NEW ROLE OF JUDICIARY IN THE CONTEXT OF ENVIRONMENT

Dissertation submitted to the Jawaharlal Nehru University
in partial fulfillment of the requirements
for the award of the degree of

MASTER OF PHILOSOPHY

MITA PRIYADARSHINI

CENTRE FOR POLITICAL STUDIES
SCHOOL OF SOCIAL SCIENCES
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI - 110067
INDIA

1998

जवाहरलाल नेहरु विश्वविद्यालय
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI - 110067

CENTRE FOR POLITICAL STUDIES
SCHOOL OF SOCIAL SCIENCES

21st July 1998

CERTIFICATE

This is to certify that the dissertation entitled **"NEW ROLE OF JUDICIARY IN THE CONTEXT OF ENVIRONMENT "**, submitted by **Ms. MITA PRIYADARSHINI** in partial fulfillment of the award of the Degree of **MASTER OF PHILOSOPHY** of Jawaharlal Nehru University has not been previously submitted for any other degree of this or any other university. We recommend that this dissertation be placed before the examiners for evaluation.

Kiran Saxena

Prof. Kiran Saxena
(Chairperson)

CHAIRPERSON
CENTRE FOR POLITICAL STUDIES,
SCHOOL OF SOCIAL SCIENCES-II,
JAWAHARLAL NEHRU UNIVERSITY,
NEW DELHI-110067.

Kuldeep Mathur

Prof. Kuldeep Mathur
(Supervisor)

To

My Parents

Who Remain a Constant Source of Inspiration for me

Acknowledgement

First of all, I wish to express my deep sense of gratitude to my supervisor, Prof. Kuldeep Mathur for his invaluable guidance and wise advices at every stage of this dissertation. Without his kind support and valuable suggestions this work would not have been possible.

I am grateful to my parents for encouraging me as well as providing their constant care and help at various stages of this research.

I would like to add a special word of thanks to Mr. Manish Sinha for not only helping me in collecting materials & proof-reading but also giving suggestions.

Thanks must go to Sujit, Avni, my cousin Manoj and especially to my borhter-in-law Sanjay for the help and cooperaton rendered by them.

Finally my sincere gratitude to Pawan, Vijay & Arasu of M/S Arpan Reprographics, JNU, New Campus for neatly typing out my dissertation.

Mita Priyadarshini

MITA PRIYADARSHINI

CONTENTS

CHAPTER I
INTRODUCTION

Environmental degradation has assumed serious proportions and it threatens the extinction of human race. The new technology that brings high productivity & comfort is also destroying man's biological capital - the air, the water and other components of the ecosystem. The onslaught on environment has caused problems like the ozone shield depletion, the green house effect, acid rain, industrial noise contamination of water, soil degradation, food poisoning, climatic variations & desertification.

GLOBAL WARMING

The most serious threat to the civilization's existence has come as a recent phenomenon of global warming. Though there are several factors responsible for this problem, the most significant cause is the green house effect. Because of the green house effect, there is a possibility of global temperature rising by 1.5°C to 4.5°C till the middle of the next century.(INCID, 1993 : 151) Burning of fossil fuels, industrial activities like cement making, large scale deforestation all have caused an increase of the rate of 100 million tons every years. Forests serve as sink of carbon dioxide but large scale deforestation has disturbed the natural atmospheric balance. The Chlorofluro Carbon is another very potent green house gas. This gas is used in domestic refrigeration, air conditioning, rigid & flexible foam building materials and as solvent in the computer industry. The Chlaofloro carbon is 100 times more efficient than Carbon dioxide and contribute 20% to the global green house effect. These green house gases

behave like an opaque medium and though allow the sun's says through to the Earth but trap some part which should have been reflected back. This phenomenon is causing global warming.

The consequent temperature rise is being accompanied by many related climate and geographic changes, like the changes in the precipitation pattern, changes in the frequency and intensity of the storms, tides & waves. It may influence ocean circulation and monsoon formation. Agricultural practices, soil conditions, forest conservation and fish farming all will be affected. Because of the sudden rise in temperature, glaciers will melt and water will reach to the sea. Water expands with the availability of more heat. Thus, in both ways water level at sea will increase. "According to one estimate, a 2° centigrade global warming will cause a 30 cm rise of sea level. It will cause recurrent floods in coastal regions.(INCID, 1993 : 150). Warming will cause increase of poisonous algae. The sudden climatic change will endanger flora and fauna. The green house effect will make most of the coastal states like Bangladesh, Egypt & India highly vulnerable.

Ozone Shield Depletion:-

Depletion of the Ozone shield is another serious threat to the environment. "Ozone, triatomic form of oxygen, exists in stratosphere. Ozone gas (O_5) absorbs ultraviolet radiation and is split into oxygen (O_2) and nascent Oxygen (O). Ultraviolet radiation again strikes with Oxygen and ozone is formed. Thus is ordinary conditions the presence of Ozone in the atmosphere remains normal." (Govindan, 1996 : 28).

Ozone by absorbing ultraviolet radiation prevents it from reaching the earth and saves mankind from many ultraviolet hazards. Ultraviolet radiation can break the DNA molecules, many cause sun burn, skin cancer or cataracts and may destroy the immune system. It is estimated that one percent decline in oxone layer has already caused 4 to 6% increase in Cancer patients."(INCID, 1993 : 150). These rays in the event of reaching the Earth may cause destruction of phytoplanptons. It will cause reduction in the oxygen output; consequently the global crop production as well as oceanic food chain will be destroyed. The basic element responsible for ozone depletion is chlorine. Chlorine is released when Chlorofluro carbon molecules disintegrate. Each molecules of chlorine is capable of breaking as many as 100,000 molecules of ozone. Every year more than 362,000 metric tones of chlorofluro carbons are released in the environment. The Chorine compounds migrate to the stratosphere & destroy the ozone molecules. This distinction of Ozone larger reduces the earth's ability to protect living beings from deadly ultraviolets rays.

Acidification of Environment

Acidification of environment brings acid rain which causes fundamental change in the chemical climate, the chemistry and biology of the surface water. Dying forests in Germany barren lakes in North America, despoiled monuments in India, degrading farm land in Brazil all point to the havoc which acid rain can create. Anthropogenic emissions of large quantities of oxides of sulphur and nitrogen are responsible for acid rain. Automobiles, especially high temperature combustion engines, emit these gases to the environment. When it rains, these

gases combine with water and form acid, so when it rains, it rains acid not water. Acid rain is 65 percent sulphuric acid, 30% nitric acid and 5% hydrochloric acid.' Acid rain know no state boundaries. The effects of the acid rain are several. It is inhibiting fundamental nutrient cycle and disrupting the main biological processes of the ecosystem. "Acid rain has caused 15% West reduction is timber growth in Scandinavian region, destroyed 8% West German and 37% Czech forests."(Sinha, 1994 : 109). In some countries lack of ventilation has led to acid rain concentration.

Acid rain causes changes in the quality of public water supply. There is rise in the aluminum level because it is bleached from the soil in the water catchment areas. Excess of Aluminum causes the rare borne wasting supply pipes which are made up of metals. Due to bleaching these metals enter into the food chain. These metals also affect birds. Through stomata & cuticular surface of leaves pollutant gases enter plants. The sulphur dioxide concentrates reduce photo synthesis process. Tropical negotiation & tropical soil is most prone to acid rain damage. Unlike temperate forests, tropical vegetation has less capacity to resist acidifying effect.

Toxicity of Air :-

The Air pollution has certain other horrifying effects. Because of air pollution, supply of oxygen to the cell is reduced. It causes many heart & lung deases, loss of vision, lung cancer etc. Human capacity to tolerate carbon particles is maximum of 2000 microgram cubic meter. In most of the cities this maximum limit has crossed. The largest & gravest source of air pollution in

many areas is motor car. The petrol engine emits carbon monoxide and unburnt hydrocarbons, nitric oxides and fuel additives such as lead. The other sources of air pollution are factories, power plants and homefurnaces and incinerators. Air pollution threatens forests, adversely affects many biological processes and causes soil degradation.

Industrial Noise :

Industrial Noise, a by product of industrial civilization, is also threatening the environment in various ways. It very often causes deafness. Certain occupational diseases are given name as boiler maker deafness, cannoneer's deafuess. Workers attached with industries have hearing defects. Noise causes many stress related diseases, like peptic ulcer and hypertension. As a slow agent of death, noise brings serious harmful effects from physiological to psychological.

According to one investigation, ordinary household noise can retard the cognition development of children from the age of seven months to two years (for further details, see Dwivedi, 1997, Chap.1). A noise level of 140 decibels can destroy the nervous system and make the person insane. The more intense is the noise, the more deleterious effect it can bring.

WATER DEGRADATION :

Degradation of water, the basic biological capital is another serious environmental hazard. Pollution of water has reached such an extent that the river water is catching fire. In 1984 the Ganges caught fire near Haridwar in

Uttar Pradesh. It was spread at the length of one km stretch. It took more than 40 hours to control the fire. Discharge of industrial wastes into water sources is causing alteration of the natural composition of water. Industries like textile, paper, sugar emit alkalies, ammonia, cynides and other harmful chemicals to the water stream. In natural state, river water is purified by a self purification process. River water has two organisms aerobes and anaerobes.Aerobes use oxygen present in the water and convert dissolved & suspended waste into inorganic matter. Algae converts these matters into organic one and release oxygen by photo synthesis. If a river becomes more polluted, consumption of oxygen increases whereas supply is limited. The water becomes disturbed and pollution goes unchecked. 7% of India's water is already polluted. This pollution is causing serious human, animal & plant hazards. Deadly cattle disease like Minomata is due to water pollution as Jaundice is to human being. Hot water discharged in to the rivers cause death of micro-aquatic animals. Ground water gets polluted because of chemical wastes dumped into the earth surface. The inhabitants of Bichare in Udaipur district of Rajasthan have to walk miles for fetching water. Their wells have got polluted due to chemical & fertilizer plants in the region (for furthur details see Desai, 1990 : Chap.2).

CHEMICAL POISONING

In recent times the increased use of chemicals has contributed much to the environmental degradation. In 1940's there were hardly 40-50 industrial pollutants but now more than 30,000 toxic chemicals are making inroads to the environment. Every year approximately, 1000 chemicals are invented. Man

and animals are taking large quantities of toxic chemicals via food or water. Certain chemicals possess the potential to alter the DNA arrangement. According to a World Health Organisation report, in terms of tonnage, 70% of pesticides used in India are hazardous. A committee in India had reported that only 7% of the chemical factories are safe. Many industries are using chemicals more lethal than methyl isocyride (MIC). Toulene di-isocynate (TOI) used in plastic industry and the poly chlorinated biphenyls used in the electronic industries are more harmful in nature than MIC.

All this exploitation of the nature does not mean that there are no regulations or laws to put a check on the factors leading to the degradation of environment. Article 48 A of Indian Constitution directs the state to protect and improve the environment & to safeguard the forests & wild life of the country. Article 51 A (g) enjoins upon every citizen, a fundamental duty to protect natural environment. There are also environmental (protection act) 1986, Environment (protection) rules 1986 Air (protection and control of pollution) Act 1981 etc.

But the relationship between environment and the law is twofold. Firstly, there are laws that regulate and control the pollution of the environment and intended to protect it. Then there are laws that adversely affect the environment. These are laws that are intended to promote economic development of society, such as mining, irrigation, power generation, industries and so on. In India laws promoting economic development, are again of two types - those that regulate and control economic activities of individual citizens, corporations and businesses, and those undertaken by the state itself. The economic and developmental activities of the State are done through legislations which create a

body/authority and define its powers, functions and duties. The economic and developmental activities of the State are overwhelming, and dominate all spheres of economic activity. Thus the largest mining corporations, the largest chemical companies and steel plants, the largest irrigation projects, defence industries and construction companies, from tourism development to space satellites, are part of the State's activities. It is important to understand the significance of this.

The State then becomes subjected to two sets of laws. Those that create environmental problems on the one hand and those that prevent and control them on the other. Both sets of laws are enforced and implemented by the same set of civil servants. It is not uncommon for bureaucrats to be transferred from the industries ministry or vice versa. More importantly, both sets of laws are founded on the same Constitutions. The interpretation of the laws refers back to the same legal source, namely the Constitution.

The laws relating to the State's economic activities are older and have been in operation uninterruptedly for decades. The founding principles of most of these laws have been in operation since the inception of colonial rule, when Angle-Saxon jurisprudence was introduced for the first time in India. The post-independence period only extended and furthered the colonial laws, but with greater legitimacy, since all the State's activities were now undertaken in the name of the people. Most of the colonial laws gave sanction to the colonial State to appropriate and exploit natural resources at will, superseding and nullifying the then prevailing customary laws. Under customary laws, the rights over natural resources were vested in the people who were in immediate proximity to them. The rights to the forest and its produce and the right to water, air and

land were vested in the people. Even the king or the sovereign could not alienate these rights from the people.

This deprivation of customary rights over natural resources is common to all laws that evolved pursuant to capitalist development. However, in the capitalist countries, during the early periods, the 'laissez faire' context in which development took place, minimised the role of the State. Also, the changes were spread over a long period of time. The foundations of the jurisprudence relating to environment, natural resources, its use and defilement therefore grew out of private law, such as torts law. There were a great deal of social negotiations through the working of the laws and in bringing about changes in customary rights and practices. In the developed countries, the development of public laws, by way of regulatory mechanisms, taxation, levies and so on, in relation to the environment and use of natural resources, is of relatively recent origins, in historical terms.

In contrast, in colonial countries this alienation of the people's rights took place by the brute force of the colonial State. It took place over a short period of time. The Land Acquisition Act, 1884, and the Railways Act, 1890, were amongst the first legislations that gave right to the State to acquire land. The State could acquire land for public purposes, provided it paid a certain monetary compensation. What the public purpose was, was never defined under the Act. It is still not defined. Invariably, the early disputes that arose, related to the customary rights of the people and the State's own interests. This becomes even more evident under the Railways Act 1890, under which the Railways had absolute authority to acquire any land they required. The railways were built for

the purpose of transporting goods to Britain, particularly raw materials for British industries, such as cotton, indigo, timber etc. This was for the public purpose. Most of these laws continued to operate after independence, and continue to be used extensively by the State for its economic and developmental activities.

The Forest Act, 1927 similarly superseded the customary rights, by giving absolute rights to the State to its produce, and by limiting the access of people to the forests and their produce. Under the Forest Act, the customary rights were substituted by various 'concessions' granted by the State to the people. Similarly, under the Land Acquisition of Mines Act, 1885, (and later the Mines and Minerals, Regulation and Development, Act, 1957) the mines and its minerals came under State control. In the 1930s, there were a spate of irrigation acts enacted by the Provincial Governments, such as the M.P. Irrigation Acts, 1931, by which the Water resources came under State control. At the dawn of independence, the State had thus already acquired absolute control over the natural resources, and the people's rights over them had been nullified. This transition from customary law to statute law, enacted by the colonial State was in fact a transition in the foundation of law as one from people's rights over natural resources to the State's rights over them. Thus, the extraordinary powers and coercive elements of the colonial State, continued to characterise the independent State.

