproportionately at risk. In fact, the overwhelming majority of the three million people who die every year from water-borne diseases are poor people, while the two million people who die every year of indoor pollution are mostly poor children and women. Environmental hazards, according to Ian Johnson and Kseniya Lvovsky, can be classified into two categories; traditional and modern. While the former refers to lack of safe water, scant sanitation, scant waste disposal, and indoor air pollution; the latter corresponds to threats from urban (outdoor) air pollution, exposure to agro-industrial chemicals and waste. On both occasions, it is the poor who are at the greatest risk. A study of environmental health in Andhra Pradesh reveals that the burden of disease from traditional risks falls disproportionately on the poorest 40% of all households. The urban poor are no safer. High rates of urbanization, particularly the unprecedented growth of large and mega cities, have resulted in the proliferation of slums and squatter settlements. They bear the brunt of air pollution, live in densely populated neighborhoods and use dirty household fuels. They are increasingly experiencing what Ian Johnson refers to as the “double burden” of environmental health risks.

A class bias on the effect of pollution on public health is evident. Without a balanced approach that addresses this bias, pollution issues will suffer from a vicious circle. While the Court has consistently insisted on the closure of polluting factories, tanneries etc., it has failed to appreciate the circular consequences of the same. With closure and without alternative means to sustain, poverty is the result and, therefore, a polluted life style and its hazardous effects. This imbalanced approach to the problem of pollution is best illustrated in the decision of the Court when it held that in a “balance of scale, life health and ecology was more important than unemployment and the consequent loss of

180. Id.
182. Id.
183. Id.
185. See Johnson, supra note 181.
186. Id.
This hierarchy of more important ends strikes at the root of pollution related problems. The need is to recognize that life, health and ecology are as important as employment and revenue generation. Recognition of this equally important relationship will logically call for a balancing policy between health concerns and revenue interests. The need for a balanced approach has been recognized internationally.

The Stockholm Declaration calls upon "states to adopt an integrated and coordinated approach to their development planning" to ensure it was compatible with environment protection. The point is more emphatically made by the Rio Declaration in its requirement that "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." The European Union and other countries have already adopted the integration principle in their laws. Even private sector business codes, like the International Chamber of Commerce Business Charter for Sustainable Development and ISO 14000, support and reinforce this precept of integrated environmental management. Evolution of such an integrated policy is squarely the responsibility of both the legislature and the executive. But without an adequate role for the local units of self-governance and a participatory approach, an integrated policy may find itself burdened to reach the desired end.

Unless the structural requirements of independent implementation and the substantive requirement of a holistic approach are adopted, the efficacy of law as an instrument in maintaining environmental standards for promoting public health will remain questionable. Perils to public health from environmental pollution are eminently ominous. Corresponding actions to alleviate the same has been too little and wholly insincere. That was the past. The robust health of a billion may be the future only if those entrusted with promoting the same care to do so.

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190. NANDA & PRING, supra note 18, at 62.