The Constitution of India subscribes to a social welfarist model of development, wherein it is envisaged that the State will promote welfare of the people by undertaking important developmental and economic activities. In

1977, the preamble of the Constitution was amended to describe India as a 'Sovereign socialist secular Democratic Republic instead of the earlier 'Sovereign Democratic Republic'.

Article 297 of the Constitution states :

1. "All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic Zone of India shall vest in the Union and held for the purpose of the Union.
2. All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.
3. The limits of the territorial waters, the continental shelf, the exclusive economic and other maritime zones of India shall be such as may be specified from time to time, by or under any law made by Parliament.

   Art. 298: The executive power of the Union and each of 0the States shall extend to the carrying on of any trade or business and to the acquisition holding and disposal of property and making of contracts for any purpose."(for details see Anand, Bhatt).

The economic activities of the State are required to be guided by the Directive Principles of State Policy, which are non-justiciable, but required to guide State policy. The Directive principles lay down numerous considerations that must guide the State in its economic activities. Amongst other things Article 38(2) states:

> "The State shall in particular strive to minimise the inequalities in status, facilities and opportunities not only amongst individuals, but also amongst groups of people residing in different areas or engaged in different vocations." (Basu, 1997: 140).

Most important, however, from the point of view of the development policies is Article 29(b), which state :

> "that the ownership and control of the material resources of the community are so distributed as best to subserve the common good."(Basu, 1997 : 143).

The Constitution also provided for Fundamental Rights, which could not be taken away by any law. These were civil rights such as the freedom of speech, equality and so on. However, no law which is enacted to give effect to any directive principle, could be void because it abridged any fundamental right. The development and economic activities of the State were therefore pursuant to the constitutional mandate to give effect to the Directive Principles of State Policy.

In 1972, at the time of the UN Conference on the Environment in Stockholm, India did not have a single law dealing directly with the environment. Until 1974, there was no legislation directly relating to the environment in India. The general laws such as municipal laws, easements acts, the penal code and tort laws laid down principles regulating specific aspects of the environment. In 1974, the Water (Prevention and Control of) pollution Act

was enacted. In 1977, the Constitution was amended to include the Directive principles of State Policy, Article 48(A), which reads:

> "The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."(Desai, 1990: 11).

In 1981, the Air (Prevention and Control of) Pollution Act was enacted. Both acts were generally perceived as weak acts, as their application was limited. Under both acts, Central and State Pollution control boards were set up. Under both acts, the State alone had a right to prosecute offenders under the Act. The Jurisdiction of civil courts to entertain any suit or proceeding in respect of any matter covered by the act, was barred.

The Environment Protection Act, 1986, was enacted against the backdrop of the Bhopal disaster, a flood of environment related litigation in courts and the growth of active environmental groups all over the country. Against this background, the Environment Projection Act modifies the provisions for prosecution somewhat by stating, while the Central Government alone has the right to prosecute against the violations of the Act, any person may do so after 60 days notice to the Central Government. The Act also provides that the actions of the Government under the act cannot be called into question in any proceeding in a civil court. For the first time, however, the Act provided that where offenses are committed by Government departments, the head of the department shall be deemed guilty, and if any other officer has been guilty he too shall be liable.

The Factories Act, 1946, was amended in 1985 to include regulations relating to manufacture and handling of hazardous chemicals and substances. While it gave the right to the workers to complain to the company, the right to prosecute the company remained solely with the Factory Inspectorate. The bar of the jurisdiction of the civil courts, to entertain any proceeding in respect of matters covered by the Act, was maintained.

All officials under the above acts for protection of the environment, and the officials manning Government Corporations and projects, against whom invariably complaints arise regarding environmental issues and working conditions, are both civil servants and cannot be prosecuted without prior Government sanction.

The above discussion has an important bearing on the nature and character of development of law relating to the environment. Legal proceedings on environmental issues have invariably been against the State, either for not enforcing the law, or for not complying with the law. Even when the offenses are committed by private companies, the cases must be filed against the State for not enforcing the laws against the private companies. In the case of State companies, the cases must be filed by one department against the other.

As a result of the ever increasing number of laws creating statutory authorities corporations etc., the size of the bureaucracy continues to grow. With every round of economic crisis, however, the resources required for maintaining the growing State machinery decline. Faced with the compulsion of siphoning off resources to the developed world as a result of increased borrowings, and the need to spend more resources on law and order at home, the

budget deficits increased and the Government resorted to curtailing expenditures by introducing restrictions on recruitment of personnel. Within available resources, the revenue earning activities got precedence over labour welfare or the environment. The enforcement agencies everywhere became plagued with problems of inadequate training, inadequate equipment and inadequate budgets.

Secondly, the State corporations and authorities are administrative authorities, and under the statutes there are detailed procedures prescribed for decision making at each level. The powers of the officials are limited by the statutes itself. This may require certain decisions to be passed over to a higher authority. All this results in endemic delays in decision making.

Thirdly, the powers and function of the statutory authorities often overlap. The Constitution lists the subjects on which the Central Government alone may make laws, and subjects on which the State Government alone may make laws. Between these two ends, there are a vast number of subjects on which both Centre and State may legislate. Besides in the case of environmental law, different aspects could be covered by different authorities. For example, in the case of water pollution, it could be a subject in the generic sense for the Central Government under the water pollution Act. It could also be a subject for the municipal authorities under the municipal law governing the laying of pipes for effluent and special locations and conditions for discharge of the same. Conflicting decisions by different authorities create problems for enforcement of laws.

Faced with such systemic problems, there is the temptation to become a rentier state' by giving out jobs to private contractors. Economic considerations dictate that the jobs are given out on the lowest possible competitive tenders. On the part of the contractor, since the jobs are Government jobs, penal laws relating to the environment and labour, do not act as effective deterrents. Of course, there is always the temptation to squeeze out extra profits by saving costs on environmental and labour protection. The Governments, both Central and State, are the largest employers of contract labour and job contracts.

All these factors cumulatively create a crisis of administration. The crisis is then not one of existence or non-existence of legislations but one of paralysis of administration. They are not implemented in a proper manner so as to benefit the people. Such a crisis by its very nature is one that spreads to include more and more aspects of public life. So, the concerned citizens who are aware of the harms done to them and also of the fact that govt. is either sluggish or fails to effectively implement these welfare legislations tend to knock the door of the courts for the effective redressal of their grievances. The court in turn has recognised their plight and responded in a positive manner. There is increasing awareness of the environment in the common man owing to wide spread press coverage and information received from the various movements. Judges on their part have realised that since litigative process is highly expensive, far beyond the reach of poor man, it is for them to resort to some less formal procedure, thus the result is liberalisations of locus standi resulting in the emergence of public interest litigation. In last few years, the tangible signs of emergence of PIL related to environment were discernible in petitions before the supreme court. It

was through lawyers, journalists, legal academicians, social organisations who are aware of the importance of environment that these PIL cases were taken up in the interest of general mass. So, there is a flood of cases in the supreme court concerning environment.

The judgements in these cases not only consist of punishments but often the court also directs the government to form different committees for the investigation and report bakc the result. The judgements also consists of closure of polluting industries or stopping the governmental from constructing buildings etc. at the public resorts. The judges have also gone to the extent of punishing government officials or giving compensation to those affected.

So, these types of judgements have led to the notion that the judiciary is exceeding its jurisdiction and so its act has been termed as judicial activism.

Boradly speaking, the term judicial activism extends to laying down priorities, policies and programmes and giving directions to execute them when they are not obligatory and are entirely in the discretion of the executive and the legislature or other authorities, and thereby usurping their functions power and wisdom. It also refers to the phenomenon of judiciary entering the spheres which previously it had not touched and thereby interfering in the jurisdictions of the executive and legislature.

So, the objective of this research is to verify whether the allegations levelled against the judiciary that it is indulging in judicial activism is correct or not. It is in this context that some important questions have to be addressed.

Firstly, what is compelling the people to go to the court so frequently for the redressal of their grievances? For this the role of the executive or the administration has to be studied in detail to see how efficient they have been in implementing the laws. This has been done in the second chapter.

Secondly, to judge whether actions taken by the court are usurptory in nature or fall within the spheres of its powers a detailed study of the powers of the court as well as the different types of judgements in various cases have to be looked into. Since the detailed study of the cases of all the courts in India is beyond the scope of this research, this study confines itself to the supreme court only.

Thus the powers enjoyed by the supreme court are dealt in the third chapter and in the fourth chapter the various types of cases brought before the supreme court since last seven years have been examined.

Though the judiciary has adequate powers but in practice, it is generally observed that it faces certain problems which actually deters its smooth progress. These problems too deserve to be delved into which are stated in the last chapter.

CHAPTER II

THE ADMINISTRATION OF ENVIRONMENTAL LAWS.

It is in relation to the administration of the environmental legislations and policies that there has been a great deal of activity since the 1980s. If the process of putting into place a Water Act commenced in 1962 and ended in 1974, the process of putting into place the Air Act, the Forest Conservation Act, the Environment Protection Act and host of rules under the Factories Act, the Motor Vehicles Act, the public Liability Act, all took place between 1980 to 1991. For this to happen an entire administrative machinery had to be put into place first. In 1972, when the UN conference was to be held, there was no administrative setup within the Government of India dealing with environmental protection.

In order to prepare for the UN summit, a National Committee on Environmental Planning and Coordination (NCEPC) was set up in February 1972. Interestingly, this was set up under the Department of Science and Technology. Later, an independent environment division was set up in the Department of Science and Technology. The task of the NCEPC included identification of environmental effects of activities and recommending modification to safe-guard the quality of the environment. The environment remained with the Science and Technology Department right through the seventies until November 1991. The environment was thus seen as science and technology problem. This perception of the problem gave it a limited orientation

and the issue got swept under the weight of numerous other priorities of the science and Technology Department.

In February 1980, the central government appointed a committee for recommending legislative measures and administrative machinery for environmental protection under the chairmanship of N.D. Tiwari. The committee's report was published in September 1980 and accepted by the government soon thereafter. The main focus of the Tiwari Committee was to create an administrative set up focusing exclusively on on the environment. The principal recommendation of the committee was to create a Department of Environment under the charge of the Prime Minister to play "a watchdog role" and to study and bring to the attention of the Government of India and parliament, instances causes and consequences of environmental protection and eco-development in a coordinating rule. The functions of the Department amongst other things were : (a) to function a nodal agency for environmental protection and economic development in the country; (b) to carry out environment appraisal for development projects through other ministries/agencies directly; and (c) to take administrative responsibility for (i) pollution monitoring and regulation; (ii) conservation of critical eco-systems designated as bio sphere reserves; and (iii) conservation of marine eco-systems.

The NCEPC was now replaced by the National Committee on environmental planning to discharge the following function: (a) preparation of an annual "state of the environment report for the country; (b) establish an environmental information and communication system for environment awareness; (c) sponsor environmental research; and (d) arrange for public

hearing or conferences on issues of environmental significance. (Singh, Anklasania and O.C. Gonsalves, p.98).

In 1985, the Department of Environment was upgraded by shifting the Department of Forests from the erstwhile Agriculture and Cooperation Ministry and merging the two into a full fledged Ministry of Environment and Forests. It will be seen therefore that from the early eighties there was a definite change in the approach to environmental issues and a sudden urgency. The eighties saw a flurry of administrative activities, constituting and reconstituting boards and organisations. Changing things from one ministry to another. In 1986 the Government of India set up five regional offices of the Ministry of Environment to deal with forest conservation. In May 1988 this was reorganised into six regional offices with the tasks of not just forests but the whole ambit environmental management and monitoring pollution control.

The Botanical Survey of India was restructured in 1987. The Zoological Survey of India established in 1916 was also restructured in 1987. The aims and objects of these organisations were redefined and now extended to surveying resources and carrying out environmental impact studies. The Forest Survey of India was constituted in 1981 for surveying India's forest. This too was reorganised. An Indian council of forestry research and education was set up. On February 26-1983 the Agriculture Ministry made a body called the National Land Board was shifted to the Environment Ministry and reconstituted as the National Land Use and Wasteland Development Council. The National Land Use and Conservation Board was set up in 1983. In May 1985 a National Wastelands Development Board was set up with the object of implementing a

massive afford station programme. The Indian board for Wild Life which was set up in 1952 was reconstituted in January 1991. The Wild Life Institute of India was set up in Dehradun in 1983. The Animal Welfare Board had been set up in 1962 under the Prevention of cruelty of Animals act 1960. This was brought under the Environment Ministry and the functions extended to include socio-economic studies, data base and research programmes for improvement of draught animals. The Central Zoo Authority was set up in 1991. The National Eco-Development Board was set up in 1981 as an advisory board to advise on economic development in harmony with ecological development.

The Tiwari Committee has reviewed some 30 statues relating to the environment. Earlier all these statutes were distributed over other ministries whose principal preoccupation was different, such as forests under the Agriculture Ministry would have different priorities and policy perceptions on forests than under the Ministry of Environment, or water pollution under health and sanitation would have different priorities than under the Ministry of Environment. The focus of the organisational activities was to give centrality to the question of the environment as such. What is important is that right from the beginning the environment was viewed as an interdisciplinary and inter-ministerial issue. So every ministry now had an environment section which was also part of the relevant division in the Environment Ministry. By 1991 the organisational set up was more or less in place. By the eighties the environment had most definitely become a concern to the government. It became a concern as the environment had become an economic issue and also an issue in world trade and international politics. There was also a possibility of securing financial

assistance from international agencies requiring to put into place an organisational set up to enforce environmental programmes. From the wide range of activities the Environment Ministry was confronted with and the sweep of the issues confronting the Ministry, industrial pollution and in particular water and air pollution became one part of a wide ranging set of tasks.

Both the Water Act and the Air Act envisage their implementation through autonomous boards to be set up under the acts. Under the acts the stage governments are required to set up stage boards and the central government is required to set up a central board. Earlier the boards were set up under the Water Act and called the Prevention of Water Pollution Control Board. After the Air Act was enacted the functions under that act was also given to the water pollution control board and it was renamed the pollution control board. If the state were reluctant to adopt the Water Act, they were even more reluctant to set up the boards to enforce the Act. By 1978, a number of states that had adopted the act under article 252, had not set up the boards within the six months stipulated under the act. The act was therefore amended to remove the time limit of six months for the states.

In 1988 a major amendment was brought about in the water and air acts by which, if the state boards were bound by the instructions of the central board and if the Central government finds that the state boards had defaulted in complying with the directions of the central board, the central board could override the state board and take over the functions of the state boards. This brought the state boards directly under the central governments supervision and control. In an ostensibly federal set up these must be seen as drastic provisions.

After 1988, the task of setting up the boards by the states went ahead. By 1991, all states except Nagaland had set up pollution control boards. After that under threats of central intervention, Nagaland too set up a pollution control board to enforce the act. (CPCB Annual Reports 1989-1990, 1991-1992).

The functions of the Central board is to: (a) advice the central government on matters concerning pollution control; (b) coordinate the activities of the state boards; (c) resolve disputes between the state board; (d) provide technical assistance and guidance to the state boards, sponsor investigations and research on pollution abatement; (e) train personnel; (f) collect, compile and publish technical data; and (g) in consultation with the state governments to lay down, modify or annual standards under the acts and to plan a nation-wide programme for pollution control. (Singh, Anklesania, S.C. Gonsalves Page No. 99).

The function of the state boards involve the nitty gritty of enforcement. They include to (a) plan pollution control programmes in the states for prevention control and abatement; and (b) advise the state governments and above all to inspect sewage or effluent works and plants, review plan specifications grant consents, lay down effluent standards for sewage and effluent and for the quality of receiving waters, provided it is not an interstate stream, evolve treatment methods, recycling and reuse of water, evolve methods of disposal and lay down the standards of treatment of sewage and effluent, issue orders if required, prosecute for offence, establish and run laboratories for analysis of samples and all the residuary functions under the acl. (Singh, Anklesaria & Gonsalvis, 1994 : 100).

All this may seem a reasonable division of functions between the central board and the state boards, with the central board in charge of overall planing and the state in charge of actual enforcement at local level. In practice however it is not such a neat and efficient arrangement. The central board being in charge of overall planning and control, all major initiatives and planning come from the central government. In addition to the control over the finances, the central government's plays a leading role in environmental planning and enforcement of programmes in the states. However, the states are in closer proximity to the numerous interests and pressures for and against the central govt's policies. It is the state boards that have to deal with these. Besides the state boards are also subject to the instructions of the state governments, which may or may not consider the objections of the state board. An instance of this kind of conflicting pressure on the state boards is with reference to the citing policies of the government. The central board may issue guidelines for the citing of certain types of industries such as the chemical industries. However, the real estate lobbies, which are generally powerful at state levels and are dealt with by the urban and town planning departments of the state governments, may take decisions conflicting with the central board's directives. In such a case the state board are caught between two powers and must "Power down" its enforcement while not abandoning it altogether in order to appease both powers. The reverse could also happen, when central ministries such as the industries especially public sector industries are involved, when state boards may show enthusiasm to enforce the act and the central board may want to water it down. Numerous examples of this kind of pressures could be given. In this process of

balancing various interest groups and pressures, tensions and differences in perception and emphasis arise between the central and state boards that tones down the effectiveness of regulation.

The composition of the boards reflect a curious combination that reflect such concerns. The state boards must consist of one chairman. Earlier it was prescribed that the chairman must be a full-time person. Later this was amended when states represented that they could not find full-time persons. In 1978 it was further stipulated that the state chairman must be a qualified person or a person having some experience in environmental matters. However, this is a post which the state government fills up by nomination. Unlike regular service posts, which require proper selection procedures and norms to be followed, the nominated posts are entirely left to the discretion of the government. Regular service posts also carry with them security of tenure and protection against political interference. Nominated posts carry no such security. Nominated posts are generally viewed as political appointments. The government has a free hand in appointing the chairman, who is a political nominee. The five state government representatives in Maharashtra include the secretary to the Ministry of Environment, Secretary to the Union Development Ministry, Secretary to the Industries Ministry, and Secretary to the Ministry of Health and Sanitation. The representatives of local bodies are elected councillors and political people. The corporation and the City and Industrial Development Corporation (CIDCO), which is a town planning body.

The central board has a full-time qualified chairman, a maximum of five officials to represent the central government, maximum of five members to represent the state governments of whom at least two must be representatives of local bodies of the state governments, a maximum of three non-officials to be nominated by the central government to represent the interests of agriculture, fishery, industry, trade or other interests, two persons to represent the companies or corporations owned and controlled by the central government. The composition of the boards, which ministries and departments heads are nominated to the board or which public sector undertaking heads are nominated on the board would reflect the kind of concerns that prevail at a particular point of time. At the same time, the same concerns are also "protected" as by being on the board, a department, or corporation can ensure that only such standards are set, guidelines issued or rules framed that they can comply with. Nothing is done which will affect their economic viability in may major way. By being represented on the board, the terms of enforcement are set at levels acceptable to the regulated themselves. There is no representation on these boards for environmental groups or representation of people's interests.

In a democratic policy the assumption is that the politicians represent the people, as they are answerable to them in the elections. However, politicians need clear political mandates. When powerful environmental movements or protest movements make it a political issue, then the politicians have a stake in the stands they take. When on the contrary the public protests are not as strong, the politicians will tend to keep the support of industry, real estate trade and business in the hope of regular support and election funds.

In India public movements against industrial pollution are seriously limited by contradictions of development itself. There is a fear that jobs will be lost and relocated to other states because of protests. There is a feeling of inevitability that pollution is part of the industralisation process and that without industries we may be condemned to medieval backwardness. Besides, people involved in industries at whatever level are more powerful and better-off than their counterpart in the villages. Thus the industrial worker has a better life despite the pollution. Better in this case is better access to modern life styles. The industrialists are more powerful in the power structures thank to the rural elites. Whatever the reasons once public pressures are weak, than then political composition of the boards work not as an agency to bring better quality of life to people but to balance the various interest and lobbies working upon the different representatives on the board. In the case of a regulatory agency such change in the orientation and mind-set become of crucial importance. It reflects in the kind of penal actions that are taken up, the kind of standards that are set, the kind of penal actions that are taken and the kind of exemptions and permissions that are granted. It must also be said here once the institutional arrangements exist, in case of a crisis or public protest, same mitigating action also becomes possible.

A central task of the pollution central boards is standard setting. It is this key task that determined "how much pollution is allowed? If the key task is how much pollution is to be allowed the question must necessarily be related to some objectives or aims. Thus, the question must then be how much pollution is to be allowed if a toxicity of water is to be reduced to a certain level by a certain time. In the absence of any targets to be achieved or policy goals to be met standard

setting becomes a directionless exercise. The task of setting standards is an exhausting and painstaking one. It requires each industry or each process to be studied by technical committees. It is also a time consuming process.

As discussed earlier, the environment question simply flooded and administration and overwhelmed it by its sheer magnitude and diversity of issues. The policy setting tasks therefore have never assumed a central position. The five year plans generally set national goals and priorities. In the Fourth Five Year Plan there was only a perfunctory reference to the environment. The Fifth Five Year Plan said nothing about environment. The Sixth Five Year Plan for the first time made a mention of the environment in the plan document. The Sixth Plan saw the environmental issue as a "developmental issue", and has continued to be so since then. The Sixth Plan set out the approach: Environmental Problems in India can be classified into two broad categories: (a) those arising from conditions of poverty and under development; and (b) these arising as negative affects of the very process of development (Sixth Plan 1980-1985). After discussing the state of the environment and different related issues the plan proposed to "adopt and integrated approach and implement methods of redressing existing environmental problems and build up the capability of preventing or migrating these that could arises in the future. (Sixth Plan 1980-1985, p.349).

The seventh Plan (1985-1990) is even more general in its policy statements and goals to be achieved. "Given the close linkages between different subject areas relating to the environment it is difficult and often counter-productive to assign absolute priorities in the sense of an "order of

importance" to these areas. For a variety of basic economic activities high priority would have to be given to the management of natural living resources; but these cannot be managed without attention to land and water management... The direct goals relating to the subject of environment as a whole would be; Institutionalising the process of integrating environmental management and development; Inducing organisations at the central and state and local levels to incorporate environmental safeguards in their plans and programmes; securing greater public participation in environmental management; establishing a strong S&T base for environmental research & development, demonstration and extension activities; strengthening mechanisms for ensuring concrete action with regard to environmental degradation that has already taken place. (Seventh Plan 1985-90: 398).

The Eighth Plan simply states: "An important task before the Government is the formulation of a comprehensive national policy an nature and natural resources ... the policy must spell out the position regarding environmental needs of the society in general and the rights of the weaker section... in industry integrated action would be needed for prevention and control of pollution hazards suitable location of industrial units recycling of industrial wastes and adoption of energy efficient technology." (Eighth Plan 1990-95:94).

From the above policy statements what does a field officer employed in the pollution central board to resolve conflicting claims? What does a standard setting body when industry insists it does not have the technology to clean up the fluent or where technology exists, if is so expansive that industry will become available? As Hadden states; "Although the seventh Plan is clear that

environmental protection and industrial development often conflict, the proper balance between them is nowhere discussed. Moreover, in neither the formulation of policy in laws nor in the implementing standards are these goals clear; the inherent conflicts between pollution central and other important economic values is scarcely even visible in these formal instruments of policy. Thus as pollution central is implementation there is no standard against which to measure industry petitions for relief and therefore no scientific or policy justification for a particular action. (Hadden, 19889 : 709).

The standard setting for affluent discharges or missions, did not arise from the need to achieve any policy goals. Both the Air Act and the Water Act adopted the standards set by the Indian Standards Institute which is a private standard setting body. In 1984, the central department of environment started promulgating the Minimum National Standards for various kinds of industries both for water and air. In 1984 these standards were sat for ten industries in the case of water and twelve industries in case of air. Each year more industries have been covered under the MINAS standards. However these standards adopted the ISI standards are set as voluntary guidelines for helping industry. The ISI itself has this to say about its standards; ISI however has cautioned that tolerance limits for industrial effluent may very for each unit depending on : (a) the capacity of the plant; (b) the technology adopted; (c) other industries polluting the receiving system; (d) recipient capacity of the receiving system; (a) the nature of the receiving system that is land, river stuaries, coastal water etc; and (f) usage of the receiving system. ISI further says; "therefore the state governments river boards and other authorities concerned in farming rules

regarding industrial effluent should take into consideration all these factors in arriving at permissible limits... And : The authorities should bear in mind that concentration of industry can give rise to situations where although each industrial effluent complies with the relevant standard the combined effect of all the effluent may pollute the water course beyond limits given in this standard." (Jain 1991 : 263).

Thus, these are the problems in implementing the policies in an effective manner. Due to lack of proper implementation of policies by the executive, the problems concerning the environment has been increasing by many folds. This has created a sense of resentment among masses and thus they have been frequenting the courts with their grievances. Since the court has been indulging in lots of cases, it has come under attack that it is interfering in the works of executive and legislature.

So, in order to find out whether the judiciary is enceeding its jurisdiction, it becomes imperative to look into the powers which the Supreme Court enjoys. And this enatly has been dealt in the following chapter.

CHAPTER III

Powers of the Supreme Court

In a democracy the there organs of the govt - legislature, executive & judiciary have well defined spheres of functioning. A system of checks & balances ensures that none of the organs exceeds its sphere.

The Idea of separation of powers found its roots in ancient constitutionalism and in the 17th Cent. it became a central feature of a system of limited government. In Lord Acton's famous generalisation of human nature, "power corrupts the man and absolute power corrupts absolutely". The doctrine of separation of powers emerged as the grand secret of liberty & good government.

Liberatanism eventually opted for the separation of powers Locke viewed the doctrine from the point of view of natural justice. Montesquieu whose name is most associated with the doctrine of the separation of powers was staunch lover of liberty. He said that "constant experience shows us that every man invested with power is apt to abuse it & to carry his authority as far as it will go." (Montesquieu : 27).

By the end of 18th Century it was widely felt that only genuine separation of powers protects the people against the aggressions of the government. In the words of James Madison, "the accumulation of all powers legislative, executive and judiciary in the same hands, whether of one a few or many and whether hereditary, self-appointed or elective may justly be pronounced the very definition of tyranny."(cited in Beloff, 1948 : 245).

The pure doctrine of the separation of powers meant that it is essential for the establishment & maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive and the judiciary. Each branch of the government must be confined to the exercise of its own functions & not allowed to encroach upon the functions of the other branches. Further more, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch.

This "pure doctrine" of the separation of powers was apt to be modified as it could not cope with the changing dimensions of states responsibilities and complete politico-economic problems of democratic societies. It faced two kinds of reformulations - to suit the presidential democratic setup to met the requirements of the parliamentary system of government.

Thus, in modern parliamentary political science & jurisprudence, roles & functions of the three organs of the state overlap, interact with each other and are interlinked. The president of India is the head of the executive but is integral part of legislature. He summons Houses, addresses houses and dissolves Lok Sabha. he nominates certain members of Lok Sabha & Rajya Sabha and promulgates an ordinance; these are powers akin to legislative branch. Dissolution is a part of checks & balance and promulgation of ordinance justified only for a temporary emergency and is subject to ultimate legislative approval. The president does exercise the power to pardon which is judicial in nature but in this the judiciary may exercise control by scrutinizing whether the power was properly exercised in a particular case or not.

The parliament may impeach the president or remove the Supreme Court and the High Court judges but such power of judicial nature may be accepted as parts of checks & balances. The Parliament may decide on the issues of contempt of House and award punishment which is akin to judicial power but the decision whether there is any privilege of the House at all rests with the judiciary. The validity of any proceedings in either House of Parliament cannot be questioned before a court of law on the ground of any alleged irregularity of procedure. The Presiding officer of each house or any member of Parliament who is for the time being vested with the powers to regulate procedure, or to enforce or carry out the decision of either houses of Parliament, is not subject to the jurisdiction of the courts in exercise of those powers. The Courts have no jurisdiction to issue a writ, direction or order relating to a matter which affects the internal affairs of the House.(for details see Kashyap, 1996: Chap.2).

The basic function of the courts is to adjudicate disputes between individuals, between individuals & the state, and between the Union and the states and while so adjudicating, the courts may be required to interpret the provisions of the constitution & the laws. And, the interpretation given by the Supreme Court becomes the law honoured by all courts of the land. There is no appeal against the judgment of the Supreme Court. It remains the law of the land unless its interpretation is reviewed or reversed by the Supreme Court itself or the law or the constitution is suitably amended by Parliament. If an Act of the Parliament is set aside by the Judiciary, the Parliament can re-enact it after removing the defects for which it was set aside. Also, the Parliament may, within the limits of the constituent powers, amend the constitution in such a

manner that the law no longer remains unconstitutional. Thus, the Supreme Court not only acts as a court of appeal but also as a Guardian of the Constitution.

Apart from these, the strongest weapon with which the court of India is armed with is the unique power known as the power of Judicial review.

Judicial review is not an expression exclusively used in constitutional law. Literally, it mean the revision of the decree or sentence of an inferior court by a Supreme Court. It is generally asserted that the institution of Judicial review originated in U.S.A. It's genesis may be traced in the celebrated pronouncement of chief Justice coke in Dr. Bonham's case. The US constitution did not contain any express privision for Judicial review and the power was carved out by the US Supreme Court under the stewardship of Chief justice Marshal in the case of Marbury Vs. Madison which evolved the principle of Judicial review.(for details see Sinha, 1994 : 9).

In India the proper position of the judiciary and its power of judicial review should be understood in light of the governmental structure adopted by the framers of the constitution. The framers of the constitution adopted a via media between the American style of judicial supremacy and the English principle of parliamentary sovereignty. They adopted the British model of parliamentary government and made the parliament the focus of political power in the country, however they did not make it a sovereign law making body like its English counterpart.

The power of Judicial review is expressly mentioned in the constitution itself and is not implied one like that of the constitution of United States. It has

been provided in the context of federal structure with defined and delimited competence of central and state legislatures. The incorporation of Fundamental Rights, with a guaranteed provision for their enforcement through the Supreme Court & High Courts invites the Judicial review and the state "shall not make any law which takes away or abridges the Fundamental rights, any law made in contravention of this clause shall to be extent of contravention be void.(Basu, 1997 : 80)

Cases ore often filed before the Supreme Court by a state govt. or by an affected private individual or a party claiming that in exacting a particular law, the concerned regard to the division of powers under the 7th schedule. While reviewing such enactment, the court decides whether jurisdiction limits have been transgressed or not.

Incorporation of a chapter on Fundamental rights in the constitution makes Judicial Review specially relevant. Article 12 guarantee Fundamental rights against all state action. And 'state' under this article has been defined to include the govt. & the legislatures of each of the states and all local or other authorities within territory of India.

Article 13 declares all laws inconsistent with or in derogation of the Fundamental Rights to be void to the extent of inconsistency.

Before 1967, the Supreme Court decided hundreds of cases involving the interpretation of the Constitution and also involving various laws enacted by Parliament & state legislatures from time to time. It declared a law void when it was not in clear contradiction of the constitutional provisions but it did not question the policy in a particular legislative measure. It exercised the power of

Judicial review but it was never questioned. On more than one occasion the Supreme Court had rejected the argument that the amending power of Parliament under Article 368 did not extend to Fundamental rights. But in 1967 in the Golak Nath case the court accepted the argument by a majority of six to five. It declared that Parliament had no power to amend any of the provisions of Part III of the constitution so as to take away or abridge the Fundamental rights enshrined there in.(A.I.R., 1967)

Parliament retaliated by passing two amendment acts. The 24th Amendment Act declared that Parliament in exercise of its constitution powers may amend any provision of the constitution including the Fundamental rights. This amendment was challenged in the Supreme Court by Swami Keshvananda Bharti on a variety of grounds. In the case the Supreme Court revised its earlier decision in the Golak Nath case & upheld Parliaments' right to amend the constitution including Fundamental Rights but not the basic structure or framework of the Constitution.(A.I.R. 1976)

Thus a sort of balance has been struck between the doctrine of Parliamentary supremacy & the Supreme Court's power of Judicial review.

The Supreme Court has been given the power to issue direction, orders or writs in the nature of habeaus corpus, mandamus, prohibition quo-warranto, centiorari whichever may be appropriate for the enforcement of any of the rights conferred.

It is noteworthy that in exercising the power of Judicial review, the courts cannot and do not go into the wisdom behind the laws made by the legislature. Their function primarily is to look into the constitutional validity of

those laws and decide accordingly. Apart from the laws made by the legislature, the courts also look into the validity of the acts of the executive in order to ensure that they do not infringe the provisions of the constitutions and are also not violative of the statutory laws made by the legislature.

Apart from all these powers the major breakthrough which the Supreme Court got in reaching the common mass was the introduction of Public Interest litigation. In the historic judgment in the Judge's transfer case, the seven judge constitution bench of the Supreme Court held that any member of the public even if not directly involved but having 'sufficient interest can approach the High Court under article 226 or in case of breach of Fundamental Rights. The Supreme Court for redressal of the grievances of the persons who cannot move to the court because of poverty, helplessness or disability or socially or economically disadvantaged position.(for details, see Kashyap, 1995 : Chap.)

Thus PIL may be defined as - "a litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective and diffused rights, interest or vindicating public interest. It has set new limits for the Court's power to intervene in matters of immediate arrest."(Hurra, 1995 : 4)

Again, as the name suggests, the effects of judicial decisions rendered in public Interests litigation must also go beyond the sphere of the parties actually present in the proceedings before the court. The traditional principle is - expressed in well known Latin phrase ' res inter alios judicate atteri non nocet nec protest' - that 'res judicata' principle, called the last refuge of individualism in civil litigation, simply cannot prevail if "diffuse" rights are to be protected by

the courts, since the "ideological plaintiff" in Public Interest litigation is not suing merely to have his own damage restored, but rather to have the wrongdoer provide indemnification for all the damage he caused to the group, the class, or the society as a whole.

For instance, when a multi-national corporation is polluting the atmosphere, it can hardly be forced to stop it's wrongdoing. It is merely to be sued by individual victims and that too only of the damage inflicted on one or some of the affected persons. Clearly, a blind refusal to indemnify the class injured by the wrong doers, can amount to on a priori refusal by the courts to provide for the effective defense of 'diffuse' rights And this will be an unsympathetic attitude, considering the fact that those rights are becoming more and more important in all advanced societies, and that judicial protection is the most trustworthy and sophisticated safeguard of legal rights ever designed by human civilization.

Nature of Public Interest Litigation :

The nature of PIL in a legal system depends on the social, political and economic development of that particular legal system. Inspite of social, political economic and geographical differences, there are certain general characteristics of PIl which are dominant features of most of the legal systems in the world today.

They are first of all, PIL does not arise out of disputes between private parties about private rights. But object of PIL is the enforcement of constitutional or statutory policies.

Secondly, in PIL, the party structure is not rigidly bilateral but amorphous. The plaintiff for 'public interest' acts as a spokesman for the public at the large or a segment of the public.

Thirdly, the scope of the lawsuit is shaped primarily by the court and the parties.

Fourthly, PIL generally seeks to enjoin future or threaten action, or to modify a course of conduct presently existing or a condition presently continuing.

Fifthly, in PIL, the fact of enquiry is not historical and adjudicative but it is predictive, prospective and legislative.

Sixthly, in PIL, the judge is not passive but he is a dominating figure. One significant aspect is that of late, judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons who are not even before the court, and requires the Judge's continuing involvement in administration and implementation.

Seventhly, the trust behind the growth of public interest actions is provided by an unprecedented liberalisation of the requirement of locus standi.

And lastly, PIL engages in research, negotiation in a variety of settings, citizens education, media relations & so on.(Hurra, 1995 : 92).

The policy underlying PIL is to give otherwise unrepresented, unorganised and unprotected interests an access to justice.

According to Justice V.S. Deshpande, "PIL is a strategy to bring about a silent and peaceful revolution in enlarging the socio-economic equality without harming the principle of meritocracy. It's a new course in constitutional

litigation to uphold such egalitarian economic right of the people even though they may not even be either expressly within or enforceable in the constitution.(Deshpande, 1983 : 113).

In view ofJustice Krishna Iyer, PIL is a part of the process of 'participative' justice. He observed.

"Indeed, little Indians in large number seeking remedies in courts through collective proceeding, instead of being driven to an expensive plurality of litigants, is an affirmation of participative justice in our democracy.(A.I.R., 1981 : 317)

Prof. Upender Baxi prefers to call it Social Action Litigation since in India it is primarily concerned with challenging state repression and governmental lawlessness. He views PIL as the outcome of 'judicial populism'.(Baxi, 2980 : 91)

P.N. Bhagwati, Ex. Chief Justice of Indian Supreme Court, views "PIL as a strategic art of legal aid movement as it attempts to deliver justice to the poor downtrodden masses who cannot get access to court of law due to their poverty conditions and other disabilities from which they suffer."(Supra Note, 20 : 1476)

The progressive judges sitting on the bench of the Supreme Court ignored the strictness of procedural technicalities and allowed the 'third party' interventions on behalf of the poor and ignorant & thus extending the scope of 'locus standi' . Therefore the real mother & also the nurse of PIL in India is 'higher judiciary'.

The concept of PIL has created deep impact on the minds of Indian population, and now it becomes the duty of the legal profession to see as to what are the ways in which the concept can be utilised for enforcing the rights of the citizens as against the state, thus fulfill the mandate dictated in Preamble to Indian constitutions.

Since PIL demonstrates a clear cut deviation from the longstanding traditional rules of procedural law, therefore the question of choice between the principles and the growth of PIL reflects the most heated debate of our century.

It would be in fitness of things to quote here John Rawl's theory of Distributive justice in support of traditional adversarial system of justice giving leeway to libralised rule of standing, resulting in germination of concept of PIL. John Rawl's principle of redress lays down that each person should have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. And here, redress requires that a society must give more attention to those with less of the contingencies of natural assets of social opportunities.(Rawls, 1971 : 250)

Accordingly, in contemporary societies there is ever increasing decline of two-party laissez faire concept of justice. This decline was predicted by Roscoe Pounds, in USA, as early as 1906. There exist several reasons for this decline.

Firstly, in modern societies, the new social, collective, meta individual, public and 'diffuse' rights are spearheaded.

Secondly, the complexity of modern society frequently generates situations in which single action or inaction by a person can be beneficial or

prejudicial to a large no. of people thus resulting in mass injuries. As for instance, the discharge of waste into a lake or river harms all those who want to enjoy its clean water. In such circumstance, the two solutions provided by adversarial system, viz. individual standing solution and govt. standing solution, fail to protect larger public interest because of the reason that individual standing solution allows the private individual to litigant only for his own interest.

Accordingly, it was due to proven inadequacies of both the traditional solutions provided by the adversarial model of litigation that the concept of public Interest litigation began. The Supreme Court has emphatically stated that PIL is different from adversary litigation in the traditional model. Thus it is a non-adversarial procedure evolved by Supreme Court. When viewed from the perspective of traditional model, the non-adversarial litigation procedure developed by the Supreme Court are of two different types.

Types of PIL :

(i) **Co-operative Litigation** : The first kind of PIL procedure evolved by the Supreme Court is Cooperative Litigation. In this the relationship between the parties is largely one of communication and co-operation, rather than discord and conflict. This kind of litigation is a perfect model which the P.N. Bhagwati, the then Chief Justice of Indian aspires as he perceives "PIL as a co-operative effort on the part of the claimant, the court and the governemnt Supreme Court & the govt. to see that basic human rights become meaningful for the large masses of people."(Bhagwati, 1986 : 11). Thus, this type of procedure which is non-adversarial in nature may be termed co-operative

litigation, the reason being that it presumes that the parties will voluntarily, on their own reach an agreement and take necessary action.

Here the role of the Court changes from that of its traditional role which revolved around determination of facts & issues of a decree. Instead, in co-operative litigation the court takes on its shoulders three different functions, viz., one that of an ombudsman wherein it receives complaints, one to the attention of responsible govt. officials, second, court acts like a Forum wherein it provides a setting for clear & calm discussion of public issues, often staging the state for such conversation by preserving the status quo or providing emergency relief through interim order. Third, the court acts as a mediation wherein it suggests possible compromises and moves the parties towards agreement.

(ii) **Inquisitionary Litigation** : The second type of 'non-adverbial' procedure developed and described, by the Supreme Court is 'inquisitionary litigation' Herein, the parties do not collaborate, but the Court steps out its passive role, which is typical of adversarial litigation, to take an active role in investigating the fact.

Ex C.J. P.N. Bhagwati says "when a poverty struck section of the society is pitted against a rich and powerful who can afford best of lawyers, naturally the poor is at disadvantageous position, and it is in such situations that PIL comes to the rescue of the poor and protect his basic human rights."(Bhagvati, 1991 : 12)

So, the primary device used by the court for this is the appointment of special commissions. These commissions serve different functions.

One such function is to propose remedial reliefs and monitor its non-implementation. Such commissions frequently include non-legal experts, and use methodologies drawn from the physical and social sciences.

Features of PIL in India

In India, eight identifying features of PIL distinguishes it from traditional litigations.

These eight identifying features of PIL are

i) In PIL, the scope of the law suit is consciously shaped by the court & parties, rather than being limited by a specific past event, such as breach of contact or personal injury.

ii) The party structure is sprawling and amorphous rather than limited to individual adversaries.

iii) The fact inquiry resembles the kind of inquiry taken into current problems by legislative bodies, rather than a simple investigation of post historical events.

iv) 'Relief' is often protective flexible and remedial having broad impact on many persons, rather than limited to compensation for a past wrong given only to party to the law suit.

v) The judgment does not end the court's involvement, but requires a continuing administrative judicial role.

vi) The relief is often negotiated by the parties than imposed by the court.

vii) The judge plays an active role in organising and shaping the litigation & is not passive.

viii) the subject matter of the law suit is a grievance about public and is not a private suit.(Hurra, 1995 : 101).lml

Thus, these are the powers which are enjoyed by the court and the court is suppossed to exercise them while giving judgements. So, to check whether the judiciary has exercised its powers within its jurisdiction or not, it becomes essential to go through the judgements given in various cases by the supreme court.

This has been analysed in the following chapter where the cases of the last seven years (1992-98) concerning environment are taken.

CHAPTER IV

Supreme Court Cases

In this chapter, the important cases filed in Supreme Court have been taken. These cases range from the year 1992 to 1998.

Cases of 1992 :

In 1992, most of the cases were through PIL and a brief introduction of these cases is given below.

1. **Tarun Bharat Sangh vs Union of India (PIL)**

Mining operations were carried on under licenses granted by the state govt. impairing environment wildlife within the Saiska Tiger Park (in Ahvar district in state of Rajasthan) declared by notifications as reserve forest, game reserve and sanctury.

The court observed that the state govt. while professing to protect the environment by means of the notifications and declarations was itself permitting degradation of the environment by authorising mining operation in the area. Thus a committee headed by a retired Judge was constituted to ensure enforcement of the state notifications and orders of the Supreme Court and to prevent devastation of environment & wildlife within the protected area.

Interlocutory direction issued that no mining operation of whatever nature shall be carried on within the protected area.(Supreme court yearly digest, [SCYD] 1993 : 206)

2. M.L. Sud vs Union of India (PIL)

This case was concerning the town planning.

Area shown in the Master Plan as "Green" and to be maintained as city forest. Petitioners alleged that DDA was cutting trees and putting up construction and lying roads in the area.

The court issued the direction for maintaining the city forest and did not allow DDA to put up the construction.(Supreme Court cases (SCC), 1992 : 123).

3. M.C. Mehta vs Union of India (PIL)

The petitioner wanted to create press awareness about environment so that people will respect their surroundings.

The court issued direction to enforce as a condition of license of all cinema halls and video parlors duty to exhibit free of cost at least two slides /message on environment in each show undertaken by them.

It also ordered to telecast & broadcast interesting programmes of 5 to 7 minutes duration everyday and a longer programme once a week by Doordarshan and AIR in the matter of environment and pollution w.e.f. Feb. 1st 1992.

Also, to make environment a compulsory subject in school, college for general growth of awareness ("SCC, 1992: 358).

3. **M. C. Mehta vs. Union of India : P.I.L.**

This case deals with the Env. and air pollution in Delhi.

There was environmental pollution due to stone crushing activities in the vicinity of Delhi. W.H.O study declared Delhi as the world's third most rubbish, polluted & unhealthy city.

The court issued direction for stopping mechanical stone crushing activities in and around Delhi, Faridabad, Ballabhgarh compliance. Direction were also issued for allotment of sites in the new "crushing zone" set up at village pali in state of Haryana to the stone crushers.

Thus, in this case also we see that while maintaining the right of every citizen to have a pollution free environment, the court also found an alternative to place for the stone crushers.(SCC, 1992 : 86).

4. **M.C. Mehta vs Union of India (PIL)**

This also concerns about the stone crushing operation around Delhi & Haryana state.

The court directed the DDA and HDA to file affidavit categorically stating whether stone crusher plants in the concerned area situated within the non confirming areas. Central Pollution Control board directed to inspect the plants on a working day and submit a detailed report.(SCC, 1992 : 86)

5. **M.C. Mehta vs Union of India (PIL)**

In this case, there was a total closure of operation of stone crushing activity in the vicinity of Delhi by union of India. Instead of approaching the

Supreme Court in the pending matters, operators were filing unit petitions in high court and obtaining interior orders.

The court ordered the petitions relating to stone crushers pending in High Court to be transferred to Supreme Court.

Thus, it can be realised from this case that the Supreme Court can put checks on the defaulters who try to enable the matter in the public interest.(SCC, 1992 : 85).

6. M.C. Mehta vs Union of India (PIL)

This case concerns about the water pollution. There was discharge of trade effluents by kanpur tanneries and distelleries into Ganga river, thereby polluting the water of the river.

The court granted time to riperian industries for filing affidavits. State pollution control board was directed to serve report on all distilleries within three days and the latter directed to file replies within two weeks.

Tanneries not operating their primary treatment plants were directed to be closed down. Tanneris which failed to deposit full amount of contribution were to be closed down.

So, it can be seen, the matters which are generally pending in the files and it takes so long for the administration to serve report etc. can speed up when it is directed by the court, within a time frame. (SCC, 1992 : 633).

7. M.C. Mehta vs Union of India (PIL)

It concerns about the earlier Supreme Court order for setting up primary treatment plants by the tanneries which were polluting Ganga river by discharging trade effluents into the water. Compliance reports were submitted.

The court ordered that the tanneries which could not yet set up the primary plant or which failed to deposit their contributions for setting up secondary treatment plants was to be closed. Directions for immediate disposal of sludge coming out from the primary plants were also issued.(SCC, 1992 : 637).

8. Tehri Bandh Virodhi Sangarsh Samity vs state of U.P.

This is about the Tehari dam where construction and implementation of Tehri Hydro Power Project and Tehri Damwas challenged on ground of non-application of mind by government to safety & ecological aspects, the site being within the earthquake prone zone.

But the facts showed that the project was considered by Environmental Apraisal Committee of Ministry of Env. and Forest, Committee of Secretaries, High level committee comprising experts of scientific specialised organisations and also by renouned experts of international repute.

Thus the court observed that the union of India considered the question of safety of the project from various details more than once and on being satisfied with the report of the experts gave clearance to the project, hence no interference of Supreme Court called for.

It further said that the court does not possess the requisite expertise to render any final opinion on the rival contention of the experts. Courts can only investigate & adjudicate the questions to whether the govt. was conscious to the inherent danger and applied its mind to the safety of the dam.

This case demonstrates clearly that the court by not interfering in this matter and totally trusting the opinions of the experts respects the opinions of various committees and does not unnecessarily interferes in the matters which are beyond its expertise.(SCYD, 1993 : 209).

The Cases of 1993

1. A.R.C. Cement Ltd. vs. state of U.P.

It concerns about the follow up measure for using land, building etc. of limestone industries shut down by court order. Manufacturing process carried on by cement factory within Mussoorie and Dehradun development authority was already stopped present to courts earlier order. Now an agreement reached between petitioner manufacturer and UPSMDC, a state corporation for shifting the factory and memorandum stating points of agreement were submitted before the court.

The court advised the petitioner and the state to find out an alternative use of the factory area with its construction so that it may not go waste.

Thus this case reflect that the courts are not concerned about the environment only (while neglecting the development sector, as alleged), but they also look after the problems faced by the factories etc.(SCC, 1993 : 426).

2. A.R.C. Cement vs state of UP

It's about the environment protection in Doon Valley where the petitioner's cement factory was operating in the Doon valley despite court's direction to declare the area as non industrial. The petitioners were seeking permission to open the undertaking in compliance with all the conditions. But this permission was refused by the court so petitioners agreed to shift their factory elsewhere but four year elapsed since without any decision regarding location of the factory.

The court directed the petitioners to offer alternative sites within two week and state Govt. directed to give a positive response in the matter within four weeks from receipt of affidavit proposing the alternative sites.(SCC, 1993 : 53)

3. Sampat Singh vs state of Haryana

It's about the environmental pollution due to mining operations in Sariska Tiger Park in Alwar districts in Rajasthan. Directions issued by the Court, in 1991 classified.

The court declared that wherever admittedly or indisputably mines are situated within the protected area, the mining activities must be stopped but if upon a elemacration of boundary line, any mining area is shown to fall clearly outside the protected area, then the ban under the order dated October 11, 1991 will not operate in respect of those mines. The district administration of Alwar district to afford adequate protection to petitioner's members and workers.(SCC, 1993 : 561)

4. M.C. Mehta vs Union of India (PIL)

This is about the discharge of trade effluents into river Gange by riparian industries (other than tanneries, distilleries) thereby polluting the water.

The court directed the Union of India to publish in newspapers general notice requiring such industries to file their affidavits before the court by 15th Jan 1993 stating steps taken to comply with court's order dated Sep. 9, 1985 and directions issued by Ministry of Environment and forest by notification dated Jan 16, 1991. If any industry fails to take step for preventing pollution or following the standard required by the notification then the industry shall be required to be closed.(SCC, 1993 : 434)

5. Bayer India Ltd. V. State of Maharashtra

It's about the construction of building in the vicinity of chemical factories, but the permission was refused to builders by Municipal corporation on representations made by the factory owners in view of danger of gas leak. Writ petitions under Art 226 filed by the builders in 1990 was allowed by High Court. But factory owners, having not been joined in the writ petition as respondents, filed SLP on ground that High court's judgment adversely affected them. Supreme Court permitting the factory owners, being persons aggrieved, to file review petition before High Court & directing the High Court to decide the same within four months treating the entire controversy as open.

Now, application filed by the factory owners before Supreme Court complaining that instead of yet disposing of the review petition, High Court has

directed the Municipal Corp. and state govt. to implement its earlier order in the writ petition.

The Supreme Court commented on the delay in disposal of the review petition and gave direction for expeditious disposal of the review petition.(SCC, 1993 : 29)

6. M.C. Mehta vs Union of India (PIL)

It's about the atmosphere pollution caused by the discharge of effluents and ash components from the boiler of sugar factory.

The court observed that it was indeed polluting the atmosphere and ordered for its closure and shift it to other place.(SCYD, 1993 : 188)

The Cases of Year 1994 and 1995

In 1994 and 1995, there were very few cases in Supreme Court pertaining to Environment so, these two years have been clubbed together in this section.

1. Andhra Pradesh V. Anupama Minerals

This comes under the forest conservation Act, 1980 and Andhra Pradesh mining rules, 1966.

In this case, the respondents applied for the grant of the renewal of the mining lease in Andhra Pradesh. The state refused to grant renewal in view of the prohibition contained in the section 2 of the Act.

The court after going through the reports directed that the renewal be considered as it is not violating the Act, and approval of the central govt. be sought.(Scale, 1994 : 514)

2. Madhya Pradesh vs Krishnadas Tiparan

This is another case of forest conservation act where after the expire of the mining lease the respondent had approached the Govt. for the renewal of the lease. The Madhya Pradesh govt. passed order to grant further renewal.
But the court did not see the renewal to be valid and subsequently canceled the lease.(Scale, 1994 : 523)

3. Howrah Ganatantrik Nagrik Samity vs West Bengal (PIL)

In this case the court observes that large No. of petitions are filed in public interest concerning environmental matters, so, there is a lot of burden on the court.

Thus, the court issues the notices to the president of the Bar Association of India, Presidents of Bar Association of West Bengal and Howrah, President of the Supreme Court Bar Association & Bar council of India to give their response and assist the court in this field

Thus, it shows from this case that inspite of burden of lots of cases, courts try to expedite the matter by taking help from the various directions.(Scale, 1995 : 224)

4. M.C. Mehta vs Union of India (PIL)

This was concerning the pollution caused by various industries in Delhi both in conforming and non conforming areas.

The court directed for the insuance of notices to the industries for the closure. It also directed them to find a suitable place for their relocation.(SCYD, 1995 : 638)

5. Indian Council for Envirolegal Action vs Union of India

The farmers were suffering due to the damage of their crops due to water pollution.

The court directed the state govt. to deposit Rs. 28.34 lakh being the loss suffered by the farmers on account of damage to their crops after deducting the amount paid by the industrialist in the first instance. The court further directs the concerned dist judge to obtain report ascertaining the compensation payable to the farmers and submit a report to the court.(Scale, 1995 : 561)

6. I.C.E.L.A. V. Union of India (PIL)

This case comes under the coastal areas classification and Development Regulations.

In this the development activities for beach/resorts/hotels were questioned as they disturbed the peace and environment of the beach.

The Court directed for the regulation of the developmental activities of these resort and hotels and asked them to submit a report whether they comply to the rules or not.(Scale, 1995 : 146)

7. I.C.F.E.L.A. vs Union of India

This case concerns about the coastal Regulation zone and takes into consideration all those states which have a coast line. The petitioner alleged that the coastal areas were being disturbed by setting up industries in their vicinity.

The court directed all the respondent states not to permit the setting up of any Industry or the construction of any type of the area atleast upto 500 meters from the sea water at the maximum High tide.(Scale, 1995 : 584)

8. S. Jaganathan Vs. Union of India (PIL)

In this case, concern has been shown about the ecologically fragile coastal areas in Andhra Pradesh, Tamil Nadu and Pondichery where the commercial aquiculture farms where disturbing these coastal areas.

The court directs the coastal states and union territory govts to issue individual notice to all the aquafarms which are located in their respective territories.(Scale, 1995 : 208).

9. Vellore Citizens Welfare forum Vs. Union of India

It concerns about the tanneries in South India which were violating the environmental law.

The court directed that all the tanneries he closed and that there should not be any set up of the tanneries in the area.(Scale, 1995 : 592).

The Cases of 1996

1. Indian Council for Environ-legal action Versus Union of India and others

This case is about the govt. apathy of ecological fragility and non-compliance with anti pollution laws.

The court issues orders & direction for implementation and enforcement of the laws to protect the fundamental right to life of the people. It says that passing such orders and direction do not amount to usurption of legislative or executive function. They are issued by the court in discharge of its judicial function. However it said that the court is not concerned with day to day enforcement of the law which is the function of the executive, High courts being acquainted with the local condition, they would be in a better position of ensuring proper implementation of the law.(SCC, 1996 : 281).

2. Indian Council for Environ-legal action (PIL) vs Union of India and Others

This concerns the central govt's notification under the Environment protection Rules, 1983 which have been presumed to be issued after due deliberations and study.

The court said that while issuing such notification Govt. should endeavour to strike a balance between ecological interest and economic social and cultural interests. Industrial development at the cost of environmental degradation or

environmental protection at the cost of industrial and economic growth not warranted.(SCC, 1996 : 298).

This case clearly shows that while giving judgments on environmental issue, the court only protects the fundamental right of the people under article 226 and does not usurp the powers of legislative. It also says that it is not concerned about the day to day enforcement of the law as it is the sphere of executive and thus it is not exceeding its jurisdiction.

This case also reflect the fact that the courts maintain the balance between the development and the environment.(SCC, 1996 : 283).

3. Vellore citizen's welfare forum vs

Union of India and Others (PIL)

Environmental pollution by tannery industries. Discharge of untreated effluent by tanneries in state of Tamil Nadu rendering river water unfit for human consumption, contaminating the sub-soil water and spoiling the physio-chemical properties of the soil, making it unfit for agricultural purposes.

The court held that such industries cannot be permitted to continue their operations unless they set up pollution control devices. Such industries are liable to compensate for the post pollution generated by them as the "Polluter pays principle". A pollution fine, of Rs 10000 imposed on each tannery. Amount to be deposited in Environment protection Fund which shall be utilized for compensating the affected persons and restoring the ecological balance.(SCC, 1996 : 647)

4. **F.B. Taraporawala and others Vs.**

Bayer India Ltd and Others

This case is about the relocation of the chemical industries. Due to the chemical factories located in the populated areas in Thane Mumbai, lives of inhabitants living around the factories in jeopardy in view of probable accident in factories. Prohibition of construction of residential building within the radius of one km. of such factories would adversely affect the right to reside in the locality.

The court therefore gave options to the industries either to obtain ownership of the area or to shift their factories to such place where residential area could be kept wide apart from the factory premises.

First option was not acceptable to the industries because of huge financial involvement. Relocation of the factories also found by the industries not possible logistically financially or otherwise.

The Supreme Court considering itself neither having expertise nor being in possession of various requisite information to decide the question of relocation directed the central Govt. to constitute an authority under section of Environment protection Act within one month.

Authority shall submit its report to the central govt within three months after examining and deciding all the relevant issue by affording reasonable opportunity of hearing to the parties concerned. Since that would take time Bombay Municipal Corp. directed to proceed further with the building plans of the appellant builders and re examine the question of grant of sanction on the basis of existing rules and byelaws.(SCC, 1996 : 647)

5. M.C. Mehta Vs. Kamal Nath and others (PIL)

This case deals with the lease granted by the state govt for commercial purpose to a private company having a motel located at the Bank of river Beas. Hotel Management was interfering with natural flow of river by blocking relief/spill channel of the river.

The Supreme Court held that the state Govt. committed break of 'public trust doctrine' which is a part of Indian law and extends to natural resource such as rivers forests, seashores, air etc. for the purpose of protecting the ecosystem. Thus prior approval granted by govt. of India, Ministry of Environmental and Forest and lease granted in favour of the Hotel quashed. Polluter pays principle applicable. Accordingly the polluter company liable to compensate by way of cost for restoration of environment & ecology of the area.(SCc, 1996 : 462)

6. M.C. Mehta Vs. Union of India (PIL)

This case is about the ecology and mining activities in the vicinity of tourist resort. Pollution was caused by stone crushing, pulverising and mining operators in Faridabad, Ballabhgarh area in state of Haryana. Report submitted by the expert body viz. Haryana pollution control Board to the court recommending closure of mining activities within a radius of 5 km from Badkal lake and surajkund (tourist places). On the basis of reports (without any order of the court) mining operation within the said area stopped by the state of Haryana. Objections were raised before the court against the closure by the state without affording any opportunities lesses of the mines. Reports were obtained by the court from another expert body, NEERI.

Having regard to the opinion of two expert bodies, the court held that the mining activities in the vicinity of tourist resort are bound to cause severe impact on the local ecology and therefore, mining activities should be stopped within 3 kms of Badkal take and surajkund.(SCc, 1996 : 212).

7. Indian Council for Environment legal Actions and others vs. UOI and others.

This was a petition alleging environmental pollution caused by private industrial units. Writ petition filed by an environmentalist organisation, not for issuance of writ, order or direction against such unit but against UOI, state govt. and state pollution Board concerned, to compel them to perform their statutory duties on ground that their failure to carry on such duties violated rights guaranteed under Art 21 of the residents of the affected area.

The court held that after ascertaining that the alleged industrial units were responsible for causing ecological fragility in the area, directed the authorities concerned to perform their statutory duties.(SCC, 1996 : 58)

8. S. Jagannath vs UOI

Its about the commercial aquaculture farming. Shrimp farming culture industry in coastal areas were causing degradation of evergreen ecosystem, depletion of plantations, commercial user of agriculture lands and salt farms, discharge of highly polluting effluents, pollution of potable water and ground water etc., besides normal traditional life and vocational activities of the local population of the coastal areas seriously hampered.

The court said that the sea coast and beaches are gift of nature and any activity polluting the same cannot be permitted. Having regards to reports of experts (eg. NEERI, Central board of prevention and Control of water pollution etc) the court held that the intensified shrimp farming culture by modern methods were violative of constitutional provisions and central Acts, especially Environment protection Act, Water (prevention and control of pollution) Act), etc. therefore it cannot be permitted to operate. These central acts would overwide state acts, if any inconsistent with them. However traditional shrimp farming is polltuin free. A high powered authority to be constituted and must scrutinise each & every case.(SCC, 1997 : 87).

9. S. Jagannath vs U.O.I.

This case concerns about the workmen displaced by closure of shrimp culture industries.

The court held that those who have put in one year of service were entitled to get compensation in terms of section 25 - F(b). They will also get six years of wages as compensation.(SCC, 1997 : 89)

10. M.C. Mehta vs U.O.I. (PIL)

Calcutta tanneries were discharging untreated noxious and poisonous effluent into Ganga river polluting land and river. Supreme Court was maintaining the writ petition for a long time with a view to control pollution. In view of categorical findings of NEERI and also several reports of West Bengal Pollution Control Board, possibility of setting up of common effluents treatment

plant at existing location of Calcutta tanneries ruled out. Inspite of all efforts made by Supreme Court and state govt. Calcutta tanneries were not cooperating in their relocation to new complex even after giving clear undertaking in their behalf to the Supreme Court.

The court held that the Calcutta tanneries even otherwise operating in violation of mandatory provisions of water pollution Act so one who pollutes the Environment must pay to reverse the damage caused by his act. Accordingly directions were issued for unconditional closure of the tanneries, relocation payment of compensation by them for reversing the damage and for rights and benefits to be made available by them to their workmen.

The Green Bench of Calcutta high court was directed to further monitor the manner of compliance.(SCC, 1997 : 411)

The Cases of 1997

1. M.C. Mehta vs Union of India

This is about the lead free petrol polluting the atmosphere.

The court asked the secretary of the concerned department to give a report as to further development in regard to the opening up of lead free petrol outlets, reduction in the lead contents in petrol all over the country and sulpher in the diesel as well as the installation of CNG stations and kits.(Scale, 1997 : SP-7).

2. M.C. Mehta vs Union of India (PIL)

It's a PIL alleging degradation of Taj Mahal, a monument of international repute due to environmental pollution. Opinions of expert committees including NEERI was obtained. According to the expert opinion use of coke.coal by industries situated within the Taj trapezium zone (TTZ) were emitting pollution and causing damage to the Taj as also the people living in the area.

The court held that the Taj apart from being a culture heritage is also an industry by itself, therefore pollution must be stopped. Industries operating in TTZ much use natural gas as substitute for coke, coal. If natural gas as a substitute is not acceptable or available to such industries. They must stop functioning and may relocate themselves.(SCC, 1997 : 411)

2. M.C. Mehta vs Union of India

The Supreme Court issues notification that construction within 200 mts of a protected monument is prohibited. It issues consequential directions regarding Mathura Refinery brick kila operators and other construction within 200 m of Taj Mahal.(Scale, 1997 : SP-3).

3. Kamini Jaiswal vs Union of India

High pressure gas pipeline laid by gas authority of India /ONGC were alleged to be unsafe and potentially hazardous in certain specified places. Detailed information were further furnished and measure taken by it were set out in the material disclosed by GAIL.

The court held that the apprehension expressed by the petitioner allayed and have no further action required to be taken by the court.(SCC, 1997 : 60).

4. M.C. Mehta vs. Union of India

It's about the falling ground water level.

The court directed the Ministry of Environment forest to appoint central ground water board as an authority under sector 3. Board is supposed to apply its mind in respect of the urgent need for regulating the indiscriminate boring and withdrawal of underground water in the county and issue necessary regulatory in that regard.(SCC, 1997 : 312).

5. M.C. Mehta vs Union of India and others

It's about the public parks in Delhi. It was alleged that the frequent use of the public parks for marriages and other functions resulting in degradation of environment and its utility as a recreation area.

Court issued directions prohibiting their use for non-recreational purposes or commercial purpose. It also ordered the closure of chief Minister camp office in a public park and directed the M.C.D. to restore the park to its original position.(Scale, 1997 : 13)

6. T.N. Godavarman Thirumulhapad Vs. UOI

It's about the protection and conservation of forests throughout the country. Reports of the high power committee pointed out failure of certain

state governments and other authorities to comply with the directions given to them pursuant to this court orders.

Court observes that the failure to comply with any such direction by any one is likely to be visited with penal and other consequences which may ensure from the failure of these authorities to comply with the directions given to them.(Scale, 1997 : SP-2).

7. Research foundation For Science Vs. U.O.I

This case concerns about the hazardous wastes.

The court was left with the impression that all the authorities do not appear to appreciate the gravity of the situation caused by the hazardous wastes, and the need for prompt measure being taken to prevent serious adverse consequences if the problem is not tackled immediately.

Court was left with no option except to constitute an appropriate committee to ensure that the needful is done to arrest further growth of this problem. It further requested learned counsel for the petitioner and the learned additional solicitor General to furnish the names of some suitable persons including experts who could be appointed to such a committee.(Scale, 1997 : 495)

8. B.L. Wadehra vs Union of India

This case deals with the cleanliness in the city of Delhi.

Court directed the M.C.D., N.D.M.C., and D.D.A. to respond to the 8th inspection report submitted by the central pollution control board and the

recommendations made by the three learned lawyers of this court who constituted a committee to ascertain the cleanliness efforts being made by the above authorities. The response were to be filed within four weeks.(Scale, 1997 : SP-2)

Thus, this case shows that how the courts can compel the authorities to work efficiently who otherwise always shrink from their duties.

9. M.C. Mehta vs Union of India & others

This case comes under the motor vehicles act and concern about the vehicular traffic in Delhi.

The petitioner alleged that the hoarding which are hazardous and a disturbance to safe traffic movement should be removed.

The court gives direction for the removal of the boardings. (Scale, 1997 : 581).

10. Indian Council for Envirolegal Action and others vs Unio of India (PIL)

Pursuant to court's order of 29.11.96 affidavit filed by pollution control Board showing the nature of pollution caused by 40 more industries.

Court issued notice to 37 industries which were stated to be polluting industries. It also permitted certain industries to treat effluents in their own EPTs instead of sending their waste to CETP. Court also issued notice to the CETP, which according to the report of the Dist. judge was itself a major contributor to pollution.(Scale, 1997 : SP-21).

11. **M.C. Mehta vs UOI (PIL)**

This case is concerning the patratu power station in Bihar.

Court directed the Thermal station to file an affidavit that all pollution control measures have been put into operation. (Scale, 1997 : SP-9)

The Cases of 1998

1. **M.C. Mehta vs Archeological survey of India & others (PIL)**

This case is concerned about the preservation of Taj and the provision of the ambient Air quality Monitoring station for it.

Court directed the U.P. state electricity board to sanction 15K.V. load to the monitoring station and also to set up an independent feeder line for continuous power supply to the station without requiring the monitoring station to formally apply for the sanction of this load. The cost involved in this project had to be borne equally by the U.P state electricity Board and the Union of India for which purpose the officers of the Board and the govt. of India in the Ministry of Environment and the Archeological Survey of India will chalk out a programme, so that the entire project is completed within two months. In the meantime, the Board will install invertors on the monitoring station at their own expenses as stock term measure. Court also reduced the time for installation from ten months to four months.(Scale, 1998 : SP-7)

2. **T.N. Godavarman Thirumulpad vs U.O.I. & others**

In this case the feeling of the Kharif frees in the forests of Jammu and Kashmir is alleged as per the order of the state govt.

The court stays the operation of the orders dated 10.8.97 issued by the govt. of Jammu & Kashmir, forest department and the order dated 27.12.97, issued by the chief conservator of forests, Jammu. Court further directs that there shall be no felling of the Khair trees nor any of the khair trees, if already felled, shall be removed from the forests.(Scale, 1998 : SP-5)

3. **Indian Council for Environment Action vs U.OI (PIL)**

The petitioner alleged that there was pollution caused by the industries in the state of Andhra Pradesh.

Court directed that the central pollution control board and the Andhra Pradesh state pollution control board shall jointly prepare a scheme of action for containing the industrial pollution and for disposal of industrial waste as also for reclaiming the polluted lands and the polluted water supply. The scheme was to contain immediate steps to be taken either by the state of Andhra Pradesh or by the industries concerned giving particulars there of setting out the goal to be achieved every four months as also the step to be taken on a long term basis for prevention of industrial pollution and the states by which these long term measures have to be completed so that every four month both the Pollution Control Boards can give and report as to whether the measures prescribed have been carried out or not.(Scale, 1998 : 664)

4. M.C. Mehta vs Union of India & others (PIL)

The petitioner pointed out the problems arising out of chaotic traffic conditions and vehicular pollution as there is decline in environmental quality. Also observed that there is lack of man power to deal with the problem petitioner desired of appointing court officers to assist the administration to ensure compliance of direction issued by this court.

The court made direction to disclose steps taken for supply of leadfree petrol and use of catalytic convertor on the new as well as existing vehicles. Status, report to be filed within ten weeks. Direction were also issued to a committee known as "Environment Pollution (Prevention & Control) Authority for the National Capital region" to submit a report about the action taken for controlling vehicular pollution.(Scale, 1997 : 602)

5. T.N. Godavarman Thirumlpad vs UOI and others (PIL)

This case was about the disposal of felled timber and ancillary matters lying in North-Eastern state.

The court held that the disposal shall commence only after completion of inventorisation certified illegal timber be confiscated by the state govt. Logs found suitable for manufacturing of newer and plywood to be processed within state factories. Disposal of remaining timber first to be sent to such departments and then to public action or sealed tender.(Scale, 1998 : 608)

6. Almita H. Patel vs VOI & others

It's a writ petition about the urban Solid waste management in class cities.

The court ordered to constitute a 8 member committee to look into all aspects of urban solid wastes management. The committee is to examine existing practices, to suggest hygenie processing and waste disposal practices. It will examine & suggest ways to improve condition for promoting ecofriendly sorting, collection, transportation disposal, recycling and reuse. Committee was to examine and formulate standards and regulations for management of urban solid waste and set time frames for their implementation.

The list of these cases show that the judgments are given on the basis of Environment (Protection) Act, 1986 Environment (Protection) Rules, 1986 Air (Protection & Control of Pollution) Act, 1981, Hazardous wastes (Management and Handling Rules, 1989, water (Prevention & control of Pollution Act 1974 etc.

Most of these case were filed through public Interest litigation. So, it shows that the judiciary have been responding positively to the grievances of the concerned people keeping in mind the different laws and acts. In some of the cases, the Supreme Court has asked the government bodies to report back about the action taken. Even while issuing such directions, the court does not overstep its jurisdictions as it has got the power to issue the writ of mandamus.

The court has also been taking help from the different expert committees and technical persons. Thus, judgements are based on the advises of these experts.

Although the court has been trying to solve the miseries of people to a great extent, still there are some problems faced by the court which act as a bottleneck in its smooth functioNing. So, in the following chapter these very problems faced by the court have been discussed.

CHAPTER V

Problems Faced by Judiciary

The final test for any regulation, law is the legal and judicial machinery under which enforcement is ensured through a system of fines, punishment or damages having the sanction of the policing powers of the state. Modern legal systems in India were introduced by the British, and have been functioning for a hundred and fifty years now. India follows the Anglo-American adversarial model of law. Under this system, the courts are supposed to resolve conflicts between two or more "adversaries" according to a set of procedural rules. The judge is supposed to be distant from the "policy" aspects of the law, and is supposed to interpret and decide the dispute before him according to a set principles of interpretation and rules. The judge is therefore not giving effect to any policy for which the law is made (that is something the legislature is supposed to take care when it formulates the legislation). The legal system consists of courts of concurrent powers. At the lowest levels are the trial courts where recording of facts take place. These recordings are according to the evidence brought to the court by the adversaries and the judge has a limited role to play in the process. The orders of the judges may be challenged in appeal, revision or review. In each of these stages, the powers of the appellate court, revisional and reviewing courts are limited by a set of legal principles and rules. Thus a revisional court will not interfere with the order of the court of original jurisdiction unless there is "error apparent on the face of the record" or the court

has "not exercised the jurisdiction vested in it" or" exceeded in its jurisdiction. (Ahuja, 1996 : 47). In an appeal, normally an appellate court will not interfere unless there has been error of law or misappreciation of evidence. In such a system, procedural law assumes a central place in the administration of the law. Above all for the adversarial system of law to function in any meaningful way, an efficient administrative machinery becomes a condition precedent. It is here that India faces its deepest crisis. Since Independence the crisis of the legal machinery has been the single most endemic crisis effecting the credibility of the Indian state as a whole.

The crisis could be ascribed to two broad factors: (a) The Constitution of India creates a welfare state and like all welfare states, gives the state a role in every sphere of life. The administrative tasks of the state has grown complex in its sweep and its depth. This is a world wide trend and India is part of the trend. Economic development proceeds on the pattern of a mixed economy, with the state enterprises, small and cooperative enterprises and private enterprises all functioning under overall state regulations. For the purposes of regulatory laws the state is both the "regulator" as well as the "regulated". While citizens have greater accessibility to challenge state actions under the constitutional guarantees and principles of open governance, the judiciary has limited powers to interfere. The judiciary's powers to interfere are limited to situations where the state has acted in an "arbitrary" way or contrary to "fundamental rights" or any existing "law". The state in India is also the principle party in a vast number of litigations under the Constitution from admissions to colleges, wrong telephone billing (telephone companies being state enterprises) to complex issues such as

GATT treaty and controversies between the central government and the states. There is therefore a flood of litigation since Independence. Under the adversarial system of law, it is the courts of original jurisdiction that are equipped to deal with controversies of facts and law at the first instance. The Constitution provides that the state actions that are violative of the Constitution can be directly challenged before the constitutional courts, but the powers of the constitutional courts are those of appeal and revision. They have no power to record evidence or go into questions of facts except in exceptional circumstances. These procedural provisions come directly in conflict with the substantive constitutional provisions. Aopellate courts are called upon to decide matters involving complex questions of facts under its constitutional powers without proper recording of evidence or on affidavits without opportunity to cross examine which is central to the adversarial system of law. Appellate powers are also "discretionary". All this weaves into the system of law an adhocism that becomes inherent to the legal system.

(b) The second factors leading the crisis of the legal system is the flood of laws since independence, a large number of which are either "regulatory" or "entrepreneurial" in nature. Again this is not a trend peculiar to India alone. All modern state have been called upon to legislate on a vast number of issue, from banning advertisements of feeding bottles to trade and tax regulations for every item or product. Each legislation however must have an adequate administrative machinery to enforce the law. In the case of the air and water acts we have seen the problems relating to administration of the laws. Each legislation also adds to the pressures on the legal machinery, and calls for

adequate expansion and resources for the administration of law. Since Independence there has been a host of legislations on every sphere of life, without adequate expansion of the judiciary, at every level. The judicial system is plagued by paucity of judges, inadequate staff and equipment. (For Further Details See Law Commission 14th, 44th Reports).

The salaries of judges are hardly attractive enough to get the best talent. Unlike the developed countries, where elevation to the bench is seen as "success" and a prestige, joining the bench in India is seen as failure at the bar, especially at the courts of original jurisdiction. All this seriously affects the quality of the legal system. The result is, endemic delays in deciding matters. A suit for damages could take 10 to 15 years to be decided finally. The first appeal could take another ten years, the second appeal a further 7-8 years and if the matter is taken to the supreme court, it could taken another 5-6 years. Since the system of law is adversarial, a litigant must prove his case to the court before he can get any relief. Since procedural law is central to the adversarial system, it is possible to stall final adjudication on the merits of the matter on procedural or technical grounds. The arrears of cases has assumed crisis proportions. Under this set up, litigation often becomes in practice a tactic to stall enforcement of regulatory laws rather than a mechanism for resolving conflicts amongst adversaries.

A pollution control board then is compelled to think a hundred times before brining an offender to book. Filling a case in court could then defeat the very purpose of regulation, if the actions of the board get stayed on some procedural or technical ground. The offenders are also aware of this. This has

the effect of reducing the sanction of the law in the eyes of the regulated, as punishment for violation can be put off, or a subsequent change in circumstances between filling of a case by the pollution control board and the final adjudication will render the penalty infructuous. Even if ultimately convicted, the offender may have gained economically be using litigation to avoid or put off regulatory measures. The board may then adopt a more practical course of action and confine itself to cajoling, threatening or persuading the offenders into complying with its directions rather than go to court and seek punishment. All the three acts, i.e. the Water Act, the Air Act and the EPA envisage enforcement by the board through bringing criminal prosecution against the offenders. The laws do not provide any specific remedies under civil law, i.e. there is no provision in the act, enabling the board to file any suit for damages, or for specific performance by the board. The acts as they existed prior to 1988 were seen as paper tigers. The only remedy available to the board against persistent offenders was that the board could file criminal prosecution. The trial could take years, and on each preliminary issue the offender could go in appeal and revision and then move the high court up to supreme Court. At each stage the matter is faced with all the uncertainties inherent in litigation.

The 1988 amendments were intended to give teeth to the act. Earlier there were no provisions for seeking injection from courts to restrain the polluter from continuing to pollute. This has become possible after the 1988 amendments in cases where the board apprehends the likelihood of discharges beyond prescribed limits. However, proceedings must follow the procedures prescribed for the collection of samples and evidence, as discussed hereafter.

The act provides for penal remedies only. Penal statutes invoke the police powers of the state and therefore considered a very serious action. Civil actions on the other hand are intended to be a dispute resolving mechanisms between private persons or even private and state organisations. It is an accepted principle of interpretation that the penal statutes must be strictly construed. The standards and degree of proof is higher. Upon being proved the accused can be fined or sentenced. The onus on the boards as the prosecuting agency therefore becomes very high. The returns to the board after a laborious process of gathering evidence and launching prosecution is most often a fine and rarely an imprisonment. These fines are often small. Earlier the fines were small. However, after the 1988 amendments, the penalty for violation of the orders of the board with respect to compliance with the board's directions has been enhanced. Now the upper limit of the fine for the first instance is unspecified and there after for each day of the continuation of the offence the fine has bee enhanced upto Rs. 5000 per day. This has brought some seriousness about the compliance with the regulations.

Criminal prosecutions proceed on the assumption that there must be means or an intention to commit an offence. In the case of environmental offences it is often difficult to establish that the polluter intended to pollute, or did something deliberately. In proving negligence, the defences could delve into what was technologically possible. Criminal prosecutions must fix liability on an individual responsible for the offence. In the case of corporations, it is often difficult to fix the responsibility on a particular person. This is even more so in large corporations where the division of responsibility crisis crossed several

departments and hierarchies. Under the Water Act, Air Act and Environment Protection Act, every person who was in charge of and responsible for the conduct of the business of the company is liable to be prosecuted. However, if the official proves that the offence has been committed without his knowledge or that he had exercised due diligence to prevent the commission of the offence, he may be exempted from the punishment. The maximum number of challenges to prosecutions launched by the board are for quashing proceedings the ground that the persons prosecuted were not in charge or responsible for the same. Consider a company which has a safety engineer, a safety officer, a welfare officer, an environmental engineer, a production manager, production engineer, and of course the managing director and director. Even when an action is brought against them jointly, it will be possible for each of them to plead he was not responsible or that there was no conspiracy by them to commit any offence jointly.

Environmental issues also involve a high degree of technological issues that come into play in the litigation. Criminal courts often prove to be a restricting forum in deciding such issues as whether the best technology was used or something better could have been used, whether cost-benefit considerations have been included or what factors in such considerations need to be given more or less weight and so on. Civil courts are better equipped to go into the entire gamut of issues, including balancing technology, financial viability and other factors.

The 1988 amendments also gave the board power to close down offending units and to cut off electric supply and water supply to the units. These were

drastic powers indeed. These powers can be exercised by the board if its orders are not obeyed. Once such orders are passed by the board it is up to the aggrieved party to go to court challenging the administrative order. Against such an order there are not appeals revisions or reviews. The remedy available to the aggrieved person would be to invoke the extraordinary powers of the High Court under its constitutional jurisdiction. The court will not adjudicate on facts or policy matters but only ensure that the board has acted bonafide, without arbitrariness and with due application of mind. In the enforcement of these provisions, very often the courts are faced with the dilemma of having to balance economic and other considerations with the environmental consideration. The act gives no principles on which this could be done. A court exercising extraordinary constitutional powers must find its reasoning from the directive principles of state policy.

As stated earlier, the directive principles enjoin the state to follow a development model that not just clashes with the environmental mandate but very often the environmental issues are the result of the state's compliance with the constitutional mandate on economic development. The laws regarding economic development are old and have been interpreted and implemented since pre-independence days. The environmental mandates are relatively new. Sometimes courts have been reluctant to give environmental laws precedence over economic projects when the state itself is involved in them. However, where private and small enterprises are concerned, the courts have been more emphatic about enforcing environmental regulations, as in those cases the matter presents itself as one of obeying the law rather than as a developmental issue. (Lawyer Collection, 1992).

The Water Act gives the state board powers to survey, inspect and install equipment in any area, and powers to call for information from any person related to its functions. However, if the board intends to prosecute a polluter, under the Water Act a separate and detailed procedure is prescribed. Before prosecuting a polluter the board must take samples for analysis from the polluting stream or well. This must be done after serving notice to the person in charge or having control over the plant or vessel or in occupation of the place, the sample must be divided into two in the presence of the occupier or his agent, it must be sealed and signed by the occupier or his agent and by the board officials and one sample must be sent to be analysed by the boards own laboratories or laboratories recognised by the board. If the occupier wishes, he may send the second sample to any other laboratory recognised by the board. In case the occupier willfully absents himself after notice, the second sample has to be sent to the recognised laboratories with intimation that the occupier absented himself, if the occupier is present and does not wish sample to be divided into two, the board may send the entire sample to its laboratories for analysis. Unless this procedure is followed, the analysis of water is not admissible in any evidence. Similar provisions exist in the Air Act and the EPA.

The kind of difficulties that could arise in implementing the procedure can be analysed from the example of the case in "Delhi Blotting Co. Pvt. Ltd v/s CBPCB 1986. (A.I.R., 1986). In this case the CBPCB had granted consent certificate to the company on the condition that a treatment plant will be erected by the company. The company did not do this and continued to discharge effluent. The board then gave notice to the company and took samples. The

sample test showed that the effluent discharged were above the level of permissible standards. The board sought court's orders to restrain the company from discharging the effluent into the stream. The Magistrate i.e. the original court granted this injunction to the board. The board went in appeal to the High Court, where the Magistrates order was reversed. The company did not challenge the result of the analysis conducted by the board itself. It confined itself to the plea that the procedure prescribed under the act had not been followed and the second sample had not been sent to the laboratory recognised by the board. The Delhi High Court did not wish to draw any adverse inference from the fact that no water treatment plant had been set up inspite of its being a condition of the consent certificate. The court quashed the orders of the magistrate on the limited procedural issue. Nor did the court keep the case on file & direct the board to collect a second sample following proper procedure & rehear the matter. The requirement that the polluters are given notice before a board may take a sample gives the polluters opportunity to temporality reduce or cease releasing pollutants during the period samples are taken. In this case the consent certificate was renewed in May 1981 on the condition that the company installs an effluent treatment plant. Untill 1983 the company had not done so. When the board decided to take action it did not dispute the result of the sample analysis done by the board but only the proper procedures were not followed and the board's complaint was dismissed on this ground in 1985. Now the board was back to square one and would have to begin prosecution all over again. In the meantime the discharge of effluent continued unabated. During this entire period & further untill such time as the board began fresh prosecution the

company could evade regulation. Proper procedural laws are the conversation of a rule of law. However, when the administration of law collapses, the procedural laws defeat substantive laws. The 1988 amendments intended to give teeth to the water Act and Air act and specifically provided powers to the court for inductive reliefs on the likelihood of discharges by a person. Such substantive charges could not wish away the procedural requirements.

Modern day enforcement of regulatory laws envisage a role for citizens groups. In welfare legislations the whole body of citizens are presumed to be interested in law enforcement which is for their benefit. Recognition of the locus standi of voluntary groups and citizens forums is a relatively new phenomenon. It was only in 1981 that the Supreme Court recognised this right though judicial pronouncement. This recognistion is however under the constitution & available against state actions/in actions only. The legislation themselves did not permit intervention by citizen groups untill 1988. The legislations, as they existed before 1988, specifically provided that the board alone will have powers to launch prosecution against offenders. A private prosecution against private citizens & corporations for not complying with the act was in terms prohibited. The 1988 amendments to the Water Act, the Air Act and the EPA have now permitted citizen groups to file private prosecutions after giving 60 days notice to the board of its intention to prosecute any private party. But this is a task which the board is supposed to do anyway and puts citizens forums under a fix. Once notice is given the board may take steps against the offender, in which case, the initiative goes out of the hands of the citizen forum and leaves scope for the board to "negotiate" the matter once the

board takes the matter under its authority the citizen's forum loses its locus standi so far as the prosecution is concerned. Besides the degree of compliance cannot then be challenged. Once the board comes and states they are satisfied with the level of compliance there is no scope for further action by courts or the citizen's forum. Thirdly, since the rules of evidence gathering under the act provide that the samples must be drawn by the board alone and after following the procedures as described above & further the samples are to be analysed only in the laboratories recognised by the state or run by the state, the prosecution launched by the citizen's forum can only call upon the Magistrate to ask the board to investigate & report.

The prosecutions being criminal in nature can only be for a complaint that the laws were not complied with. There is no way a citizen's forum can challenge the standards set by the board on basis of scientific or technical data. The Water Act & Air Act specifically provide that the boards orders setting standards, granting consent to discharge or emit, and terms of consent certificate for existing units will not be called into question before any civil court. While this may deter companies from challenging the boards directions in this regard, it also limits the scope for citizen's groups from challenging the terms on which consent certificates are issued and similar orders of the board under the act. Under the administrative law, this will not be entertained being "policy matter". Criminal law is always for enforcing existing laws. This leaves the citizen's forum with the only remaining recourse i.e., taking action under tort law. Tort law or common law falls under the category of nuissance, negligence & strict liability. The relief under tort law could be damages or injunction. The

damages awarded in tort actions in India is notoriously low & pose no detterrance to the polluter. Lengthy delays in the adjudication of cases combined with chronic inflation dilute the value of any damages that a successful plaintiff may receive. (Lawyers Collection, 48th Report).

An important aspect is that in India the state itself is involved in a large variety of enterprises. The three acts provide that in case of government departments the head of the department will be liable for offences, under the acts. This is a radical departure from other similar regulatory laws. Under the criminal Procedure code a party seeking to prosecute a govt. official must first obtain sanction of the govt. In case of private prosecutions by citizen's forums this would still hold. The board officials, are all public servants & hence to bring any action against them or the public sector undertaking officials, under the general civil or criminal law previous sanction of the govt will be needed. All these provision limit the scope of action for citizen's groups. Such limitations arise out of the structural limitations of the legal system itself.

Thus, these are the problems faced by the judiciary and because of these problems the people do not get full advantage of the implementation of law.

Conclusion

After going through all the cases of last seven years, one can conclude that the Judiciary is definitely not exceeding it's jurisdictional sphere. All the judgments are given to safeguard the fundamental right of the citizens to live a pollution free life (Art 21). While also keeping in mind the different laws like Environment (protection) Act, 1986, Air (prevention & Control of pollution) Act, 1981, Hazardous waste (Management & Handling) Rules etc.

But besides these laws as discussed in the first chapter there are developmental laws also which encourage the developmental sector at the cost of environment. So, the Indian state has to maintain a balance between these two objectives.

Secondly, in the second chapter, it was seen that although there exist many laws about environmetn, still lack of proper implementation has generally rendered them ineffective. And it is because of this that people are frequenting the courts for the redressal of their grievences.

Although, the courts possess adequate powers (as seen in chap 3), it also faces lots of difficulties, (described in the preceding chapter) because of which people have to face problem while going to the judiciary also.

But, the central question is that why the Judiciary is entering into every nook & corner of the society? There are several factors responsible for this.

For example, the negative response of the executive & the legislature & other public institutions to the need and grievances of the people, the delays,

indifference, waste, inefficiency and corruption on the part of the implementing machinery, the extent of the arbitrary exercise of power and of the denial of civic facilities, the destruction & pollution of ecology & environment etc.

It seems that the executive is sinking down to inaction where action is needed and the governmental functioning are loosing sight of public interest. It is generally seen that instead of serving the people & ensuring provision f justice, all politicians have become merely vote merchants and power brokers and remain fully engaged in the struggle for somehow getting to power, remaining here and amassing unlimited wealth for themselves. The scams & scandals are following in quick succession & the houses of our legislatures remain silent spectators.

Actually, after the independence till the emergency period, the court was acting in a subtle manner and it rarely looked into the sphere which was supposedly reserved for the executive. It acted independently and there was virtually no tussle between the parliament & the judiciary.

But during the period from 1975-77 i.e., during Emergency the court had increasingly become subordinate to the executive & legislature. Any time, there was pro-property decision given by the court, it was neutralized by the constitutional amendment. During the emergency, the constitution had already been amended 41 times. There were political appointment transfer of "uncommitted judges" to undesirable posts & places and the practice of suppression i.e., promotion of junior judges over their senior colleagues served to erode further the autonomy of judges. The government transferred a large no. of anti government high court judges to hardship posts. Both these moves were

attacks on independence of the judiciary. During this period, the courts failed to assert fundamental rights. This process culminated in the 42nd amendment in 1977 which sought to eliminate the power of judicial review. The 42nd amendment sought to override the "basic structure" doctrine, has since been tempered by the 43rd & 44th amendment executed by the Janata govt.

The post emergency period gave some inspite to the judiciary. It could now act in an independent manner.

The post emergency period also witnessed rapid industrialisation in the country. This industrilisation process has brought about some side effects also. Trees are felling, deforestation is rampant, because of the location of hazardous industries in the cities, there is no pollution free air to breathe even. Environment and natural resources which were earlier taken as "granted" have suddenly become vulnerable, so people and social action groups who are aware of this danger on environment are desperetly trying to have a way out.

But, since last few years, the polity of this country is passing through the phase of coalitions which entails a weak legislative and a weaker executive which cannot function in an effective manner. So, a kind of "power-vacuum" has been created and which is compelling the people to go to judiciary for the redressal of their grieuances. And it is in this context that courts have also tried asserting for themselves a more high profile role in Indian Socio-political life.

Thus, what has come to be called hyper activism of the judiciary draws its strength, relevance & legitimacy from the inactivity, incompetence, disregard of law, corruption, utter indiscipline among the leaders, ministers and administration. It was perhaps, in this background that the former chief justice

of India Mr. A.M. Ahmadi in course of his Zakir Hussain Memorial Lecture rightly said that "judicial activism has been more or less thrust upon the Indian judiciary." (Ahmadi, 1996 : 12)

To quote Rajiv Dhavan, a senior advocate of Supreme Court, "Even if the executive has failed, the judiciary cannot stand idly by. It is the duty of the judges to bring governance back to the discipline of the rule of law which does not just consist of acting according to law but also fulfilling the positive and proactive duties of the administration in respect of poverty, disadvantage, environment etc." (Dhavan 1996 : 2). So, the judiciary has simply played a compensatory role to put the other institutions back on track. Modest in its approach, exating in its queries and relatively uncompromising in its directions, the judiciary is trying to restore order out of chaos.

In fact, the judges have not done much more than that. While the constitution and the laws are the same as before, none of the orders passed by the supreme court in the nature of "judicial activism" has gone against any of our laws. In other words, each of these decisions such as the directions to remove pollution causing industries in Delhi or near Taj, closure of tanneries in South India, or checking the pollution of Gangas river, is a lawful order.

Then what exately is there to distinguish these orders from normal court orders and place them in the class of activism? The answer is to be found not within the precincts of the courts of law, but within the field of India's growing social conciousness. There are people and public organisation who have despaired of redress from the bureaucracy as well as the elected representatives, they have taken courage in both their hands and aroused the courts into righteous

indignation and this can be proved all the more when after the study of different cases, one found out that most of the cases were through Public Interest Litigation or Non-governmental organisations working for Environment or the public spirited people like Mr. M.C. Mehta. It goes to the credit of the members of the judiciracy that they have responded well.

Besides, lately social or democratic organisations have gained a growing acceptance by the people and the Judiciary and are recognised as legitimate representatives of the interests of the people. They have also become indespensable to fight for the democratic might of the people.

There is a clear mass movement, although in different form but surely indicating the desired indication of rights of the people. For instance there are environmental movements. Narmada Bachao Andolan, Chipto movements, etc. Since Most of these organisations are with lawyers as its members which convince the people about its legitimacy, magnitude, caliber and vigor. Thus people started approaching these social organisations straight way to seek judicial redressal of their grievances.

The press has also played and it still playing a very significant role in giving choice to the victims of injustices. In this regard investigative journalism has played a vital role in exposing the inequitable treatment, oppression, sufferings from pollution, degradation of environment etc.

There are various factors responsible for this state of affairs viz. lack of initiative and general failure of political process to bring in social changes in the country which could solve problems of the people, overall maladministration in the country, absence of enough number of alternative 'public focusing' to discuss and negotiate the issues affecting the large no. of people etc.

Consequently, citizens are mobilising to act collectively to contest meta individual interests in court of law. The idea behind this collective action is the fact that when one person's rights are violated, it indirectly affects every one's. Besides when the plight of the poor, degradation in th environment, ill effects of pollution was exposed, it prompted certain public spirited individuals to seek judicial redress on their behalf. And more so when judiciary also showed positive sympathetic attitude towards their cause, the initiative taken by one individual for many gained further pace.

Thus in a way if we look at it from a different angle, it can be called activism on the part of people themselves. So, the present situation is not really a case of one democratic institution trying to exert itself over another, rather it is a case of citizen's finding new ways of expressions, their concerns for events occurring at the level national and exerting their involvement in the democratic process.

The public has become so aware of the environmental issues that can be realised by the Algarswami Report as under :-

"People in general have become aware of the environmental issue, ever so much that as that related to aquiculture. A current case in point is the agitation against a large commercial form coming up in Chilka lake (Orissa). People have demanded an EIA of the project. People in Nellore Distt. in Andhra Pradesh have raised environmental issues & called for adoption of eco-friendly technologies and rejection of "imported technologies" from regions which have suffered environmental damage. Protests have been voiced by the local people in Nellore are in Tamilnadu." (SCC, 1996 : 46)

All this does not mean that there are only banquets for the work that the Judiciary has done. It has also received its share of brickbats.

The critiques object that the judiciary enters an area where it has no expertise and competence to undertake the regulation and management of the affairs. The history of the cases so far shows that the courts have entered such arena only when compelled so do so for reasons of law and have taken precaution to be guided by experts in the field. It is also contended that courts are indulging in activism at the express of their normal adjudicatory work and this is one of the reasons responsible for the huge arrears of cases. This criticism has no basis in fact. The statistics show that where the court assumes the allegedly "activist role" constitutes a negligible proportion of the total no. of cases. Such cases by their very nature attract attention of the people & the media and are alone reported. An impression is therefore created that the courts do not do other work.

There is also this conception that there is growing misuse of public Interest litigation and in the name of public interest, personal scores are settled. But this is also not a fact and it can be proved by the following case. In Sublas Kumar vs state of Bihar, the petition was filed against Tata Iron & Steel company for discharging slurry/sludge into the Bokaro river through a PIL. The court held that from the evidence on record the petitioner had no public interest in mind, but had filed the case to avenge the loss of a contract to transport and dispose of additional slurry and sludge. The court warned against filing of public interest petitions to subserve private interests. Thus, it can be seen that there is no misuse of public interest litigation.

There is also dissent on the ground that the elected representatives are elected directly by the people and they are accountable to the people as they have to go back to them after five years. But that is not the case with judges.

The judges may not be elected but they give a transparent reasons for their decisions. And moreover the elected representatives sometimes do not undertake measures, if such measures are likely to cost them their vote banks. But the judges are not concerned about the vote banks so it can compel the authority to perform its obligatory duty for the benefit of the society.

Thus to adopt Marx's phrase : "the problem is not to criticise the judiciary but to improve & better it." (Cited in Dhavan, 1996 : 2).

But let us not think that the judges have now taken charge and our worth days are over. As for the effective working of the democracy, all the three organs must be active not only one cannot substitute the other two. The Indian states needs or active judiciary accompanied with active executive & active legislature. Thus, ex chief justice of India Mr. A.M. Ahmadi rightly said that the phenomenon of judicial activism in its aggressive role will have to be temporary one. (Ahmadi, 1996 : 12)

BIBLIOGRAPHY

Government Document

A.I.R., 1966, 1976, 1986 and 1991-1997.

INCID 1994, Agenda 21.

Law Commission Reports 14th, 44th, 48th.

Lawyer Collection, 1992.

Scale, 1992-1997.

Supreme Court Cases, 1992-1997.

Supreme Court Yearly Digest, 1992-1997.

Books

Ahuja S, 1996, People Law & Justice, New Delhi, Deep & Deep Publisers.

Bandyopadhyay J., 1985, India's Environment : Crises & Responses, Dehradun, Natraj.

Bandyopadhyay J., 1985, India's Environment : Crisis and Responses, Dehradun, Natraj.

Banerjee B, 1986, Bhopal Gas Tragedy Accident or Experiment, New Delhi, Parilurs Publishers.

Basu, 1997, Introduction to the Constitution of India, New Delhi, Prentice Hall of India et.al.

Beloff, 1948, The federalist, New York, Crowell-Collier and Macmillan Inc).

Bhargava G, 1992 Pollution and its Control, New Delhi, Mittal Publications.

Bhatt S, 1985, Environmental Protection and International Law, New Delhi, Radiant.

Chaphekar and Mhatre, 1986, Human Impact on Harga River Ecosystem : An Assessment, New Delhi, Concept Publishing.

Chaturvedi C.K., 1981, Legal Control of Marine Pollution", New Delhi, Deep & Deep Publications.

Chute R.M., 1971, Environmental Insigh", New York, Harper & Row.

Desai B, 1990, Water pollution in India Law and Enforcement, New Delhi, Lancers books.

Diwan P, 1992, Environment Administration Law and Judicial Attitude, New Delhi, Deep & Deep Publications.

Dwivedi O.P., 1997, India's Environmental Policies, Programmes and Stwardship, London, Macmillan Press Ltd.

Echolm, E.P, 1982, Down to Earth ; Environment and Human Needs, London, Pluto Press.

Faludi A, 1987, A decision - centred View of Environmental Planning, Oxford, Pergamon Press.

Friendmann, 1972, Law in a Changing Society, London, Stevens & Sons Ltd.

Harf E and Trourt, 1986, Politics of Global Resources : Population, Food, Energy and Environment, New York, Dube University Press.

Hart R.A, 1984, Ecosociety : a Historical Study of Ecological Man, Dehradun, Natraj Publishers.

Hayek F.A., 1973, Law, Legislation & Liberty, London, Routledge & began Paul.

Huma S, 1994, PIL-in Quest of Justice, London, Macmillan.

Iyer K, 1992, Environmental Protection and Legal Defence, London, Sterling.

Iyer V.R., 1972, Law and the people, New Delhi, People's Publishing House.

Jain P, 1991, Law and Environment, New Delhi, Deep & Deep Pub.

Kashyap S, 1989, Our Constitution, New Delhi, National Book Trust.

Kashyap S.C., 1989, Our Parliament, New Delhi, National Book Trust.

Lodha R.M, 1991, Environmental Essays, New Delhi, Ashish Publishing House.

Nagchandher B.O, 1987, The Global Environment Movement : a New Hope for Mankind, New Delhi, Sterling.

Pepper, 1993, The roots of Modern Environmentalism London, Routledge.

Rawls J, 1971, A theory of Justice, Cambridge Harvard University Press.

Sen A, (ed.), 1988, Environmental Manragement and Planning, New Delhi, Wiley Eastern Ltd.

Sepni A.K., 1987, Environmental Management in India (Vols I and II), New Delhi, Ashish Publicaton.

Singh, Anklesaria, 1994, The Environmental activist's Handbook, Bombay, Colin Gonsalvis.

Singh R.B, 1988, Studies in Environment and Development, Common Wealth Publishers.

Singh S. (ed.), 1984, Environmental Policy in India, New Delhi, Indian Insititute of Public Administration.

Sinha B.N, 1994, Ecosystem Degradation in India, New Delhi, Ashish Publishing House.

Tewari P.N, 1987, Victims of Environmental Crisis, Dehradun, EBP Educational.

Articles

Agarwal S., October-November, 1996, "Pollution Explosion, a threat on Urban Environment", Third Concepts, p.51.

Ahmadi, 4 June 1996, Times of India, p.12

Bandyopadhyay D., 28 September, 1991, "Grassroots Justice : Law, System and People", Economic and Political Weekly, 26(39), pp.2240-42.

Bandyopadhyay Jard Shiva, February, 1987, "Chipko", Seminar (330), pp.33-39.

Beckerman and Malkin, Winter 1994, "How Much Does Global Warning Matter", Public Interest (114), pp.3-16.

Chaturvedi M.N., 1984, "Liberalising the Requirement of Standing in Public Interest Litigatiion", Journal of Indian Law Institute, p.42.

Dhavan, 3rd June 1996, Sunday Review, p.2.

D'Monte D., March, 1989, "Green at the Grassroots", Seminar, p.16.

Gadgil M, Prasad S.N and Hegde K.M., 1984, "Wither Environmental Activism?" Lokayan Bulletin, 2(2), 27-37.

Gadgil M and Guha R., 21 January 1989, "Greening the Commons", Mainstreams, 27(17), pp.9-10.

Guha R., 3 December, 1988, "Ideological Trends in Indian Environmentalism", Economic and Political Weekly, 23(49), 2578-81.

James, Simon, Winter 1996, "Political and Administrative Consequences of Judicial Review", Public Administration, 74(4).

Khurshid, Salman, Winter 1996, "Judges in a democracy", Seminar (449), 30-32.

Kothari, S., 15 August 1986, "Ecology vs. Development, the Struggle for Survival", Janata, 41(19), pp.29-41.

Krishna Iyer V.R., 27 July, 1991, "Judicial Accountability to the Community : A Democratic Necessity", Economic and Politicdal Weekly, 26(30), pp.1808-1814.

Leggett, June, 1992, "Global Warming : The Worst Case", Bulletin of the Atomic Scientists, 48(5), pp.28-33.

Nagam, February 1996, "Developing Countries Perspective on Population, Enviornment and Development", Population Research and Policy Review, 15(1), pp.1-19.

Nissani, July, 1996, "Greenhouse Effect : An Interdisciplinary Perspective", Population and Environment, 17(6), 459-90.

Paragil, April-June, 1996, "Environment and Development : A Normative Appraisal of Sustainable Development", Philosophy and Social Action, 22(2), pp.23-36.

Peritore N., August, 1993, "Environmental Attitudes of India Elities : Challenging Western Postmodernist Models", Asian Surveys, 33(8), pp.804-18

Prajapati, Rohit, April, 1997, "Narmada, the Judiciary and Parliament" Economic and Political Weekly, 32(14), pp.5-11.

November, 1993, "Report of the Committee on Science and Technology, Environment and Forests : Part-II", Link, 36(15-16), pp. 21-31.

Prasad M.S., January 1996, "Need for Environmental Awareness", Third Concept, p.49.

Saberwal S., July, 1987, "The Problem", Seminar, p.1-12.

Sahaya, Jainarayan, March, 1997, "Justice and Judiciary in the Fifty Years of Independence", Radical Humanist 60(I12), pp.6-10.

Sathe S.P., 1984, "Public Participation in Judicial Process", Journal of Indian Law Institute.

Sen A., November 1988, "Economics, Ecology and the Deep Green Light", Wastelands News, 4(2), pp.21-22.

Singh A.K., 1 January 1988, "Forests : Protectors of Environment", Yojna, 32(18), 1 Jan 1988, 21-22.

SINHA S.K., July 1996, "Judicial Activism a Ray of Hope," Radical Humanist, 60(4), pp.9-12.

SUEUR, Andre Le., Winter 1996, "Judicial Review Debate : From Partnership to Triction", Government and Opposition, 31(1).

SUNDARAM, I., May-June 1996, "Is Judicial Activism Justified", New Quest (117), pp.171-74.

Suresh and Nagasaila, June 1995, "Public Interest", Seminar.

Tobey, A. and Smets, January 1996, "Pollutor Pays Principle in the Context of Agriculture and the Environment," World Economy, 19(1), pp.63-87.

Von Weizsacker, 1993, "Ecological Structural Change as a Responses to the Greenhouse Effect," Economics (48), pp.34-42.